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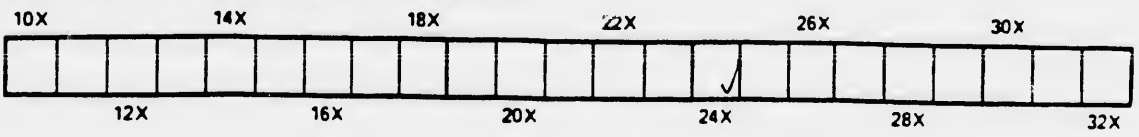

THE

ONTARIO DIGEST

1891-1895

OF

THE CASES REPORTED IN VOLUMES

18-22 APPEAL REPORTS.
20-26 ONTARIO REPORTS.
14-16 PRACTICE REPORTS.
18-24 SUPREME COURT OF CANADA REPORTS.
1-3 EXCHEQUER COURT OF CANADA REPORTS.

AND OF THE CANADIAN CASES DECIDED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL REPORTED IN [1891-1895] APPEAL CASES,

WITH

TABLES OF CASES CONTAINED IN THE DIGEST, THOSE AFFIRMED, REVERSED, OR SPECIALLY CONSIDERED, AND OF THE STATUTES REFERRED TO.

COMPILED BY ORDER OF THE LAW SOCIETY OF UPPER CANADA.

BY

J. F. SMITH, Q. C., E. B. BROWN, AND R. S. CASSELS,

BARRISTERS-AT-LAW.

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year of our Lord
UPPER CANADA,

PREFACE.

In the compilation of this Digest the main features of the Digests published in this Province have been followed, the principal alterations being the arrangement of the sub-titles and sub-divisions of sub-titles in alphabetical order, and the introduction of head-lines which have been re-written. The first word of the head-lines in each case will also be found in alphabetical order with reference to the sub-title or sub-division in which it may be. This, it is hoped, will increase facility of reference. The Roman numerals following a cross-reference, refer to the sub-titles: the figures following a cross-reference to a case, to the column of the Digest.

Tables of cases contained in the volume, and of cases affirmed, reversed or specially considered, as also of the statutes specially referred to, are prefixed to the Digest.

Chief Justices and Judges

OF THE

SUPREME AND EXCHEQUER COURTS OF CANADA

AND OF THE

SUPERIOR COURTS OF ONTARIO

DURING THE PERIOD OF THIS DIGEST.

Supreme Court of Canada.

CHIEF JUSTICES.

Hon. Sir William Johnstone Ritchie .	Appointed	11th January, 1879.
" Sir Samuel Henry Strong	"	13th December, 1892.

JUDGES.

Hon. Samuel Henry Strong.....	Appointed	8th October, 1875.
" Télesphore Fournier	"	8th October, 1875.
" Henri Elzéar Taschereau	"	7th October, 1878.
" John Wellington Gwynne	"	14th January, 1879.
" Robert Sedgewick	"	18th February, 1893.
" George Edwin King.....	"	21st September, 1893.
" Désiré Girouard	"	28th September, 1895.

Exchequer Court of Canada.

JUDGE.

Hon. George Wheelock Burbidge	Appointed	1st October, 1887.

The Court of Appeal for Ontario.

CHIEF JUSTICE.

HON. JOHN HAWKINS HAGARTY ..... Appointed 6th May, 1884.

JUDGES.

HON. GEORGE WILLIAM BURTON ..... Appointed 30th May, 1874.
" FEATHERSTON OSLER ..... " 17th November, 1883.
" JAMES MACLENNAN ..... " 27th October, 1888.

The High Court of Justice for Ontario.

[*Queen's Bench Division.*]

CHIEF JUSTICE.

HON. JOHN DOUGLAS ARMOUR ..... Appointed 15th November, 1887.

JUDGES.

HON. WILLIAM GLENHOLME FALCONBRIDGE Appointed 21st November, 1887.
" WILLIAM PURVIS ROCHFORT STREET " 30th " "

[*Common Pleas Division.*]

CHIEF JUSTICES.

HON. SIR THOMAS GALT ..... Appointed 7th November, 1887.
" SIR WILLIAM RALPH MEREDITH... " 5th October, 1894.

JUDGES.

HON. JOHN EDWARD ROSE ..... Appointed 4th December, 1883.
" HUGH MACMAHON ..... " 30th November, 1887.

[*Chancery Division.*]

CHANCELLOR.

HON. JOHN ALEXANDER BOYD..... Appointed 3rd May, 1881.

JUDGES.

HON. THOMAS FERGUSON ..... Appointed 24th May, 1881.
" THOMAS ROBERTSON ..... " 11th February, 1887.
" RICHARD MARTIN MEREDITH ..... " 1st October, 1890.

Ministers of Justice and Attorneys-General

FOR

THE DOMINION OF CANADA.

Hon. Sir John David Sparrow Thompson, K.C.M.G., Q.C.	Appointed 25th September, 1890.
" Sir Charles Hibbert Tupper, K.C.M.G., Q.C.	" 21st December, 1894.

Attorney-General

FOR

THE PROVINCE OF ONTARIO.

Hon. Sir Oliver Mowat, Q.C.	Appointed 31st October, 1872.

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*** *The cases are indexed under the names of both plaintiff and defendant. Cross-references are not included.*

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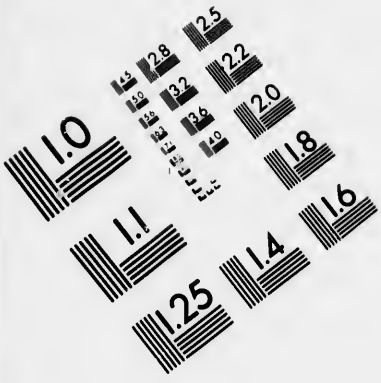

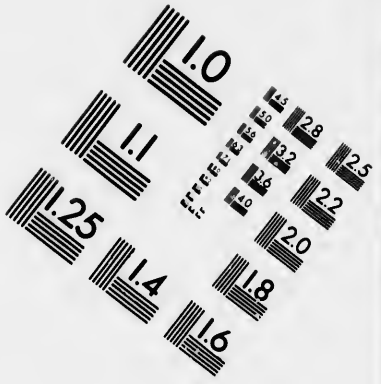

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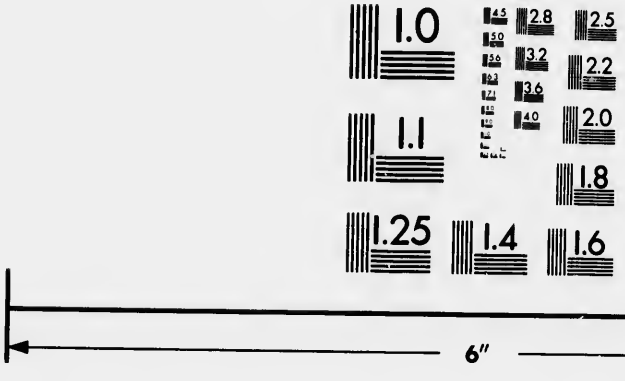

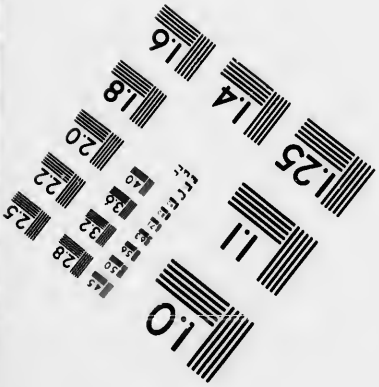

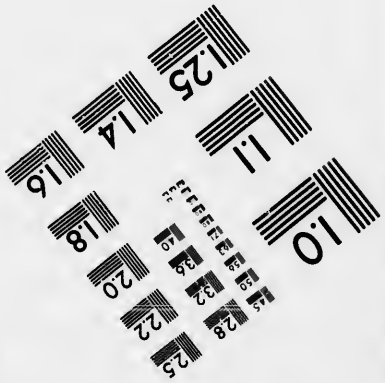

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ABBREVIATIONS.

A. R.	Appeal Reports (Ontario).
(B. C.)	British Columbia.
(C.)	Province of Canada.
C. C. or C. C. L. C.	Civil Code (Quebec).
C. C. P. or C. P. C.	Code of Civil Procedure (Quebec).
Ch. Chamb	Chancery Chamber Reports (Upper Canada and Ontario).
C. P.	Upper Canada Common Pleas Reports.
C. L. J.	Canada Law Journal.
C. L. T.	Canada Law Times.
C. L. T. Occ. N	Canada Law Times Occasional Notes.
C. S. C.	Consolidated Statutes of Canada (Province).
C. S. B. C.	Consolidated Statutes of British Columbia.
C. S. L. C.	Consolidated Statutes of Lower Canada.
C. S. N. B.	Consolidated Statutes of New Brunswick.
C. S. U. C.	Consolidated Statutes of Upper Canada.
(D.)	Dominion of Canada.
E. & A.	Upper Canada Error and Appeal Reports.
Ex. C. R.	Exchequer Court of Canada Reports.
Gr.	Grant, Chancery Reports (Upper Canada and Ontario).
(Imp.)	Imperial Statute.
L. C. Jur.	Lower Canada Jurist.
(Man.)	Province of Manitoba.
N. B. Rep.	New Brunswick Reports.
N. S. Rep.	Nova Scotia Reports.
N. W. T. Rep.	North-West Territories Reports.
(O.)	Province of Ontario.
O. R.	Ontario Reports.
P. E. I.	Prince Edward Island.
Pugs.	Pugsley, New Brunswick Reports.
Q. L. R.	Quebec Law Reports.
P. R.	Practice Reports (Ontario).
Rev. Leg.	Revue Légale (Quebec).
R. S. C.	Revised Statutes of Canada (Dominion).
R. S. N. S., 4th Ser.	Revised Statutes of Nova Scotia, 4th series.
R. S. N. S., 5th Ser.	Revised Statutes of Nova Scotia, 5th series.
R. S. O. 1877	Revised Statutes of Ontario, 1877.
R. S. O.	Revised Statutes of Ontario, 1887.
R. S. Q.	Revised Statutes of Quebec.
S. C. R.	Supreme Court of Canada Reports.
U. C. R.	Upper Canada Queen's Bench Reports.
U. C. L. J.	Upper Canada Law Journal.
U. S R.	United States Supreme Court Reports.

A DIGEST

OF

THE REPORTED CASES

CONTAINED IN VOLUMES

18–22 APPEAL REPORTS,
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18–24 SUPREME COURT OF CANADA REPORTS.

ADDENDUM AND ERRATA.

Column 125..*Robertson* v. *G. T. R.*, for 21 A. R. "264" read "204."

" 162..*Tennant* v. *Union Bank*, for sec. "19" read sec. "91."

" 232..*Clarke* v. *Creighton*, for 14 P. R. "31" read 14 P. R. "34."

" 299..*City of Quebec* v. *The Queen*, for 50-51 Vict. ch. "10" read ch. "16."

" 364..*In re Wallace* v. *Virtue*, for "7" R. S. O. read "70" R. S. O.

" 368..*Jones* v. *Paxton*, strike out the word "County" in 3rd line from bottom of case.

" 460..*Huntington* v. *Attrill*, for 17 O. R. "295" read "245."

" 504..*Re Wilson*, for 14 P. R. "260" read "261," and same case in Table of Cases, p. lxiv., for "216" read "261."

" 522..*Frank* v. *Sun Life Ass. Co.*, at foot of column add "23 S. C. R. 152*n*."

" 543..The reference to *Huntington* v. *Attrill*, should be to "20 A. R. (Appendix.)"

" 647..*McRae* v. *Marshall*, for 17 A. R. "39" read 17 A. R. "139."

" 685..*Re Reed* v. *Wilson*. "22 O. R. 552" should be "23 O. R. 552."

" 912..*Macdougall* v. *Law Society*. Reference should be "13 O. R. 204, 15 A. R. 150."

sion for delivery to the sheriff of property of the debtor in the hands of such person.

And where the debtor's solicitor was shewn by an affidavit of the plaintiff to have in his hands for collection certain promissory notes, the property of the debtor, and the solicitor did not deny the fact, such an order was affirmed. *Buntin* v. *Williams*, 16 P. R. 43.

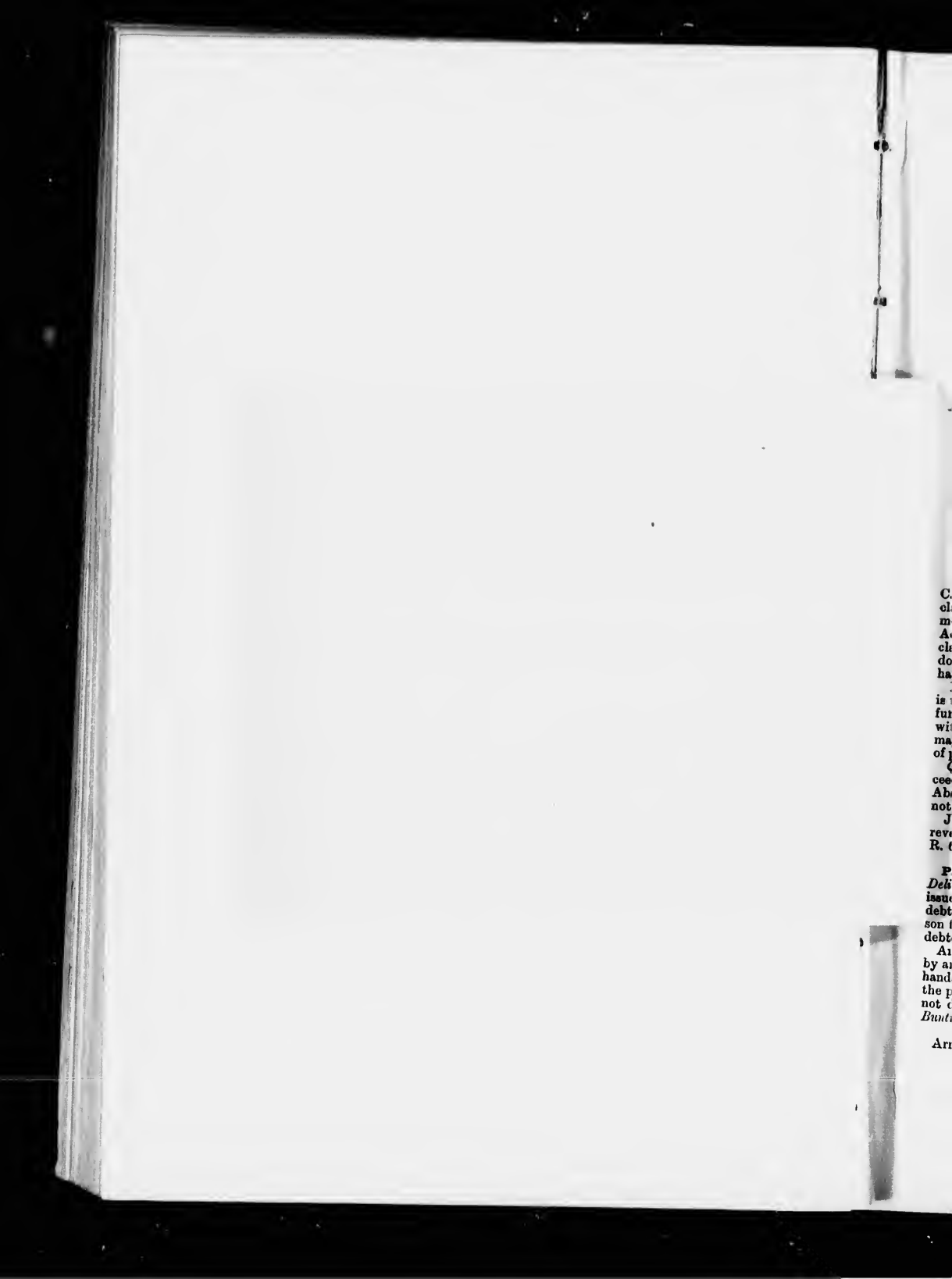
Arrest of Absconding Debtors.—*See* ARREST.

ABUSE OF PROCEDURE.

See ACTION, V.

Damages—*Benefit Insurance.*]—*See Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 299, *post* 329.

Judgment.]—Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction. Where, therefore, the judgment debtor forwarded to the solicitor of the judgment creditor a bank draft, payable to the solicitor's order, as payment "in full," and the solicitor endorsed the draft and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full," the judgment creditor was allowed to proceed for the balance. *Day* v. *McLea*, 22 Q. B. D. 610, applied.



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AND ALSO OF CANADIAN CASES BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL REPORTED IN [1891–1895] APPEAL CASES.

ABATEMENT OF ACTION.

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ABSCONDING DEBTOR.

"Commencing Proceedings."]—Per Hagarty, C.J.O., and Osler, J.A.—Making the affidavit of claim is not commencing proceedings within the meaning of section 26 of the Absconding Debtors' Act, R. S. O. ch. 66. Something to bring the claim within the control of the Court must be done before it can be said that proceedings have commenced.

Per Macleman, J.A.—Making the affidavit is the first step directed by the Act, and if the further steps be then taken in good faith and without undue delay, the making of the affidavit may properly be regarded as the commencement of proceedings.

Quære, per Maclennan, J.A.—Whether proceedings against an absconding debtor under the Absconding Debtors' Act, R. S. O. ch. 66, must not still be commenced by writ of attachment.

Judgment of the County Court of Simcoe reversed. *Bank of Hamilton* v. *Aitken*, 20 A. R. 616.

Property in Hands of Third Person—*Delivery to Sheriff.*]—Where an attachment has issued against the property of an absconding debtor, an order may be made upon a third person for delivery to the sheriff of property of the debtor in the hands of such person.

And where the debtor's solicitor was shewn by an affidavit of the plaintiff to have in his hands for collection certain promissory notes, the property of the debtor, and the solicitor did not deny the fact, such an order was affirmed. *Buntin* v. *Williams*, 16 P. R. 43.

Arrest of Absconding Debtors.—*See* ARREST.

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See ACTION, V.

ACCELERATION.

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Damages—*Benefit Insurance.*]—*See Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 299, *post* 329.

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Sec. 53, sub-sec. 7, Judicature Act, as to part performance of an obligation in satisfaction, considered.

Order of the County Court of Wellington affirmed. *Mason* v. *Johnston*, 20 A. R. 412.

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ACT OF PARLIAMENT.
ACT OF LEGISLATURE.

See CONSTITUTIONAL LAW—STATUTES.

ACTION.

I. BY AND AGAINST WHOM MAINTAINABLE.

Assignment—*Moneys Entrusted for Investment — Transfer — Prête-nom.*]—Money was entrusted to M. for the purpose of being invested in a land speculation, but was not so used, and a claim against M. therefor was transferred *sous seing privé* to J. who brought an action for the amounts so entrusted:—

Held, that it appearing that the transfer *sous seing privé* had been admitted by M., the transferee, even if considered a *prête-nom*, had a sufficient legal interest to bring the action. *Moodie* v. *Jones*, 19 S. C. R. 266.

Assignment—*Negligence.*]—A claim by a client for negligence against a firm of solicitors in directing the distribution of moneys in the sheriff's hands was assigned by him to another, and by the latter to the plaintiff:—

Per Armour, C.J., at the trial. The claim did not by virtue of R. S. O. ch. 122, sec. 7, pass to the plaintiff so as to enable him to maintain an action therefor in his own name, but in any event no negligence was proved.

On appeal to the Divisional Court the judgment was affirmed on the ground of the absence of any proof of negligence, but

Per MacMahon, J., if negligence had been proved, the plaintiff could properly have maintained the action in his own name. *Laidlaw* v. *O'Connor*, 23 O. R. 696.

Covenant—*Action by Stranger to Enforce.*]—*See Moot* v. *Gibson*, 21 O. R. 248, and *Faulkner* v. *Faulkner*, 23 O. R. 252, *post*, COVENANT.

Creditor—*Claim under $40.*]—A creditor for an amount under $40 cannot attack a conveyance of land as voluntary or fraudulent, and he cannot improve his position by bringing his action on behalf of other creditors. *Zilliax* v. *Deans*, 20 O. R. 539.

Creditor—*Debt not Due.*]—"Void as against creditors," in section 2 of 55 Vict. ch. 26 (O.), which extends the provisions of the Act respecting Mortgages and Sales of Personal Property to simple contract creditors suing on behalf of themselves and other creditors, must be read "voidable as against creditors," and a sale of the mortgaged goods by the mortgagee before an election is made by the simple contract creditors commencing proceedings to attack the mortgage cannot be impeached.

Whether such an action can be brought by a simple contract creditor whose debt is not due *quære*.

Judgment of Armour, C.J., reversed. *Meriden Britannia Co.* v. *Braden*, 21 A. R. 352.

But see as to the construction of this section and as to the right of an assignee for the benefit of creditors to bring such an action, *Clarkson* v. *McMaster*, 25 S. C. R. 96, reversing 22 A. R. 138.

Creditor — *Fraudulent Conveyance — Mortgage.*]—Mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within 13 Eliz. ch. 5, nor is the mortgage debt a debt within that statute, unless it is shewn that the mortgage security at the time of the alleged fraudulent conveyance was of less value than the amount of the loan.

Where, therefore, shortly after the making of a mortgage, the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the value of the mortgaged property at the time being greatly in excess of the amount of the loan, and deemed by all parties to be ample security, and no intention to defraud being shewn, the settlement was upheld, although, from the stagnation in real estate when the mortgage matured, a sale of the property for the amount of the indebtedness thereon could not be effected. *Crombie* v. *Young*, 26 O. R. 194.

Creditor—*Inconsistent Remedies.*]—A creditor cannot take the benefit of the consideration for a transfer of goods and at the same time attack the transfer as fraudulent.

An assignee for the benefit of creditors has no higher right in this respect.

A creditor suing in the name of the assignee obtained judgment against third persons, for the payment to him as part of the debtor's estate of the proceeds of promissory notes given to the latter for part of the purchase money of his stock-in-trade:—

Held, that it was then too late for him to attack the sale as fraudulent.

Beemer v. *Oliver*, 10 A. R. 656, referred to. *Wood* v. *Reesor*, 22 A. R. 57.

Damages—*Stranger.*]—A lessee covenanted with the lessor to keep the premises in repair, and his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building:—

Held, that the daughter had no right of action for damages on account of the accident against the lessor, nor could she be considered as standing in the position of a stranger. *Mehr* v. *McNab*, 24 O. R. 653.

Status of Plaintiff—*Special Denial—Art. 144 C. C. P.*]—The quality assumed by the plaintiff in the writ and declaration is considered admitted unless it be specially denied by the defendant. A *défense en fait* is not a special denial within the meaning of Art. 144 C.C.P. *Martindale* v. *Powers*, 23 S. C. R. 597.

Tenant—*Consolidated Municipal Act, sec. 531.*]—In an action against a city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building, which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof were, at the instance of the municipality, made defendants under section 531 of the Consolidated Municipal Act. The pipe in its condition at the time of the accident, discharging the water upon the sidewalk, had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of a building, or, if unoccupied, the owner, to remove ice from the front of a building abutting on a street within a limited time:—

Held, that the owner was, but the tenant was not, liable over to the municipality for the damages recovered. *Organ* v. *City of Toronto*, 24 O. R. 318.

Tenant—*Reversion.*]—The owner of houses occupied by tenants can maintain an action in his own name for damages and to restrain the continuance of a nuisance arising from privy pits on the land of an adjoining owner, if the nuisance is of such a nature as to be practically continuous and permanent.

The owner of the adjoining land, although also occupied by tenants, is liable for the nuisance caused by them if the pits are so constructed that the constant use of them will necessarily result in the creation of a nuisance, or if allowed by the owner to remain in an unsanitary condition where there is power to remedy the grievance.

Decision of MacMahon, J., at the trial affirmed. *Park* v. *White*, 23 O. R. 611.

II. For what Maintainable.

Application for Insurance—*Agreement to Forward—Escrow.*]—B., wishing to insure his vessel, the C. U. Chandler, went to a firm of insurance brokers, who filled out an application and sent it by a clerk to K., agent for a foreign marine insurance company. In the application the vessel was valued at $2,500, and the rate of premium was fixed at 11 p.c. K. refused to forward the application unless the valuation was raised to $3,000, or 12 p.c. premium was paid. This was not acceded to by the brokers, but K. filled out an application with the valuation increased and forwarded it to the head office of his company. On the day that it was mailed the vessel was lost, and four days after K. received a telegram from the attorney of the company at the head office, as follows: "Chandler having been in trouble we have telegraphed you declining risk, but had previously mailed policy; please decline risk and return policy." The policy was received by K. next day and returned at once; he did not shew it to the brokers nor to B., nor inform them of its receipt. In an action by B. against K. to recover damages for neglect in not forwarding the application promptly, with a count in trover for conversion of the policy:—

Held, affirming the judgment of the Court below, that as K. was never authorized nor requested to forward the application which he did forward, namely, that in which the vessel was valued at $3,000, and had refused to forward the only application authorized by the brokers on behalf of B., the latter could maintain no action founded on negligence:—

Held, further, that as the property in the policy prepared at the head office and sent to K. never passed out of the company, and was at the most no more than an escrow in the hands of K., the agent, trover would not lie against K. for its conversion. *Buck* v. *Knowlton*, 21 S. C. R. 371.

Conditional Promise.]—After negotiations had taken place for the sale of a farm at $9,500, the following contract was signed by the purchasers:—"We agree to take your farm and pay you $9,000, and if we get along fairly well, we will give you the other $500 as soon as we are able":—

Held, that the provision as to the $500 was a conditional promise which might be enforced on proof that the purchasers were of ability to pay, which the evidence in this case failed to shew. *Sylvester* v. *Murray*, 26 O. R. 599. Affirmed by the Divisional Court, 24 O. R. 765.

Damages—*Action Quia Timet.*]—Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts and agreements of the firm, no cause of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought against the firm.

Mewburn v. *Mackelcan*, 19 A. R. 729; and *Leith* v. *Freeland*, 24 U. C. R. 132, distinguished.

Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible.

Judgment of Galt, C.J., affirmed. *Sutherland* v. *Webster*, 21 A. R. 228.

Damages—*Turkey.*]—The owner of a turkey-cock which without negligence strays upon the highway contrary to a by-law of the municipality is not liable for damages resulting from a horse taking fright and running away at the sight of the bird acting as turkeycocks usually do.

Judgment of the County Court of Lincoln affirmed. *Zumstein* v. *Shramm*, 22 A. R. 263.

Foreign Lands.]—*See Burns* v. *Davidson*, 21 O. R. 547; *Ross* v. *Ross*, 23 O. R. 43; *Henderson* v. *Bank of Hamilton*, 23 S. C. R. 716, *post*, High Court of Justice.

Husband and Wife — *Alienation of Husband's Affections.*]—*See Quick* v. *Church*, 23 O. R. 262, *post*, HUSBAND AND WIFE.

Husband and Wife—*Enticing away Wife.*]—*See Metcalf* v. *Roberts*, 23 O. R. 130, *post*, HUSBAND AND WIFE.

Maliciously Commencing Civil Action.]—Action for damages against solicitors for, as alleged in the statement of claim, "wrongfully and unlawfully without any instructions or retainer" issuing a writ of summons against the plaintiff in the name of the third party by reason of which the plaintiff was injured in his occupation as a builder, and suffered in his credit and reputation and was hindered in the performance of his contracts, and had to borrow money at a higher interest than he would otherwise have had to do, and other creditors were induced to sue him whose accounts he had to compromise and settle at great loss :—

Held, on demurrer, that neither malice and want of reasonable and probable cause nor special damage, both of which are necessary in such an action, were sufficiently alleged.

Semble, that an allegation that by reason of the proceedings complained of the plaintiff was put into insolvency or bankruptcy, if such a thing were possible in this country, might be a sufficient allegation of special damage. *Mitchell* v. *McMurrich*, 22 O. R. 712.

Partners — *Election of Remedies.*] — The defendant was sued by the same plaintiffs in a former action as indorser of a promissory note, and judgment was entered in his favour upon the defence that he indorsed it for the accommodation of the plaintiffs without consideration. In this action he was sued upon the same note and others as a partner in the firm who were the makers of the notes, along with the other partner :—

Held, that the plaintiffs were not debarred by the recovery of a judgment against the partnership from bringing an action upon the judgment against the individual members of it.

Clark v. *Cullen*, 9 Q. B. D. 355, followed.

The defendant set up that the plaintiffs had elected to treat the other member of the firm as their sole debtor, by reason of their having proved their claim with and purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm ; and that the defendant had relied and acted upon their conduct and election, and they were therefore estopped from suing him as a partner :—

Held, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiff's action, no estoppel arose, because the plaintiffs did nothing shewing an election not to look to him, and he had no right to assume an election from what they did, nor to act as if such an election had been made. *Ray Isbister*, 22 A. R. 12, reversing in part 24 O. R. 497.

Seduction—*Previous Acquittal for Rape.*]—Held, that the fact of the defendant having been previously acquitted on an indictment for rape on the plaintiff's daughter was not a bar to an action for enticing her away and having connection by force and against her will. *Cole* v. *Hubble*, 26 O. R. 279.

Taking Advantage of One's Own Wrong.]—In an action to recover an amount received by the defendant for the plaintiff, the defendant pleaded *inter alia* that the action was premature, inasmuch as he had got the money irregularly from the treasurer of the Province of Quebec on a report of distribution of the prothonotary before all the contestations to the report of collocation had been decided :—

Held, affirming the judgment of the Court below, that this defence was not open to the defendant, as it would be giving him the benefit of his own improper and illegal proceedings. *Bury* v. *Murray*, 24 S. C. R. 77.

Taking Advantage of One's Own Wrong.]—Devisee killing testator cannot take under the will. *Lundy* v. *Lundy*, 24 S. C. R. 650.

See, also, HIGH COURT OF JUSTICE.

III. NOTICE OF ACTION.

Constable.]—Where in an action against a constable for false arrest it is found by the jury that the defendant acted in the honest belief that he was discharging his duty as a constable, and was not actuated by any improper motive, he is entitled to notice of action, and such notice must state not only the time of the commission of the act complained of, but that it was done maliciously. *Scott* v. *Reburn*, 25 O. R. 450.

Constable.]—The object of the "Act to protect Justices of the Peace and others from Vexatious Actions," R. S. O. ch. 73, is for the protection of those fulfilling a public duty, even though in the performance thereof they may act irregularly or erroneously, and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause ; but where a person entitled to the benefit of the Act voluntarily does something not imposed on him in the discharge of any public duty, such notice is not required. *Kelly* v. *Barton*, 26 O. R. 608 ; *Kelly* v. *Archibald*, 26 O. R. 608. Affirmed in appeal, 22 A. R. 522.

Government Railway Act.]—*See Kearney* v. *Oakes*, 18 S. C. R. 148, *post* 286.

Libel.]—The statement of claim must be confined to the matters complained of in the notice. *Obernier* v. *Robertson*, 14 P. R. 553.

Municipal Corporation.]—In an action against a municipal corporation for injuries caused by the defective state of a sidewalk the following letter from plaintiff's solicitor was relied on as a sufficient notice of action : "As it is Mr. Christie's intention to claim damages from you for such injuries, I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to":—

Held, per Ritchie, C.J., and Strong, J., that the letter of the solicitor was not a sufficient notice of action under the statute.

Per Ritchie, C.J.—If notice of action was necessary the want of it could not be relied on as a defence without being pleaded.

By 25 Vict. ch. 16, sec. 84 (N.B.) and amending Acts, relating to highways, the * * privileges and immunities formerly vested in commissioners of roads are declared to be vested in the council of the town of Portland. By another Act no action could be brought against a commissioner of roads unless notice thereof was given. The town of Portland afterwards became part of the city of St. John and an action was brought for injuries caused by a broken plank on a sidewalk in what was formerly the town of Portland :—

Held, per Strong, J.—One of the "immunities" vested in the council was that of not being subject to an action without prior notice.

Per Taschereau, Gwynne, and Patterson, JJ.—Notice was not necessary; the liability did not depend on sec. 84 of 25 Vict. ch. 16, but on the statutory duty of the council to keep the streets in repair; the only "privilege or immunity" to the commissioner was exemption from performance of statute labour. *City of St. John* v. *Christie*, 21 S. C. R. 1.

Municipal Corporation.]—A municipal corporation is not entitled to notice of action under the Act to protect Justices of the Peace and others from Vexatious Actions, R. S. O. ch. 73. *Hodgins* v. *Counties of Huron and Bruce*, 3 E. & A. 169, followed.

Defence of want of such notice struck out upon summary application. *McCarthy* v. *Township of Vespra*, 16 P. R. 416.

Municipal Councillors—*Pathmaster.*]—Two of the defendants, members of a township council, were appointed by resolution of the council a committee to rebuild a culvert, and they personally superintended the work, and were paid for doing it, but there was no by-law authorizing their appointment or payment. The other defendants were employed by them and did the work. The plaintiff met with an accident on the highway near the culvert owing, as she alleged, to the negligence of the defendants in obstructing the road with their building materials, and brought this action for damages for her injuries :—

Held, that the defendants were not fulfilling a public duty, and were not entitled to notice of action under R. S. O. ch. 73 :—

Held, also, that the statute is applicable only to officers and persons fulfilling a public duty for anything done by them in the performance of it, when it may be properly averred that the act was done maliciously and without reasonable and probable cause, and therefore not to actions for negligence in the doing of the act :—

Held, lastly, that one of the defendants, who was pathmaster for the beat in which the culvert was situated, did not come within the protection of the statute as pathmaster, because he was not employed as such in doing this work, but as a day labourer. *McDonald* v. *Dickinson*, 25 O. R. 45. Affirmed in appeal, 21 A. R. 485.

Slander—*Public Officer.*]—The plaintiff, the wife of a postmaster, complained of slander by the defendant, an assistant post office inspector, to the effect that she had taken money from letters and had given him a written confession of her guilt :—

Held, that the defendant was not entitled to notice of action as a public officer; the statutes requiring such notice applying only to actions brought for acts done.

Royal Aquarium Society v. *Parkinson*, [1892] 1 Q. B. 431, followed.

Murray v. *McSeriney*, I. R. 9 C. L. 545, distinguished.

Semble, also, that the statutes requiring notice of action cannot be invoked where the words spoken are defamatory and have been uttered with express malice. *Hanes* v. *Burnham*, 26 O. R. 528. Affirmed in appeal, 23 A. R. 90.

Tax Collector.]—A tax collecter sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R. S. O. ch. 73. *Howard* v. *Herrington*, 20 A. R. 175.

IV. Settlement of Action.

Notice by Solicitor to Parties — *Costs* — *Collusion.*]—Where a compromise of the action has been effected between the parties without the intervention of the solicitors, in order to entitle the plaintiff's solicitor to enforce his lien for costs upon the fruits of the litigation, by means of an order upon the defendant, collusion must be shewn, or the act complained of must have been done after notice from the solicitor complaining.

And where the parties made such a compromise, and the plaintiff's solicitor gave notice to the defendant's solicitor after the agreement but before payment of the money agreed upon :—

Held, that this was sufficient notice. *Sanridge* v. *Ireland*, 14 P. R. 29.

Notice by Solicitor to Parties — *Costs*—*Collusion.*]—It is competent for a client to settle his action behind the back of his solicitor, notwithstanding that the solicitor has given notice to the client and to the opposite party not to settle except with the solicitor's consent.

The equitable interference of the Court cannot be invoked on behalf of a solicitor in an action settled in such a manner, unless there are fruits arising from such settlement upon which the solicitor's lien can attach; for there is no lien on the action.

Upon such a settlement, unless where collusion between the parties to defraud the plaintiff's solicitor of his costs is clearly shewn, a defendant will not be ordered to pay the costs of the plaintiff's solicitor. *Bellamy* v. *Connolly*, 15 P. R. 87.

See, also, Costs, V.

V. Staying Action.

Abuse of Process of Court.]—H. & Bro., being the owners of certain lumber in the hands of the defendants as warehousemen, sold it to L., who gave his promissory note for the purchase

money, and pledged the lumber to the plaintiff's testator for an advance of money, and the defendants agreed to hold it to the order of the testator. L. having become insolvent, H. & Bro. notified the defendants not to deliver the lumber to L. or to the testator, and the testator demanded the delivery of the lumber to him. The defendants then interpleaded, and an order was made, upon the consent of the testator, directing a sale of the lumber and payment of the proceeds into Court, and the trial of an issue between the testator and H. & Bro. to determine which of them was entitled to the lumber or the proceeds thereof. That issue was determined in favour of H. & Bro. The plaintiff then brought this action for conversion of the lumber, the alleged conversion being the nondelivery by the defendants to the testator of the lumber which they agreed to hold to the order of the testator:—

Held, that this action was vexatious and an abuse of the process of the Court; and an order was made staying it with costs. *Ross* v. *Edwards*, 14 P. R. 523. *See* the next case.

Abuse of Process of Court.]—Held, reversing the order of the Queen's Bench Divisional Court, 14 P. R. 523, and restoring that of MacMahon, J., *ib.*, that this was not a case in which the exceptional power of the Court to refuse to allow its process to be abused by a frivolous action, could be properly exercised. *Ross* v. *Edwards*, 15 P. R. 150. *See Ross* v. *Edwards*, 14 R. (Dec.) 9.

Interpleader Issue.]—An interpleader proceeding is not an action; and Rule 641 (*c*), which enables the Court to "order the action to be discontinued," upon terms as to costs, does not apply to interpleader issues.

Hamlen v. *Bellehey*, 6 Q. B. D. 63, and *Re Dyson*, 65 L. T. N. S. 488, followed.

Semble, that the execution creditor can abandon the seizure or the prosecution of the issue, but only on the terms of answering all costs. *Hogaboom* v. *Gilkes*, 16 P. R. 402.

ACQUIESCENCE.

See LACHES.

ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS.

See EVIDENCE.

ADVERSE POSSESSION.

See LIMITATION OF ACTIONS, II.

ADVERTISEMENT.

Executors and Administrators — *Advertisement for Creditors.*]— Publication in the Ontario Gazette of an advertisement for creditors, pursuant to R. S. O. ch. 110, sec. 36, is not necessary to release executors from liability for payments made by them. *Re Cameron, Mason* v. *Cameron*, 15 P. R. 272.

Mortgage—*Sale under Power.*]—An advertisement for sale of lands is a "proceeding" within the meaning of the words "no further proceedings" in sec. 30 of R. S. O. ch. 102.

Where a mortgagee served upon the mortgagor a notice demanding payment of the mortgage money, and stated that unless payment were made within a month from the service, the mortgagee would proceed to sell, an injunction was granted restraining the mortgagee from publishing, until after the expiry of the month, an advertisement of the sale of the mortgaged premises. *Smith* v. *Brown*, 20 O. R. 165.

AFFIDAVIT.

Affidavit and Affirmation—*Presumption of Authority—Persons Having Religious Scruples.*]—The Act respecting newspapers in Manitoba (50 Vict. ch. 23) provides that no person shall print or publish a newspaper until an affidavit or affirmation, containing the matter directed, is deposited with the prothonotary of the Court and that such affidavit or affirmation may be taken before a justice or commissioner:—

Held, that such affidavit or affirmation, if a corporation is proprietor of the newspaper, may be made by the managing director; that there is an option either to swear or affirm and the right to affirm is not confined to members of certain religious bodies or persons having religious scruples; and that if the affidavit or affirmation purport to have been taken before a commissioner his authority will be presumed. *Ashdown* v. *Manitoba Free Press Co.*, 20 S. C. R. 43.

Affidavit of Bona Fides—*Designation of Commissioner—Solicitor's Power to Take Affidavit.*]—An affidavit of *bona fides* in a chattel mortgage sworn before a person who is in fact a commissioner authorized to take affidavits in and for the High Court, but who places after his signature in the jurat only the words "A Comr., etc.," is good.

Such an affidavit may be made before a solicitor employed in the office of the mortgagees' solicitors.

Judgment of the County Court of York affirmed. *Canada Permanent Loan and Savings Co.* v. *Todd*, 22 A. R. 515.

Mistake in Plaintiff's Name — *Nullity — Irregularity.*]—On a motion by the defendant to set aside an order for his arrest in an action for breach of promise of marriage, the plaintiff's affidavit on which the order was based was headed in the proper style of cause, and proceeded, "I, Alberta Jane Boyd, the above named plaintiff," her name being Alberta Jane Vansickle, and was signed "Berta J. Vansickle":—

Held, that the affidavit was not a nullity, but the mistake therein was merely an irregularity, and the objection thereto should have been expressly taken in the notice of motion. *Vansickle* v. *Boyd*, 14 P. R. 469.

Registry Act.]—Per Maclennan, J.A.—An affidavit of execution for the purpose of registration may be made by a person who in fact witnesses the signature, but who writes his name, not as a witness but as the person to whom a letter is addressed.

Per Osler, and Maclennan, JJ.A.—Where an instrument is in fact registered, section 80 of the Registry Act cures any irregularity in the proof for registration.

Judgment of the Chancery Division reversed. *Hoofstetter* v. *Booker*, 22 A. R. 175. Affirmed by the Supreme Court.

See BILLS OF SALE, II.

AGISTMENT.

Horses.]—The plaintiff's mare, while in charge of the defendant under a contract of summer agistment, was killed by falling through the plank covering of a well in the defendant's yard, the existence of which was known to the defendant but not to the plaintiff, and to which yard the mare, with other horses of the defendant, had access from a field in which they were at pasture:—

Held (Meredith, J., dissenting), that the plaintiff had, on proof of these facts, given sufficient *primâ facie* evidence of negligence to cast the onus on the defendant of shewing that reasonable care which an agister is bound to exercise; and a nonsuit was set aside.

Per Boyd, C.—The test in such cases is not necessarily the care which the agister may exercise as to his own animals. It is, in general, not what any particular man does, but what men as a class would do with similar property as a class.

Per Meredith, J.—The agister is not an insurer. The onus of proof of neglect of his duty is on the plaintiff, and had not been satisfied in this case. *Pearce* v. *Sheppard*, 24 O. R. 167.

ALIEN.

Domestic and Foreign Creditors.]—In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors. *Re Klebe*, 28 Ch. D. 175, followed.

Con. Rule 271, which came into force since the above decision, and which relates to service of initiatory process out of the jurisdiction, if applicable at all to such a case, merely relates to procedure, and does not affect a proceeding in which all the parties have attorned to the jurisdiction of the Court. *Milne* v. *Moore*, 24 O. R. 456.

ALIMONY.

See HUSBAND AND WIFE, I.

AMENDMENT.

Mechanics' Lien.]—The Master or Official Referee in a proceeding under 53 Vict. ch. 37 (O.), "An Act to simplify the Procedure for enforcing Mechanics' Liens," should be judicially satisfied that the facts stated before him are sufficient to manifest a valid claim; but if any one element is omitted he has general power of permitting an amendment if the facts and circumstances warrant it, *e.g.*, as in this case, to permit an amendment of the claim shewing when the work was done or materials furnished. *Orr* v. *Davis*, 22 O. R. 430.

Notice of Motion—*Election.*]—The notice of motion did not shew any interest in the relator, as required by sec. 187 of the Act; but it having been shewn by affidavit filed in support of it that the relator was a candidate, an amendment of the motion would, if necessary, have been allowed under Con. Rule 444. *Regina* v. *Worth*, 23 O. R. 688.

Style of Cause.]—The action was in the Queen's Bench Division; but the plaintiff, in applying with respect to the costs of writs of *fi. fa.* and a set-off of costs, entitled his proceedings in the Chancery Division and "in the matter of certain orders made in the action":—

Held, that this was formally wrong; but an amendment was allowed on payment of costs. *Clarke* v. *Creighton*, 14 P. R. 34.

Style of Cause.]—A person carrying on business alone, in a name denoting a partnership, cannot bring an action in that name. Where, however, such name consisted of his surname, prefaced by the initials of his Christian names, and followed by the words "and Co.":—

Held, that these words in the style of cause in an action were mere surplusage, or, if not, they should be struck out; and, as the mistake was trifling, and no one was misled or affected by it, an amendment at the trial should have been granted as of course.

Mason v. *Magridge*, 8 Times L. R. 805, distinguished.

Judgment of the 10th Division Court of York reversed. *Lang* v. *Thompson*, 16 P. R. 516.

Summoning Party in Different Capacity.]—Where parties are before the Court *qua* executors and the same parties should also be summoned *qua* trustees an amendment to that effect is sufficient and a new writ of summons is not necessary. *Ferrier* v. *Trépannier*, 24 S.C.R. 86.

Trial—*Bills of Sale Act.*]—Under Rule 444 an amendment should be allowed at any stage of the proceedings, if it can be made without injustice to the other side; and there is no injustice if the other side can be compensated by costs.

Steward v. *North Metropolitan Tramways Co.*, 16 Q. B. D. 556, applied and followed, notwithstanding the difference in the English Rule.

And, *semble*, a matter of mere hardship should not govern the question of granting or refusing an amendment.

And where, in an action to recover possession of a chattel, the defendants, who were subsequent *bonâ fide* purchasers for value without notice of the plaintiff's purchase, were at the

trial refused liberty to amend their defence by setting up the provisions of the Bills of Sale Act, which amendment would have called for no additional evidence, a Divisional Court allowed it upon appeal.

Judgment of Rose, J., upon this point reversed. *Williams* v. *Leonard*, 16 P. R. 544. Affirmed in appeal, 17 P. R. 73.

Trial—*Negligence—Adding Third Party as Defendant.*]—An action for damages for injuries resulting from a defective sidewalk was brought against a city, who under R. S. O. ch. 184, sec. 531, sub.-sec. 4, obtained an order adding O. as a party defendant, and alleged in their defence that O. was responsible for the defects in the sidewalk, and asked a remedy over against him. O. delivered a defence denying the cause of action, and alleging that if any accident occurred, it was through the neglect of the city. At the trial the jury found that O. occasioned the accident, and gave damages to the plaintiff. The plaintiffs then applied for leave to amend their statement of claim by claiming directly against O., which leave was granted, and judgment was entered against O., for the damages awarded :—

Held, affirming the decision of MacMahon, J., that the leave to amend was properly granted, and the judgment should be affirmed.

Per Boyd, C. Modern procedure endeavours to work out the rights and liabilities of all parties as far as possible in the same action, and so long as no substantial injustice is done it is permissible to conform the pleadings to the facts at the close of the case. *Stillaway* v. *City of Toronto*, 20 O. R. 98.

Trial—*Surprise.*]—In an action for enticing away and having carnal knowledge of the plaintiff's daughter, the plaintiff was allowed at the close of the case to amend by setting up, as an alternative cause of action, the enticing away of the daughter and having connection with her by force and against her will, and consequent loss of service. No application was made by the defendants to put in further evidence, nor was any suggestion made that they were in any way prejudiced by the amendment :—

Held, that the amendment was properly allowed. *Cole* v. *Hubble*, 26 O. R. 279.

Trial—*Variance from Relief Claimed by Bill.*]—At the hearing of a suit by P. to enforce performance of an agreement by the devisee of land under a will to convey it to P. he claimed to be entitled to a decree in the event of the case made by his bill failing, on the ground that the said will was not registered according to the registry laws of New Brunswick, and was therefore void as against him an intending purchaser, and C. had an interest in the land he had agreed to sell to him as an heir-at-law of the estate :—

Held, that on a bill claiming title under the will, P. could not have relief based on the proposition that the same will was void against him, and no amendment could be permitted to make a case not only at variance with, but antagonistic to, that set out in the bill, especially as such amendment was not asked for until the hearing. *Porter* v. *Hale*, 23 S. C. R. 265.

Writ of Summons—*Description of Mortgaged Lands.*]—Under the liberal powers of amendment now given by Rules 444 and 780, the writ of summons and all subsequent proceedings may be amended after judgment.

And where the plaintiff by mistake omitted from the description of lands in the writ of summons in a mortgage action, a parcel included in the mortgage, an order was made, after judgment and final order of foreclosure, vacating the final order, directing an amendment of the writ and all proceedings, and allowing a new day of redemption by a subsequent incumbrancer who did not consent to the order ; and in default the usual order to foreclose. *Clarke* v. *Cooper*, 15 P. R. 54.

Writ of Summons—*Time for Appearance.*]—A writ of summons issued for service out of the jurisdiction required an appearance thereto to be entered within eight weeks after service, inclusive of the day of service. The plaintiffs obtained an order shortening the time for appearance to ten days, not specifying whether inclusive or exclusive of the day of service, and amended the writ under the order by merely substituting "ten days" for "eight weeks." The writ as amended was served, and the order with it, on the 27th January. On the 6th February following judgment was signed for default of appearance :—

Held, that the judgment was irregular ; for the writ was not amended in accordance with the order, and the latter must govern ; and according to its terms, having regard to Rule 474, the ten days were to be reckoned exclusively of the day of service, and the defendants had the whole of the 6th February to appear. *Bank of British North America* v. *Hughes*, 16 P. R. 61.

ANCILLARY PROBATE.

See SURROGATE COURT.

ANIMALS.

I. DOGS—*See* DOGS.

II. INJURY TO HORSES OR CATTLE BY RAILWAYS—*See* RAILWAYS, VIII.

III. SHEEP—*See* SHEEP.

ANNUITY.

Apportionment.]—In consideration of $12,000 paid by plaintiff's testator to the defendants, they, by an instrument in writing, agreed to pay him $1,800 every year during his natural life, in equal quarterly payments of $450 each. The terms "policy" and "annuity bond" were both used in the document itself as descriptive of its nature. The consideration was stated to be not only the $12,000, but "the application for this policy and the statements and agreements therein contained, hereby made a part of this contract ;" and it was provided that upon certain conditions "this policy shall be void" :—

Held, in an action by his executors, that the instrument was not a policy of assurance within the exception in R. S. O. ch. 143, sec. 5, but an annuity bond; and that the money payable by the defendants under it was apportionable within section 2; and therefore the plaintiffs were entitled to recover a part of a quarterly instalment in proportion to the period between the last quarter day and the death of the testator. *Cuthbert* v. *North American Life Assurance Co.*, 24 O. R. 511.

APPEAL.

I. Appeal Generally.

Amount Involved.]—It is not beneath the dignity of the Court to determine an appeal where the amount involved is less than $40. *Clarke* v. *Creighton*, 14 P. R. 100.

Contempt—*Motion to Quash Appeal.*]—The fact that a party to an action is in contempt is no bar to his proceeding with the action in the ordinary way; the contempt is only a bar to his asking the Court for an indulgence.

And where the defendants received certain moneys in disobedience to an interim injunction, which was made perpetual by the judgment at the trial, a motion by the plaintiff to quash the defendants' appeal from the judgment was refused. *Ferguson* v. *County of Elgin*, 15 P. R. 399.

Judgment of Court Appealed From—*Credibility of Witnesses.*]—The Court of Appeal for Ontario, composed of four Judges, pronounced judgment in an appeal before the Court, two of their Lordships being in favour of dismissing and the other two pronouncing no judgment. On an appeal from the judgment dismissing the appeal it was objected that there was no decision arrived at:—

Held, that the Appellate Court should not go behind the formal judgment which stated that the appeal was dismissed; further, the position was the same as if the four Judges had been equally divided in opinion, in which case the appeal would have been properly dismissed:—

Held, also, that the Master was the final judge of the credibility of witnesses examined before him, and that his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence. *Booth* v. *Ratté*, 21 S. C. R. 637.

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

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

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

Held, per Gwynne and Patterson, JJ., that the case was properly before the Court, and as the evidence shewed that the servants of the company had complied with the statutory requirement as to giving notice of the approach of the train the company was not liable. *Canadian Pacific R. W. Co.* v. *Fleming*, 22 S. C. R. 33.

II. Abandonment and Waiver.

Acquiescence in Judgment.]—In an action in which the constitutionality of 36 Vict. ch. 81 (Q.) was raised by the defendant the Attorney-General of the Province of Quebec intervened, and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney-General's intervention, the defendant appealed to the Court of Queen's Bench (appeal side) but afterwards abandoned his appeal from the judgment on the intervention. On a further appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench in the principal action the defendant claimed he had the right to have the judgment of the Superior Court on the intervention reviewed:—

Held, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned the judgment on the intervention of the Attorney-General could not be the subject of an appeal to this Court. *Ball* v. *McCaffrey*, 20 S. C. R. 319.

Acquiescence in Judgment.]—By a judgment of the Court of Queen's Bench the defendant society was ordered to deliver up a certain number of its shares upon payment of a certain sum. Before the time for appealing expired the attorney *ad litem* for the defendant delivered the shares to the plaintiff's attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before the plaintiff's attorney complied with the terms of the offer. On a motion to quash the appeal on the ground of acquiescence in the judgment:—

Held, that the appeal would lie.

Per Taschereau, J.—That an attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken. *Société Canadienne-Française de Construction de Montreal* v. *Davelny*, 20 S. C. R. 449.

Compliance Under Protest.]—Compliance with an order for security for costs by giving security under protest, and with notice to the opposite party that it was under protest, and proceeding in the action:—

Held, not such an acceptance of or acquiescence in the order as to waive the right of appeal. *Duffy* v. *Donovan*, 14 P. R. 159.

Cross-appeal—*Enforcement of Order.*]—A respondent in an appeal to the Court of Appeal who desires to vary the decision appealed against, is in the same position as if he were an appellant, and whatever would be an answer to his contention if he had brought an independent appeal would also be an answer to the same contention when urged by way of cross-appeal.

And where, before the hearing of an appeal, the respondent moved in Chambers for an order allowing him to enforce the order appealed against without prejudice to his cross-appeal:—

Held, that it was not for a Judge in Chambers, in advance of the appeal, to determine a question which might arise on the appeal itself, viz., whether the enforcement of the order would be an answer to the cross-appeal. *Re Charles Stark Co.*, 15 P. R. 451.

Part of Order.]—Where two appeals in respect of matters wholly separate and distinct were disposed of by one order:—

Held, that a party might appeal from the decision in respect of one of the appeals, while taking advantage of the decision in respect of the other. *Clarke* v. *Creighton*, 14 P. R. 100.

Undertaking not to Appeal.]—A judgment of the High Court of Justice contained an undertaking by the plaintiff not to appeal therefrom; notwithstanding which the plaintiff filed and served notice of appeal to the Court of Appeal, and also filed the usual bond for security for costs:—

Held, that the action was not removed out of the High Court of Justice into the Court of Appeal; the notice and bond were irregular and unwarrantable proceedings, and the High Court, being still seized of the case, could interfere, by virtue of its inherent jurisdiction, to set them aside. *Donovan* v. *Haldane*, 14 P. R. 106.

III. As to Costs.

By-law in Question in Action Repealed.]—Since the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada:—

Held, that the only matter in dispute between the parties being a mere question of costs, the Court would not entertain the appeal. Supreme and Exchequer Courts Act, sec. 24. *Moir* v. *Village of Huntingdon*, 19 S. C. R. 363.

Defendant Ordered to Pay all Costs.]—Where a defendant is ordered to pay the costs of the action, but no further relief is given by the judgment, an appeal from the judgment is not an appeal for costs within the meaning of section 65, O. J. Act. A judgment ordering the defendant to pay the whole costs of the action cannot be supported unless the plaintiff is entitled to bring the action.

Dick v. *Yates*, 18 Ch. D. 76, followed.

Judgment of Street, J., 20 O. R. 547, affirmed. *Fleming* v. *City of Toronto*, 19 A. R. 318.

Erroneous Principle.]—An appeal lies to a Divisional Court from the order of a trial Judge who has awarded costs on a wrong principle. *McCausland* v. *Quebec Fire Ins. Co.*, 25 O. R. 330.

Lapse of Time—*Curing Defect Complained of.*]—Held, that as the valuation roll sought to be set aside in this case had been duly homologated and not appealed against within the delay provided in Art. 1061 (M. C.) the only matter in dispute between the parties was a mere question of costs, and therefore the Court would not entertain the appeal. *Moir* v. *Village of Huntingdon*, 19 S. C. R. 363, followed; *Webster* v. *Sherbrooke*, 24 S. C. R. 52, distinguished. *McKay* v. *Township of Hinchinbrooke*, 24 S. C. R. 55.

IV. Interfering with Findings of Fact.

Expropriation Proceedings — *Interfering with Amount Awarded.*]—*See* Arbitration and Award, I.

Findings of Fact.]—G. was the manager for the Ottawa District of a lumber company whose head-quarters were in Edinburgh and whose head office for Canada was in Toronto. The company having gone into liquidation an order was obtained from the Court of Sessions in Edinburgh for the delivery of its books by the manager to the liquidator, or to some person appointed by him. This order not having been obeyed, an action was brought by the company to recover possession of the books from G., who set up the defence that he had already given them up, and also that the company had no *locus standi* to maintain the action. The evidence given on the hearing shewed that after the proceedings in liquidation were commenced G. was dismissed from his employment as manager, whereupon he demanded an audit of the books which was commenced but never completed, and G. swore that after handing over the books to the auditors he had never had possession of them. He also swore that they had never been in his control, having been kept in a safe of which a clerk of the company and the new manager alone had the combination. It was shewn by the plaintiffs, however, that some time after the audit, an agent of the liquidator went to Ottawa to get the books and saw G., who first agreed but afterwards refused to deliver them up, giving as the ground of his refusal that he was liable for the rent of the office, and for other debts of the company, and that he wished to retain what property of the company he had to protect himself. The agent, with the assistance of G's. landlord, then obtained access to the office where he saw some books which he took to belong to the company, and a safe in which he believed there were others, but G. coming in refused to allow him to remove them and ejected him from the office. On this evidence the trial Judge made an order against G. directing him to deliver to the liquidator all the books and papers of the company in his possession or under his control. This decision was affirmed by the Divisional Court and the Court of Appeal. On appeal by G. to the Supreme Court of Canada :—

Held, that the books having been shewn to have been in the possession of G. at the date of the visit of the liquidator's agent to Ottawa, and the defendant not having attempted to shew what became of them after that date, and his testimony that he did not know what had become of them, having been discredited by the trial Judge, there was no reason for interfering with the order appealed from. *Grant* v. *British Canadian Lumber Co.*, 18 S. C. R. 708.

Findings of Fact.]—T., a solicitor, brought an action against the officers of the Liberal-Conservative Association of the East Riding of Northumberland for services alleged to have been rendered as their solicitor and counsel in the matter of an election petition against the return of the member for the riding in the Legislative Assembly of Ontario. At the trial of the action the plaintiff swore that he was duly appointed solicitor to carry on the election petition by resolution passed at a meeting of the association, and that in consequence of such resolution he acted as such solicitor in the conduct of the petition. The defence to the action was that no such appointment was made, or if it was, that the plaintiff agreed to render his services gratuitously, and the evidence given for the defendants was that the plaintiff offered his services free of charge, and that it was decided to protest the election in consequence of such offer. The trial Judge held that no retainer of the plaintiff was proved, and dismissed the action. His decision was reversed by the Queen's Bench Division, and their decision in its turn was reversed by the Court of Appeal and the judgment of the trial Judge restored. On appeal by the plaintiff to the Supreme Court of Canada :—

Held, affirming the judgment of the Court of Appeal, that the question being purely one of fact which the trial Judge was the person most competent to determine from seeing and hearing the witnesses, and it not being clear beyond all reasonable doubt that his decision was erroneous, but, on the contrary, the weight of evidence being in its favour, his judgment should not be interfered with on appeal. *Titus* v. *Colville*, 18 S. C. R. 709.

Findings of Fact.]—In a suit for an account of the earnings of a steamer transferred to the defendants by the plaintiff, the case had been heard and judgment given when defendants made application to be allowed to put in newly discovered evidence, which was refused by the Court below, but allowed by the Supreme Court of Canada, which latter Court also gave leave to both parties to amend their pleadings. The original answer of the defendants to the action alleged that the transfer of the steamer was made by the plaintiff as security for all advances made or to be made, while plaintiff claimed that it was only as security for a fixed amount. After the order of the Supreme Court of Canada defendants set up a new case, namely, that the transfer was absolute in consideration of an annuity of $1,000 to be paid to plaintiff during his life. This defence was raised in accordance with the newly discovered evidence, which consisted of an agreement purporting to be executed by plaintiff to transfer to defendants said steamer and all power and control over the same in consideration of such annuity, and to execute an absolute bill of sale thereof to defendant. Pursuant to the order of the Supreme Court evidence was taken of the execution of this agreement and resulted in a judgment by the Judge in equity, who heard the case, declaring that it did not contain the true agreement between the parties, that it was executed by plaintiff while intoxicated and incapable of transacting business, and that the only consideration for the transfer to defendant was the fixed sum stated by plaintiff, and he ordered an account to be taken as to the state of the general accounts between the parties. This judgment having been affirmed by the full Court :—

Held, that under the evidence and considering the nature of the transaction and all the circumstances attending it the Courts below could not have found otherwise than they did, and their decision should be affirmed. *Seeton* v. *King*, 18 S. C. R. 712.

Findings of Fact.]—The finding of two Courts on a question of fact will not be interfered with by the Supreme Court. *Schwersenski v. Fineberg*, 19 S. C. R. 243.

Findings of Fact.]—Held, per Fournier, Taschereau, and Sedgewick, JJ., that though the findings of the jury were not satisfactory upon the evidence a second Court of Appeal could not interfere with them. *Grand Trunk R. W. Co. v. Wegar*, 23 S. C. R. 422.

Findings of Fact.]—Held, per Strong, C.J., that though the case might properly have been left to the jury, as the judgment of nonsuit was affirmed by two Courts, it should not be interfered with. *Headford v. McClary Manufacturing Co.*, 24 S. C. R. 291.

Findings of Fact.]—An action was brought against the city of Toronto to recover damages for injuries incurred by reason of snow having been piled on the side of the streets, and the street railway company was brought in as third party. The evidence was that the snow from the sidewalks was placed on the roadway immediately adjoining by servants of the city and snow from the railway tracks was placed by servants of the railway company upon the roadway immediately adjoining the track without any permission from the city, thus raising the roadway next to the track, where the accident occurred, to a height of about twenty inches above the rails. The jury found that the disrepair of the street was the act of the railway company, which was therefore made liable over to the city for the damages assessed. The company contended on appeal that the verdict was perverse and contrary to evidence :—

Held, affirming the decision of the Court of Appeal, that under the evidence given of the manner in which the snow from the track had been placed on the roadway immediately adjoining, the jury might reasonably be of opinion that if it had not been so placed there the accident would not have happened, and that this was the sole cause of the accident. *Toronto R. W. Co. v. City of Toronto*, 24 S. C. R. 589.

Findings of Fact.]—*See*, also, *Bickford v. Hawkins*, 19 S. C. R. 362 ; *Bowker* v. *Laumeister*, 20 S. C. R. 175 ; and *The Santandarino* v. *Fauvert*, 23 S. C. R. 145.

Jury and Non-jury Cases.] — Held, per Strong, J. An appeal court exercises different functions in dealing with a case tried by a Judge without a jury from those exercised in jury cases. In the former case the Court has the same jurisdiction over the facts as the trial Judge, and can deal with them as it chooses. In the latter the Court cannot be substituted for the jury to whom the parties have agreed to assign the facts for decision. *Phœnix Insurance Co.* v. *McGhee*, 18 S. C. R. 61.

V. Interfering with Judicial Discretion.

Damages—*Increasing and Reducing.*]—*See* Arbitration and Award, I.—Damages, III.

Discretion—*Examination of Witnesses.*]—Where witnesses residing out of Ontario come within the jurisdiction and are about to return to their homes, an order may be made for their examination here before their departure.

Such an order is a discretionary one, and, where the witnesses have been examined under it, will not be reversed on appeal unless a very clamant case of error appears. *Delap* v. *Charlebois*, 15 P. R. 142.

Discretion — *Executors and Trustees — Accounts.*]—The Supreme Court of Canada, on appeal from a decision affirming the report of a referee in a suit to remove executors and trustees, which report disallowed items in accounts previously passed by the Probate Court, will not reconsider the items so dealt with, two Courts having previously exercised a judicial discretion as to the amounts and no question of principle being involved. *Grant* v. *Maclaren*, 23 S. C. R. 310.

Discretion—*Extension of Time for Appeal.*]—*See Abell* v. *Morrison*, 14 P. R. 210, *post* 26.

Discretion—*New Trial.*]—*See Scott* v. *Bank of New Brunswick*, 21 S. C. R. 30 ; and *Trumble* v. *Hortin*, 22 A. R. 51, *post* 27.

Discretion—*Refusal of Extension of Time to Appeal.*]—*See Township of Colchester South* v. *Valad*, 24 S. C. R. 622, *post* 25.

Discretion — *Renewal of Writ.*] — A writ issued from the High Court of Justice for Ontario in June, 1887, was renewed by order of a Master in Chambers three times, the last order being made in May, 1890. In May, 1891, it was served on defendants, who thereupon applied to the Master to have the service and last renewal set aside, which application was granted and the order setting aside said service and renewal was affirmed on appeal by a Judge in Chambers and by the Divisional Court. Special leave to appeal from the decision of the Divisional Court was granted by the Court of Appeal, which also affirmed the order of the Master, Mr. Justice Osler, who delivered the principal judgment, holding that the Master had jurisdiction to review his own order ; that plaintiffs had not shewn good reasons, under Rule 238 (*a*), for extending the time for service ; and the ruling of the Master having been approved by a Judge in Chambers and a Divisional Court, the Court of Appeal could not say that all the tribunals below were wrong in so holding. On appeal to the Supreme Court of Canada :—

Held, that for the reasons given by Mr. Justice Osler in the Court of Appeal the appeal to this Court must fail and be dismissed with costs. *Howland* v. *Dominion Bank*, 22 S. C. R. 130.

VI. Leave to Appeal and Time to Appeal.

Extending Time.]—Where sufficient grounds are disclosed the time for leave to appeal from a judgment of the Exchequer Court of Canada prescribed by section 51 of The Exchequer Court Act (as amended by 53 Vict. ch. 35, sec. 1), may be extended after such prescribed time

has expired. [The application in this case was made within three days after the expiry of the thirty days within which an appeal could have been taken.] (2.) The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time for leave to appeal prescribed by the statute has expired. (3.) Pressure of public business preventing a consultation between the Attorney-General for Canada and his solicitor within the prescribed time for leave to appeal is sufficient reason for an extension being granted, although the application therefor may not be made until after the expiry of such prescribed time. *Clarke* v. *The Queen*, 3 Ex. C. R. 1. *See* the next case.

Extending Time.]—On the trial in the Exchequer Court in 1887 of an action against the Crown for breach of contract to purchase paper from the suppliant, no defence was offered, and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the Court, and judgment was given against the Crown for the amount thereby found due. The Crown appealed to the Supreme Court, having obtained from the Exchequer Court an extension of the time for appeal limited by statute, and sought to impugn on such appeal the judgment pronounced in 1887 :—

Held, Gwynne and Patterson, JJ., dissenting, that the appeal must be restricted to the final judgment pronounced in 1891 ; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter unless the time was extended as provided by the statute and the extension of time granted by the Exchequer Court on its face only referred to an appeal from the judgment pronounced in 1891 :—

Held, per Gwynne and Patterson JJ., that the judgment given in 1891 was the only judgment in the suit in respect to the matters put in issue by the pleadings, and on appeal therefrom all matters in issue are necessarily open. *The Queen* v. *Clarke*, 21 S. C. R. 656.

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

Held, affirming the decision of the Court of Appeal, that the appeal not having been brought within one month from the date of the report, as required by C. dated Rule 848, it was too late ; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it ; and that the refusal to extend the time was an exercise of judicial discretion with which this Court would not interfere. *Township of Colchester South* v. *Valad*, 24 S. C. R. 622.

Extending Time.]—Upon an application to extend the time for an appeal, to do justice in the particular case is above all other considerations ; and the expression "the justice of the case" means the justice of the case upon the undisputed facts of it.

And where the plaintiff desiring to appeal to the Court of Appeal from the judgment of the Chancery Divisional Court, 19 O. R. 669, was two months and twelve days late in filing his appeal bond, and offered no sufficient excuse for his delay, but asked to have the time extended as an indulgence, and it appeared that if the plaintiff were to succeed in his contention in the case, he would obtain and have at the expense of the defendant more than he could have had under his contract :—

Held, that the justice of the case was against the plaintiff ; and that an order of the Master in Chambers extending the time for appealing, though a discretionary order, was so clearly wrong that it should be reversed. *Abell* v. *Morrison*, 14 P. R. 210.

Extending Time—*Long Vacation.*]—Upon the true construction of Rule 484, the period of long vacation is not to be reckoned in the time allowed by section 71 of the Judicature Act for filing and serving notice of appeal to the Court of Appeal :—

Semble, also, that under the circumstances of this case, if the notice had been late, the time would have been extended under Rule 485. *Hespeler* v. *Campbell*, 14 P. R. 18.

Interlocutory Proceeding.]—Leave to appeal was refused on the merits, and also as a matter of discretion, where the proposed appeal was upon an interlocutory proceeding in the course of another appeal. *Jones* v. *Macdonald*, 14 P. R. 535.

Railway Act.]—An appeal under section 161 of the Railway Act, 51 Vict. ch. 29 (D), from an award need not be brought on for hearing within a month from notice of the award ; an effective notice of appeal, given in good faith, within the month, is sufficient. *Re Potter and Central Counties R. W. Co.* 16 P. R. 16.

Winding-up Proceedings—*Leave to Appeal.*] —*See* COMPANY, VIII.

VII. PRACTICE AND PROCEDURE.

Practice.]—A judgment of the Court of Queen's Bench for Lower Canada (appeal side) held that a *rendition exponas* issued by the Superior Court of Montreal, to which Court the record in a contestation of an opposition had been removed from the Superior Court of the district of Iberville under Article 188 C. C. P., was regular. On appeal to the Supreme Court of Canada :—

Held, that on a question of practice such as this the Court would not interfere. *Mayor of Montreal* v. *Brown*, 2 App. Cas. 184, followed. *Arpin* v. *Merchants Bank of Canada*, 24 S. C. R. 142.

Practice.]—The Supreme Court will not interfere on a question of practice and procedure. *Macdonald* v. *Ferdais*, 22 S. C. R. 260.

Procedure.]—Decisions of provincial Courts resting upon mere questions of procedure will not be interfered with on appeal to the Supreme Court of Canada except under special circumstances. *Ferrier* v. *Trépannier*, 24 S. C. R. 86.

Taxation of Costs.] — *See O'Donohoe* v. *Beatty*, 19 S. C. R. 356; and *McGugan* v. *McGugan*, 21 S. C. R. 267.

VIII. Right to take New Grounds or put in Further Evidence.

New Evidence—*New Trial—Discretion.*]—Allowing a new trial on the ground of the discovery of new evidence is a matter of legal discretion, and where the subject matter of the action was of a trifling nature and a Divisional Court ordered a new trial on affidavits shewing merely the discovery of further evidence corroborative of the evidence of the trial, the order was set aside. *Murray* v. *Canada Central R. W. Co.*, 7 A. R. 646, followed. Judgment of the Common Pleas Division reversed. *Trumble* v. *Hortin*, 22 A. R. 51. *See* also *Howarth* v. *McGugan*, 23 O. R. 396.

New Evidence.]—On the argument of an appeal evidence as to a prior action was admitted, and on this evidence and objection then taken the judgment below was reversed, without costs. *Wood* v. *Reesor*, 22 A. R. 57.

New Evidence.]—On the argument of an appeal to the Divisional Court from the trial Judge where a by-law of the city of Toronto had been proved at the trial, but evidence was not given of the registration of the same, evidence was tendered on the argument of the appeal shewing the fact and date of the registration of the by-law:—

Held, that the evidence should properly be admitted. *Burfoot* v. *DuMoulin*, 21 O. R. 583.

New Evidence.]—Evidence by affidavit of the loss of a policy received by the Divisional Court under Con. Rule 585. *Dolen* v. *Metropolitan Life Insurance Co.*, 26 O. R. 67.

New Grounds.]—In an action on a policy of insurance against fire on a stock of goods the verdict for the plaintiff was moved against on the grounds of its being against the weight of evidence and of improper exclusion of evidence. The first ground was mainly urged in regard to the amount of damages. As to the second ground the evidence tendered related to the fact that a quantity of unburnt matches and shavings had been found near the part of the premises in which the fire occurred where the bulk of the goods were alleged to have been burnt. The evidence was rejected by the trial Judge for the reason that there was no defence pleaded that the fire was incendiary, and on appeal to the full Court below it was for the first time urged that it was admissible as shewing the nature and extent of the fire in the vicinity. The verdict for the plaintiffs was sustained by the full Court. On appeal to the Supreme Court of Canada:—

Held, Gwynne, J., dissenting, that the decision of the Court below should be affirmed.

Per Ritchie, C. J., that though the amount of the damages found in the case was not satisfactory and might well have been submitted to a jury of business men as a question proper for their determination he would not dissent from the judgment dismissing the appeal. As to the other ground, the evidence was rightly rejected. When evidence is tendered the Judge and opposing counsel are entitled to know the ground on which it is offered and none can be urged on appeal that has not been put forward at the trial. *Royal Insurance Co.* v. *Duffus*, 18 S. C. R. 711.

New Grounds.]—An objection to the sufficiency of the traverse to a declaration will not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient. *Mylius* v. *Jackson*, 23 S. C. R. 485.

IX. Staying Proceedings.

Execution.]—Where the plaintiffs were appealing to the Privy Council from a judgment of the Court of Appeal dismissing with costs an appeal from the judgment of the Queen's Bench Division in favour of the defendants with costs, and had given security in $2,000, as required in sec. 2 of R. S. O. ch. 41:—

Held, that the order of a Judge of the Court of Appeal, under section 5, allowing the security should not have stayed the proceedings in the action, and so much of the order as related to the stay should be rescinded —

Held, also, that the plaintiffs not having given security to stay execution for the costs in the Courts below, and the stay being removed, if they now desired to have execution for such costs stayed, they should give security therefor as provided by Rule 804, which is made applicable by section 4 of the Act:—

Held, also, that if an order for payment out of the High Court of money therein, awaiting the result of the litigation, was "execution" within the meaning of section 3, it was stayed by the allowance of the security, and required no order; if it was not execution, a Judge of the Court of Appeal had no jurisdiction to stay proceedings in the Court below; and it was for the High Court to determine whether such an order was "execution," and if not, whether the money should be paid out. *McMaster* v. *Radford*, 16 P. R. 20.

Money in Court.]—By the terms of a consent order, a sum of money was to be retained in Court to abide the result of such proceedings as the plaintiffs might be advised to take to assert and enforce their rights and remedies

with respect to a claim made by them, and such proceedings were to be commenced within four months. Substantially the sum of money was to represent that which the plaintiffs claimed, and they were to have it if their claim proved a valid one. The plaintiffs brought this action to enforce their claim, and carried it to the Court of Appeal, where it was dismissed. They then commenced an appeal to the Supreme Court of Canada :—

Held, that this appeal was one of the proceedings, or part of such proceedings, as the plaintiffs were at liberty to take under the order, and until its determination, the money should not be paid out. *City of Toronto* v. *Toronto Street R. W. Co.*, 15 P. R. 358.

APPOINTMENT OF TRUSTEES.

See TRUSTS AND TRUSTEES, III.

APPORTIONMENT.

ANNUITY.—*See Cuthbert* v. *North American Life Assurance Co.*, 24 O. R. 511, *ante* 16.

BONUS.—*See Village of Brighton* v. *Auston*, 19 A. R. 305, *post* 116.

DAMAGES.—*See* DAMAGES.

INSURANCE.—*See* INSURANCE.

RENT.—*See* LANDLORD AND TENANT, XIX.

APPROPRIATION OF PAYMENTS.

See PAYMENT, III.

ARBITRATION AND AWARD.

I. APPEAL FROM AWARD.

Expropriation.]—In a matter of expropriation the decision of a majority of arbitrators, men of more than ordinary business experience, upon a question merely of value should not be interfered with on appeal. *Lemoine* v. *City of Montreal*, *Allan* v. *City of Montreal*, 23 S. C. R. 390.

Expropriation.]—Where an award of the official arbitrators in an expropriation matter was not excessive in view of the evidence before them, the Court declined to interfere with it. *The Queen* v. *Carrier*, 2 Ex. C. R. 101.

Expropriation.]—Where the official arbitrators in making their award have not proceeded upon a wrong principle, nor arrived at an estimate of value not warranted by the evidence, the Court ought not to disturb such award. *Re Macklem and Niagara Falls Park*, 14 A. R. 20, and *Re Bush*, 14 A. R. 73, followed. *Fellowes* v. *The Queen*, 2 Ex. C. R. 428.

Expropriation — *Judgment of Exchequer Court.*]—The Supreme Court will not interfere with amount of award where the finding is not clearly erroneous. *Town of Levis* v. *The Queen*, 21 S. C. R. 31.

Increasing Award—*Evidence.*]—Held, per Hagarty, C.J.O., and Maclennan, J.A. In an arbitration within sections 401 and 404 of the Consolidated Municipal Act, 55 Vict. ch. 42 (O.), a Judge to whom an appeal is taken against the award cannot, merely on his own understanding of the evidence and on a view of the premises, increase the amount awarded.

Per Burton, and Osler, J.J.A. The Judge can deal with the award on the merits, and can increase or reduce the amount or vary the decision as to costs.

In the result the judgment of Rose, J., 24 O. R. 443, was affirmed.

In re Christie and Toronto Junction, 22 A. R. 21. Affirmed by the Supreme Court.

Official Arbitrators.]—The Court will not interfere with an award of the official arbitrators where there is evidence to support their finding, and such finding is not clearly erroneous. *Samson* v. *The Queen*, 2 Ex. C. R. 94.

Railway Act—*Amount.*]—In a case of an award in expropriation proceedings under the Railway Act, R. S. C. ch. 109, it was held by two Courts that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice. On appeal to the Supreme Court of Canada :—

Held, that the judgment should not be interfered with. *Benning* v. *Atlantic and N. W. R. W. Co.*, 20 S. C. R. 177.

Railway Act—*Time.*]—An appeal under section 161 of the Railway Act, 51 Vict. ch. 29 (D.), from an award need not be brought on for hearing within a month from notice of the award, an effective notice of appeal, given in good faith, within the month, is sufficient.

Such an appeal should be brought on for hearing before a single Judge in Court, not before a Divisional Court. *Re Potter and Central Counties R. W. Co.*, 16 P. R. 16.

View of Premises. *Opinion Evidence—Potential Value—Interest.*]—A municipal corporation expropriated land for a road, under a by-law which described the land, and provided "that the same is hereby taken and expropriated for and established and confirmed as a public highway or drive," pursuant to which the corporation took possession.

Upon appeal from an award by which the land-owners were allowed $5,595 as compensation for the land taken, and $10,685 for other lands injuriously affected, and interest on both sums from the date of the by-law:—

Held, that where an arbitrator has viewed the premises, but has not proceeded upon his view, the Court should not give any greater effect to his findings than if he had not taken a view.

2. As to the weight of evidence: there was ample testimony to warrant the arbitrator, if he gave credit to it, in his findings; and it was not for the Court to say that he should have preferred the evidence of one set of witnesses to that of the other, in a matter especially where so much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions.

3. That the arbitrator was justified in taking into account the potential value of the property when improved, after allowing for the cost of improving it, as a means of arriving at its actual value.

Ripley v. *Great Northern R. W. Co.*, L. R. 10 Ch. 435; *Bidder* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 625; and *Boom Co.* v. *Patterson*, 98 U. S. 403, followed.

4. That the whole sum allowed must be taken upon the face of the award to have been allowed as purchase money of the land taken.

James v. *Ontario and Quebec R. W. Co.*, 12 O. R. 624, 15 A. R. 1, specially referred to.

5. That the land must, from the date of the passing of the by-law, be deemed to have been "taken" by the city corporation, and interest was payable on the whole sum from that date.

Rhys v. *Dare Valley R. W. Co.*, L. R. 19 Eq. 93, and *In re Shaw and Birmingham*, 27 Ch. D. 614, followed.

6. That the arbitrator had jurisdiction to award interest. *Re Macpherson and City of Toronto*, 26 O. R. 558.

II. Arbitrator.

1. *Disqualification of.*

Contract—*Engineer of Municipal Corporation.*]—Under a contract with a municipality for the laying of block pavements on certain streets with a provision that "the decision of the city engineer on all points coming within this contract and specifications shall be final and conclusive whether as to the interpretation of the various clauses, the measurements, extra work, quantity, quality, and all other matters and things which may be in dispute, and from his decision there shall be no appeal," the city engineer is not disqualified, in the absence of fraud or of bad faith, from deciding whether certain work is or is not extra work and does or does not fall within the plans and specifications. The possible bias of the engineer in favour of the plans and specifications drawn by him is not sufficient to disqualify him. Judgment of Rose, J., affirmed on other grounds. *Farquhar* v. *City of Hamilton*, 20 A. R. 86.

Contract—*Superintendent of Work.*]—By a contract between plaintiff and a city municipality for additions and improvements to its system of waterworks, it was provided that all differences, etc., should be referred to the award, order, arbitrament, and final determination of H., the superintendent in charge of the said work:

Held, that the fact of H. being such superintendent did not disqualify him from acting as arbitrator; and on the evidence that no cause existed to restrain him from proceeding with the reference. *McNamee* v *City of Toronto*, 24 O. R. 313.

Counsel.]—Upon a motion to set aside an award of two out of three arbitrators, it was objected that one of the two, a Queen's counsel, was disqualified by reason of interest. It appeared that, for some years prior to the arbitration, he had from time to time acted as chamber counsel for the standing solicitor of a corporation, one of the parties to the arbitration, and had advised him with respect to matters affecting the corporation. It did not appear that he was the standing counsel for the corporation, nor for the solicitor in matters affecting the corporation, nor that he had advised or acted for the corporation or for the solicitor after his appointment as arbitrator, nor that there was any business connection between him and the corporation:—

Held, that there was no such relation between him and the corporation as might give rise to bias or shew an interest which would invalidate the award.

Vineberg v. *Guardian Fire and Life Assurance Co.*, 19 A. R. 293, distinguished. *Re Christie and Town of Toronto Junction*, 24 O. R. 443. Affirmed in appeal, 22 A. R. 21, and in the Supreme Court, 25 S. C. R. 551.

Insurance.]—Proceedings under R. S. O. ch. 167, sec. 114, (16) for the ascertainment of the amount of a loss under a fire policy, are proceedings in the nature of an arbitration and not of a valuation merely.

Arbitrators must be indifferent, and an award made by arbitrators, one of whom was at the time of arbitration sub-agent for an agent of the defendants in obtaining insurance risks, though he had acted as such to only a very small extent, was, affirming the judgment of Rose, J., at the trial, and of Ferguson, J., in the Divisional Court, held void.

Race v. *Anderson*, 14 A. R. 213, followed; *Vineberg* v. *Guardian Fire and Life Assurance Co.*, 19 A. R. 293.

Solicitors.]—The High Court has power to prevent a non-indifferent arbitrator from acting without waiting until the award is made, though perhaps the better course is to apply

for leave to revoke the submission if another arbitrator be not substituted.

Malmesbury R. W. Co. v. *Budd*, 2 Ch. D. 113, and *Beddow* v. *Beddow*, 9 Ch. D. 89, followed.

A barrister and solicitor who had acted as counsel for the husband on an indictment and trial for obstructing an alleged highway claimed by his wife to be her property, and who had written a letter concerning the matter as solicitor for both husband and wife, was restrained from acting as arbitrator in an arbitration between the wife and the municipal corporation in which the highway was situate.

Vineberg v. *Guardian Fire and Life Assurance Co.*, 19 A. R. 293, followed. *Township of Burford* v. *Chambers*, 25 O. R. 663.

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2. *Powers of.*

Costs.]—Where upon an arbitration under section 385 *et seq.* of the Municipal Act, 1892, the arbitrators made their award and directed that the costs should be paid by the land-owners, but did not fix the amount nor direct on what scale they should be taxed, as required by section 399 :—

Held, that there was no authority for their taxation either upon the High Court or the County Court scale.

But *semble*, that upon a proper application the award would be referred back to the arbitrators to complete it in the matter of costs. *Re Village of Preston and Klotz*, 16 P. R. 318.

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3. *Proceedings Before.*

Evidence.]—*Semble*. Where an arbitrator or assessor to whom a claim is referred by the Crown for report is empowered to take oral evidence, he cannot proceed to take such evidence without swearing the witnesses and giving each party an opportunity to cross-examine them. *Pouliot* v. *The Queen*, 1 Ex. C. R. 313.

Foreign Commission.]—A Judge of the Court of Appeal has no power to order the issue of a commission to take evidence abroad for use upon a compulsory arbitration pending before an arbitrator named by a Judge of that Court, under section 487 (1) of the Municipal Act, 55 Vict. ch. 42 (O.).

Such an arbitration is not a "reference by rule, order, or submission," within the meaning of section 49 of the Act respecting arbitrations and references, R. S. O. ch. 53 ; nor, even if it were a "matter" within the meaning of Rule 566, would a Judge of the Court of Appeal have any jurisdiction, by reason of his having appointed the arbitrator or otherwise.

And *semble*, distinguishing *Re Mysore West Gold Mining Co.* 37 W. R. 794, it is not such a "matter." *Re Macpherson and City of Toronto*, 16 P. R. 230.

III. Award.

Award by Two out of Three Arbitrators.]—Where a submission to arbitration provides that the award thereunder shall be made by three arbitrators, the award to be valid must be made by the three unanimously. *Re O'Connor and Fielder*, 25 O. R. 568.

Report by Two of the Official Arbitrators.]—By a rule of Court made on March 7th, 1888, it was ordered that, unless it was otherwise specially ordered, any matter pending before the official arbitrators when the Exchequer Court Act (50-51 Vict. ch. 16), came into force that had been heard or partly heard by such arbitrators should be continued before them as official referees and that their report thereon should be made to the Court in like manner as if such matter had been referred to them by the Court under the 26th section of the said Act. Prior to the making of this rule a claim had been referred by the Minister of Railways and Canals to the official arbitrators for investigation and award. This claim, however, was proceeded with and an award before two of such arbitrators only, and a report thereon in favour of the claimant was made by them to the Court. On motion by claimant for judgment on such report :—

Held, that the hearing of the claim by two of the official arbitrators was not a hearing within the meaning of the rule, and that judgment could not be entered on the report. *Richard* v. *The Queen*, 2 Ex. C. R. 91.

IV. Costs and Fees.

Excessive Charge for Arbitrator's Fees.]—The liability imposed on arbitrators by section 29 of R. S. O. ch. 53 in case of an overcharge of fees, to pay treble the amount of the fees charged or paid, is penal in its nature, and does not arise where a person entitled to take up the award has voluntarily paid the charges without any previous demand of the award by such person, followed by a refusal or delay to make, execute, or deliver the same by the arbitrator until payment of the excessive charges.

Taxation of the fees is not a condition precedent to maintaining an action for the penalty. *Jones* v. *Godson*, 25 O. R. 444. *See* this case in the Court of Appeal, 23 A. R. 34.

Fees of Arbitrators—*Day's Sitting.*]—Upon the proper construction of the schedules to R. S. O. ch. 53, arbitrators are not entitled to charge as fees for a day's sitting which extends beyond six hours more than the maximum amount fixed by the schedules for a single day's sitting.

Armstrong v. *Darling*, 6 C. L. T. 214 ; 22 C. L. J. 149, overruled. Decision of Street, J., affirmed. *In re Town of Thornbury and County of Grey*, 15 P. R. 192.

Second Counsel Fee.]—In taxing the costs of an arbitration, a taxing officer has jurisdiction, in his discretion, to allow a second counsel fee.

The provision of R. S. O. ch. 53, sec. 25, that not more than one counsel fee shall be taxed, is inconsistent with item 164 of the tariff of costs appended to the Consolidated Rules, 1888, and, by virtue of 51 Vict. ch. 2, sec. 4 (O.), must be taken to be repealed.

Re McKeen and Township of South Gower, 12 P. R. 553, followed.

Howard v. *Herrington*, 20 A. R. 175, and *Arscott* v. *Lilley*, 14 A. R. 283, distinguished. *Re Pollock and City of Toronto*, 15 P. R. 355.

V. Setting Aside Award.

Award Made Final by Submission.]—An award will not be set aside on the ground that a memo., furnished by the arbitrator to the losing party after its publication, shewed that the accounts between the parties were adjusted upon a wrong principle, the defect, if any, not being a mistake on the face of the award or in some paper forming part of, and incorporated with, the award, and there being no admission by the arbitrator himself that he had made a mistake. Judgment of the Court of Appeal, 16 A. R. 348 affirmed. *McRae* v. *Lemay*, 18 S. C. R. 280.

Expropriation.]—In a railway expropriation case the respondent, in naming his arbitrator, declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of $1,974.25 damages and costs for land expropriated was made under Art. 5164 R. S. Q. The demand for expropriation, as formulated in their notice to arbitrate by the appellants, was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award:—

Held, affirming the judgment of the Courts below, that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction. *Quebec, Montmorency and Charlevoix R. W. Co.* v. *Mathieu*, 19 S. C. R. 426.

Nova Scotia Mines Act.]—*See Palgrave Gold Mining Co.* v. *McMillan*, [1892] A. C. 460.

Petition of Right.]—T. McG., who claimed a large sum of money from the Government of the Province of Quebec under a contract he had for the construction of a portion of the North Shore Railway, agreed to submit to three mediators or *amiables compositeurs* all controversies and difficulties existing between the Government and himself, and the submission stated that these mediators should inquire into, *inter alia*, the extent of the obligation of the contract passed between the Government of Quebec and the said T. McG.; the alterations and modifications made in the plans, particulars and specifications mentioned in the said contract; what influence the said alterations and modifications may have had on the obligations of the said T. McG. and on those of the Government; the delays caused by reasons irrelevant to the action of the contractor: the pecuniary value, whether for more or for less, of the alterations or any increase in the works; and finally, all things connected with the matter and the execution of the said contract, and with regard to the charges and obligations of both the Government and the said contractor, according to the terms of the said contract. The submission also provided that the award was to be executed as a final and conclusive judgment of the highest court of justice. The mediators by their award, after reciting the matters in controversy between the parties, found that the Government of the Province of Quebec was indebted to T. McG. in the sum of $147,473, and annexed thereto an affidavit stating they had inquired into all matter and difficulties submitted to them as appeared in the deed of submission. This amount being much less than the amount claimed by T. McG., he filed a petition of right, asking that the award be set aside on the ground that it did not cover the matters referred to the arbitrators in the submission. The Superior Court for the District of Quebec set aside the award, and on appeal to the Court of Queen's Bench for Lower Canada (appeal side) that Court reversed the judgment of the Superior Court and dismissed the petition of right. On appeal to the Supreme Court of Canada:—

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side) that the object of the submission was to ascertain what amount the contractor T. McG. was to receive from the Government, and the specification of the several matters referred to in the submission was merely to secure that in determining the amount the mediators should fully consider all these matters, and that all matters having been so considered the award was valid. Strong and Taschereau, JJ., dissenting.

Per Fournier, J.—Mediators (*amiables compositeurs*) are not subject to the provisions of Art. 1346 C. P. C. and their award can only be set aside by reason of fraud or collusion if given on the matters referred to them. *McGreevy* v. *The Queen*, 19 S. C. R. 180.

Public Works—*Sub-contract*—*Rescission*—*Quantum Meruit.*]—P. was a contractor with the Government of Canada for building a post office and K. was sub-contractor to do the mason and brick work for a lump sum, the sub-contract consisting simply of an offer to give the work for the sum named and an acceptance by K. P., being dissatisfied with the work done by K., took the contract out of his hands before it was completed, and finished it himself. K. then brought an action for the value of the work done by him and on reference by the Court to arbitration an award was made in K.'s favour. The Court of Appeal set aside the award and remitted the case to the arbitrator for further consideration, holding that though the contract did not authorize P. to take over the work and finish it at K.'s expense, and the latter was therefore entitled to recover on the *quantum meruit*, yet the cost of completing the work was considerably in excess of the contract price:—

Held, reversing the judgment of the Court of Appeal, that as it appeared from the evidence that the arbitrator fully understood the matter and got all the information that could be obtained on the subject, and as no impropriety or mistake was shewn to have been committed by him, no benefit could result from sending the award back for reconsideration, and the decree of the Court of Appeal was not justified. *Kennedy* v. *Pigott*, 18 S. C. R. 699.

Time—*Official Arbitrators.*]—Under the provisions of 44 Viet. ch. 25, sec. 43 (D.), an application to the Court for an order to set aside an award of the official arbitrators must be made

within three months after the party applying has had notice of the making of the award, but the order need not be granted within that period. *Pouliot* v. *The Queen*, 1 Ex. C. R. 313.

Time.]—In the Province of Ontario the governing statute as to the time for applying to set aside an award which has been made under a rule of Court, or to remit it to the arbitrators for reconsideration and redetermination, is R. S. O. ch. 53, sec. 37, and it is not required that the application should be made before the last day of the term next after the making of the award as provided by 9 & 10 Wm. III. ch. 15, sec. 2. Gwynne, J., dissenting.

An award may be remitted to arbitrators for reconsideration and redetermination under the Ontario statute though the result of the reconsideration may be to have the award virtually set aside by a different, or even contrary, decision of the arbitrators.

The Court is justified in remitting an award to the arbitrators if fraud or fraudulent concealment on the part of the persons in whose favour it is made is established, or if new evidence is discovered which, by the exercise of reasonable diligence, could not have been discovered before the award was made. *Green* v. *Citizens' Ins. Co.*, 18 S. C. R. 338.

Time.]—Section 4 of 52 Vict. ch. 13 (O.), which requires motions to set aside awards of a specific kind to be made within fourteen days from the filing thereof; and section 6 of the same Act which allows motions to set aside awards of another kind to be made within three months from the making and publication thereof, do not apply to arbitrations under the Municipal Act, and a motion made on the 10th of February, 1891, to set aside an award made in an arbitration under the Municipal Act on the 31st of December, 1890, and filed on the 19th of January, 1891, was held to be in time.

The scope and meaning of the several sections of the Act considered. *In re Prittie and Toronto*, 19 A. R. 503.

Time.]—A motion to set aside an award under a reference by consent was made within fourteen days of the filing, but more than four months after the making thereof:—

Held, too late. *Baldwin* v. *Walsh*, 20 O. R. 511.

Time.]—A notice of motion to set aside an award made on 24th July, 1893, of which the applicants had notice on 7th August, 1893, was served on the 29th March, 1894:—

Held, too late.

The motion, if made under 9 & 10 Wm. III. ch. 15, should have been made before the last day of what was formerly Trinity Term; and, if the award was one to which section 4 of 52 Vict. ch. 13 (O.) did not apply, by section 6 could not have been made after the expiration of three months from the making and publication.

The provision of section 2 of the latter Act, as to filing awards, does not prevent the time limited by either enactment from running. *Re Garson and Town of North Bay*, 16 P. R. 179.

Witness.]—Examination of arbitrator as witness on motion to set aside award. *See In re Christie and Toronto Junction*, 22 A. R. 21.

VI. Submission.

Appointment of Arbitrator.]—The provisions of a submission to arbitration in reference to the appointment of a third arbitrator must be strictly followed. Where, therefore, a submission provided that the third arbitrator should be appointed by writing endorsed thereon under the hands of the arbitrators therein named and the appointment was not so endorsed, the award was held invalid. *Bryce* v. *Loutit*, 21 A. R. 100.

ARREST.

I. Cause for Arrest.

Absconding Debtor.]—An application under Rule 1051 to discharge from custody is an original proceeding, independent of the order to arrest, and the Judge to whom it is made is invested with a very large discretion.

If the appellate Court has doubt as to the proper result of all the evidence, that doubt should lean in favour of personal liberty.

Our statute 22 Vict. ch. 96 (now R. S. O. ch. 67, sec. 1) differs from its original, the Imperial Act 1 & 2 Vict. ch. 110, and was expressly enacted so as to restrain the freedom of those only who were believed to be contemplating fraud as against their creditors; under it, it cannot be said that a person indebted, without substance, who contemplates removing from Ontario to better his condition, is leaving with intent to defraud creditors; two things must concur before the statute operates—the quitting of Ontario, and an intent thereby to defraud creditors.

Robertson v. *Coulton*, 9 P. R. 18, observed upon.

Upon the evidence in this case, the Court was not satisfied that the defendant had any intention to flee the country at the time of his arrest, or that there was such dealing with his property as was within the mischief of the statute, and affirmed an order of a Judge in Chambers discharging him from custody. *Toothe* v. *Frederick*, 14 P. R. 287.

Absconding Debtor.]—The plaintiff stated in her affidavit, on which the order of arrest was made, that the defendant, taking advantage of their engagement, had seduced her, and, as soon as he discovered that she was with child, went to the United States, but subsequently returned to attend his father's funeral, and was then about to quit Ontario with intent to

defraud her, etc. The plaintiff's father also swore to the intent; while the defendant, though filing an affidavit, made no reference to his financial condition :—

Held, that the alleged intent was sufficiently disclosed.

Toothe v. *Frederick*, 14 P. R. 287, and *Rogers* v. *Knowles*, *ib.* 290, *n.*, distinguished. *Vansickle* v. *Boyd*, 14 P. R. 469.

Absconding Debtor.]—An order for the arrest of the defendant was made on 16th March, 1892, upon an affidavit of the plaintiff, in which he alleged that the defendant in March, 1891, absconded from this Province for the purpose of defrauding his creditors, and that, having lately returned to the Province, he was about to leave it again with a like purpose. The defendant applied, upon new material, to the Judge who made the order to set it aside and to be discharged from custody :—

Held, that the affidavit of the plaintiff was, if true, a sufficient foundation for the order.

Kersterman v. *McLellan*, 10 P. R. 122, followed.

And the order could not be set aside by the Judge upon the new material contradicting the case made by the plaintiff.

Damer v. *Busby*, 5 P. R. 356, and *Gilbert* v. *Stiles*, 13 P. R. 121, followed.

The departure of the defendant from this Province in March, 1891, was open and public; he announced it at a public meeting to six or seven hundred persons along with the fact that he intended to sell his household effects before his intended departure; the newspapers in the place where he lived announced that he was going to Chicago, U.S., with his family to take a situation there which he had obtained; and his fellow townsmen gave him a public dinner, at which several of his creditors were present, before he left. He departed for Chicago, taking no property with him. The only piece of property which he possessed in Ontario was an unsaleable and heavily mortgaged house and lot, which, a year before he left, he had transferred to a creditor as security for a debt. He had a permanent situation and residence in Chicago with his wife and family, and in March, 1892, returned to this Province for a merely temporary purpose. During the year he spent in Chicago he remitted considerable sums earned by him to his creditors in Ontario :—

Held, that, under these circumstances, the defendant could not be said to have left Ontario with intent to defraud his creditors, and that he should be discharged from custody under the order for arrest.

It is within the power of the Court or a Judge, upon an application to discharge a defendant from custody, to impose upon him the term that he shall bring no action against the plaintiff; but it should only be imposed where the plaintiff is shewn to have been entirely frank and open in his application for the order for arrest, and to have had reasonable grounds for the statements he has laid before the Judge. The circumstances of this case did not warrant such a term being imposed; for the plaintiff was aware of the circumstances and the publicity of the defendant's departure in 1891, and conveyed a false impression when he swore that the defendant then "absconded from this Province."

For the same reason the defendant was entitled to the costs of his application to be discharged from custody. *Scane* v. *Coffey*, 15 P. R. 112. *See* the next two cases.

Absconding Debtor.]—In an action for damages for arrest under the order made in the above action the plaintiff recovered a verdict for $1,000. Upon motion to set it aside, made before a Divisional Court composed of Armour, C.J., and Falconbridge, J. :—

Held, per Armour, C.J., that so long as the order for arrest stood, an action for maliciously and without reasonable and probable cause arresting the plaintiff could not be maintained.

Erickson v. *Brand*, 14 A. R. 614, distinguished.

2. Where a creditor, by affidavit, satisfies the Judge that there is good and probable cause for believing that his debtor, unless he be forthwith apprehended, is about to quit Ontario, the inference is raised that he is about to do so with intent to defraud; for he is removing his body, which is subject to the jurisdiction of the Courts of Ontario, and liable to be taken in execution, beyond the jurisdiction of such Courts.

Toothe v. *Frederick*, 14 P. R. 287, commented on and not followed.

Robertson v. *Conlon*, 9 P. R. 16, approved and followed.

3. The facts that the plaintiff, being a resident of Ontario, and having numerous creditors therein, including the defendant, left the Province without paying them, and went to reside permanently in the United States, whether he left openly or secretly, and whether he announced his departure and intentions beforehand or concealed them, and that he came back to Ontario for a temporary purpose, intending to return to the United States, afforded reasonable and probable cause for and justified his arrest.

4. Considering the action as one for imposing upon the Judge by some false statement in the affidavit to hold to bail, and thereby inducing him to grant the order for arrest, the fact falsely suggested or suppressed must be a material one for the Judge to consider in granting the order, and the burden is upon the plaintiff of shewing that the Judge was imposed upon.

5. The word "absconded" truly described the going away of the plaintiff, whether he went away secretly or openly, and he was properly described as an absconding debtor.

Falconbridge, J., adhering to the views expressed in *Scane* v. *Coffey*, 15 P. R. 112, was of opinion that the plaintiff had a cause of action, but thought there should be a new trial on the grounds of excessive damages and misdirection; and concurred *pro formâ* in the decision of Armour, C.J. *Coffey* v. *Scane*, 25 O. R. 22. *See* the next case.

Absconding Debtor.]—Where a man, having numerous creditors in Ontario, leaves the Province openly to reside in the United States after publicly announcing his intention so to do, without paying his creditors, and after his departure it is found that statements made by him as to property available to pay his debts are false and that nothing is in fact available for that purpose, his arrest upon civil process upon his return to Ontario for a temporary purpose, intending to return to the United States, is justifiable.

Judgment of the Queen's Bench Division, 25 O. R. 22, affirmed. *Coffey* v. *Scane*, 22 A. R. 269.

Absconding Debtor.]—The defendants left the State of Pennsylvania and came to Ontario, with the intent of defrauding their creditors. They stayed some time in London, Ontario, and left there with their wives, by train, booked for Toronto. One of their creditors left London by the same train, and while on the train, between London and Hamilton, he heard one of the wives say to her husband that she wondered what time they should reach Montreal. While waiting at Hamilton for the Toronto train, the creditor obtained an order for the defendants' arrest and they were arrested :—

Held, upon the evidence, that the defendants intended to leave Ontario with the intent of defrauding their creditors.

Per Armour, C.J., and Falconbridge, J., that the defendants having come into Ontario with the intent of defrauding their creditors, and their intention being to pass through it, they must be held to have been quitting Ontario with intent to defraud their creditors.

Per Street, J., that the mere fact of the defendants having absconded to this Province to defraud their creditors elsewhere did not afford any evidence of an intention to abscond from this Province to defraud the same creditors, so as to justify an order for their arrest upon their arrival here; but the circumstances of the case led to the conclusion that the defendants were about to leave the Province *Meyer Rubber Co.* v. *Rich*, 14 P. R. 243.

Breach of By-law.]—A breach of a city by-law for driving an omnibus without the license required thereby, does not justify the summary arrest of the offender, even though the officer arresting may have believed that he was acting legally and in the discharge of his official duty. *Kelly* v. *Barton*, 26 O. R. 608; *Kelly* v. *Archibald*, 26 O. R. 608. Affirmed in appeal, 22 A. R. 522.

Trespass — *Railway.*]—Section 283 of the Railway Act of Canada, 51 Viet. ch. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where the constable arrests an offender and takes him before the justice.

A summary conviction of the defendant by a justice for the county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested but merely summoned. *Regina* v. *Hughes*, 26 O. R. 486.

Trespass — *Arrest Before Endorsement of Warrant—Detention Afterwards—Damages.*]—*See Southwick* v. *Hare*, 24 O. R. 528, *post* 42.

Uttering Forged Note.]—The defendant laid an information charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars, purporting to be made against J. M. in favour of T. A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was under it apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted :—

Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and an action of trespass was not maintainable against the defendant, even upon evidence of his interference with the arrest.

Semble, that if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, an action for malicious prosecution would nevertheless lie. *Anderson* v. *Wilson*, 25 O. R. 91.

Witnesses—*Right to Arrest for Default in Attendance.*]—*See Gordon* v. *Denison*, 22 A. R. 315, *post* 263.

II. Damages.

Arrest before Endorsement of Warrant— *Detention After.*]—A warrant for the arrest of the plaintiff, who had made default in paying a fine on conviction for an infraction of the liquor license law, was sent from an outlying county to a city. Before it was indorsed by a magistrate in the city the plaintiff was arrested there by two of the defendants, the chief constable and a detective, and confined. Some hours after the arrest the warrant was properly indorsed and the detention of the plaintiff was continued until payment of the fine :—

Held, that the only damages recoverable by the plaintiff were for the trespass up to the time of backing the warrant :—

Held, also, that the plaintiff being illegally in custody under a criminal charge, his subsequent detention on a similar charge under a proper warrant was lawful.

Distinction between subsequent civil and criminal proceedings in such cases pointed out. *Southwick* v. *Hare*, 24 O. R. 528.

III. Setting Aside Order.

Affidavit — *Mistake in Plaintiff's Name—Indorsement of Claim for Lien on Land.*]—On a motion by the defendant to set aside an order for his arrest in an action for breach of promise of marriage, the plaintiff's affidavit on which the order was based was headed in the proper style of cause, and proceeded, "I, Alberta Jane Boyd, the above named plaintiff," her name being Alberta Jane Vansickle, and was signed "Berta J. Vansickle" :—

Held, that the affidavit was not a nullity, but the mistake therein was merely an irregularity, and the objection thereto should have been expressly taken in the notice of motion.

The writ of summons was indorsed with a claim for a lien on certain land in Ontario. The defendant did not state in his affidavit that he owned any land; while the plaintiff's counsel stated that, notwithstanding the indorsement, he had no knowledge of the defendant's owning any land :—

Held, that this was no ground for setting aside the arrest. *Vansickle* v. *Boyd*, 14 P. R. 469.

Costs—*Terms.*]—Where the defendant in his notice of motion to set aside an order for his arrest and for his discharge, asked for costs, and an order was made in his favour with costs:—

Held, that the Judge making the order had power to impose the term that the defendant should be restrained from bringing any action.

Review of the English authorities. *Adams* v. *Annett*, 16 P. R. 356.

Jurisdiction.]—Rule 536 does not apply to cases of *ex parte* orders for arrest, which are specially provided for by Rule 1051; and a County Court Judge has no jurisdiction to set aside his own order for arrest.

Where an order for arrest has been acted on by the sheriff, it should not be disturbed. *Jury* v. *Jury*, 16 P. R. 375.

Arrest for Contempt of Court—*See* CONTEMPT OF COURT.

ARTIZAN'S LIEN.

See LIEN.

ASSESSMENT AND TAXES.

I. APPEALS AND ACTIONS.

Court of Revision—*Notice of Sitting—Finality of Assessment.*]—A person appealing against his own assessment to a Court of Revision is not entitled to a personal notice of the time and place of the sitting of the Court under sub-section 9 of section 64 of the Consolidated Assessment Act.

He is sufficiently notified by the publication of the advertisement required by sub-section 7, and by the posting of the list under sub-section 4.

Where there is jurisdiction to assess, any appeal from a Court of Revision must be to the County Judge or stipendiary magistrate, as the case may be. *Vivian* v. *Township of McKim*, 23 O. R. 561.

Court of Revision — *Right of Counsel to Appear.*]—Courts of Revision created under the Consolidated Assessment Act, 1892, are not obliged to hear counsel in support of an appeal against an assessment of property under that Act.

A mandamus for such purpose was refused. *Re Rosbach and Carlyle*, 23 O. R. 37.

Finality of Assessment.]—The plaintiffs having been illegally assessed at L., and having paid the taxes under protest, were held entitled to maintain an action to recover them back.

Judgment of Armour, C. J., reversed. *Watt* v. *City of London*, 19 A. R. 675. Affirmed by the Supreme Court, 22 S. C. R. 300.

Finality of Assessment.]—The decision of the Judge of a County Court on a question of assessment is final, when he is dealing with property that is assessable at all.

Judgment of Ferguson, J., 24 O. R. 643, affirmed. *Confederation Life Association* v. *City of Toronto*, 22 A. R. 166.

Finality of Assessment.]—*See James* v. *O'Keefe*, 26 O. R. 489; 23 A. R. 129, *post* 56.

II. ASSESSMENT.

Business Carried on in Two Municipalities.]—Sec. 65 of the Ontario Assessment Act (R. S. O. ch. 193) does not enable the Court of Revision to make valid an assessment which the statute does not authorize. Section 15 of the Act provides that "where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such persons shall be assessed in the municipality in which such personal property is situated." W., residing and doing business in Brantford, had certain merchandise in London stored in a public warehouse used by other persons as well as W. He kept no clerk or agent in charge of such merchandise, but when sales were made a delivery order was given upon which the warehouse keeper acted. Once a week a commercial traveller for W., residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into at London:—

Held, affirming the decision of the Court of Appeal, 19 A. R. 675, that W. did not carry on business in London within the meaning of the section and that his merchandise in the warehouse was not liable to be assessed at London. *City of London* v. *Watt*, 22 S. C. R. 300.

Description of Land.]—In describing lands for assessment, "the north-east part," even with the addition of the acreage, is an ambiguous description; and *quære* as to the effect upon the validity of a by-law. *Re Jenkins and Township of Enniskillen*, 25 O. R. 399.

Gas Company—*Mains and Pipes laid under Streets.*]—The mains and pipes of the Toronto Gas Company laid under the public streets are assessable under the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.), as appurtenant to the land owned by the company for the purposes of its business.

Semble, that the proper mode of assessment in a city divided into wards would be to value the concern as a whole and then apportion rateably to the wards so much of the value as falls to that part of the concern territorially situate in each locality. *Consumers' Gas Co. of Toronto* v. *City of Toronto*, 26 O. R. 722.

Insurance Company—*Net Profits—Reserve Fund.*]—The amount deposited by an insurance company with the Dominion Government for protection of policy-holders may properly be deducted from the gross income of the company in ascertaining the net profits liable to taxation under the assessment law of the city of St. John, 52 Vict. ch. 27, sec. 125 (N. B.).—The Act requires the agent or manager of such company to furnish the assessors each year with a statement under oath, in a prescribed form, shewing the gross income for the year preceding and the amount of certain specified deductions, the difference to be the net income, and if such statement is not furnished the assessors may assess according to their best judgment. W. furnished a statement in which, in place of the deductions of one class specified, he inserted, "an amount equal to seventy-five per cent. of the premiums received, as deposited with the Dominion Government for security to policy-holders." The assessors disregarded this statement and assessed the company in an amount fixed by themselves, and on application for *certiorari* to quash such an assessment, it was shewn by affidavit that the deposit of the company was equal to about seventy-five per cent. of the premiums :—

Held, reversing the decision of the Court below, Fournier and Taschereau, JJ., dissenting, that the agent was justified in departing from the form prescribed to shew the true state of the company's business; that the deposit was properly deducted; and that the assessors had no right to disregard the statement and arbitrarily assess the company as they saw fit. *Peters* v. *City of St. John*, 21 S. C. R. 674.

Insurance Company — *Reserve Fund.*] — Where the County Court Judge had decided, on appeal from the Court of Revision, that the plaintiffs were liable under sec. 34, and sec. 2, subsec. 10, of the Consolidated Assessment Act, 55 Vict. ch. 48 (O.), to be assessed upon the interest arising upon investments of their reserve fund, although such interest was always added to the reserve fund and reinvested as part of it, and the plaintiffs now brought this action to have the assessment declared illegal :—

Held, that, although the plaintiffs were bound by law to keep up the reserve fund upon a certain scale, the amount varying according to the values of the lives insured by them, as fixed by actuaries' tables, yet they were not bound to apply the income arising from the investments of the fund in keeping the fund at its proper level, but might make the necessary increase with any money whatever, and the Judge of the County Court had full jurisdiction, and the matter was, therefore, *res judicata*. *Confederation Life Association* v. *City of Toronto*, 24 O. R. 643. Affirmed in appeal, 22 A. R. 166.

Local Improvement—*By-law—Division of Lots.*]—Where under a local improvement by-law an assessment is made of the lands benefited and chargeable with the cost of the improvement, and lands having a specified street frontage are thereafter charged with a specific amount of the cost of the improvement which is entered on the assessment and collectors' rolls, and such lands are subsequently subdivided, the whole rate cannot legally be charged against a portion of the lands so subdivided.

The duty of the clerk of the municipality is to bracket on the roll the different subdivisions with the name of the persons assessed for each parcel and the annual sum charged against the original parcel as that for which the sub-lots and persons assessed for them are liable under the special rate. *Capon* v. *City of Toronto*, 26 O. R. 178.

Local Improvement — *By-law — Registration.*]—In constructing local improvements, a municipal corporation must either make an assessment of the probable cost, giving the ratepayers an opportunity of appealing, and then, if necessary, make a further assessment to be confirmed by the Court of Revision in the same manner as the first, or they must defer the actual assessment until after the completion of the work, the ratepayers then having the right to appeal. They cannot proceed partly in one way and partly in another without giving any opportunity of appealing from a definite assessment.

A municipal corporation, under the provisions of a general by-law respecting local improvements, determined to construct a sewer, and proceeded to assess the estimated cost on the property benefited. This assessment was confirmed by the Court of Revision. The council then passed a by-law authorizing the construction of the sewer to be proceeded with, and on its completion passed another by-law by which the actual cost, which was much greater than the amount of the assessment, was imposed and assessed upon the property. The council proceeded to enforce this assessment without having brought it before the Court of Revision :—

Held, that the assessment was invalid and could not be supported as a mere alteration of the estimated cost, or as a supplementary assessment.

The provisions of section 351 of the Municipal Act, R. S. O. ch. 184, are imperative and not merely directory, and if a local improvement by-law is not registered within two weeks after its final passing, a ratepayer may shew that it is invalid and successfully resist payment of the local improvement tax.

Re Farlinger and Morrisburg, 16 O. R. 722, distinguished.

Judgment of MacMahon, J., reversed. *Sweeny* v. *Town of Smith's Falls*, 22 A. R. 429.

Local Improvement — *By-law — Variance between Notice and By-law.*]—In carrying out a local improvement the council may either ascertain and provide for the cost of the work before it is actually commenced by imposing and confirming the assessment necessary for that purpose, or they may do the work first and make the special assessment after its completion.

A by-law imposing assessments for local improvements initiated by the city was quashed where the work done and the times of payment

therefor were different from those set out in the notice of intention to do the work.

Per Osler, J.A. - The by-law was bad on the further grounds (1) that the notice given to the ratepayers was of an improvement costing the sums named therein, to be provided for by an assessment to be made and confirmed before the commencement of the work, while the by-law imposed an assessment for the cost of construction as ascertained after its execution; and (2) that a petition duly signed objecting to the performance of the work had been, within the proper time, delivered to the council.

The motion to quash the by-law was dismissed by Galt, C.J., on the ground that it had been expressly validated by 54 Vict. ch. 82, sec. 14 (O.). While an appeal from the judgment was pending 55 Vict. ch. 90 (O.) was passed, section 6 of which enacted that "nothing contained herein or in the Act passed in the 54th year of Her Majesty's reign, and chaptered 82, shall affect any action or proceeding now pending."

Per Osler, J.A.—The latter Act was declaratory or retrospective; its effect was to prevent the defendants from asserting that the by-law had been validated by the earlier Act, and therefore the by-law being defective the judgment must be reversed, though it was right when it was delivered.

Quilter v. *Mapleson*, 47 L.T.N.S. 561, referred to.

Judgment of Galt, C.J., reversed. *In re Gillespie and City of Toronto*, 19 A. R. 713.

Local Improvement—*General By-law.*]—The council of a city by a resolution confirming the report of the Committee on Works authorized the corporation to enter into an agreement with certain railway companies—who were liable to maintain and keep in repair the existing bridges over their tracks on a certain street—whereby the corporation were to build as a local improvement two new bridges over said tracks at an approximate cost of $75,000, $20,000 thereof to be paid by the railway companies in full of all liability, $30,000 by the corporation as their respective share, and $25,000, the estimated damage to lands, to be assessed against the properties fronting on the street. No provision was made in the estimates for the current year for the payment by the corporation of the amount to be paid by them:—

Held, that before the expenditure could be brought within the local improvement clauses of the Municipal Act, a special by-law must be passed fixing the amount or proportion of the cost of the work to be assumed by the city and to be assessed on the locality, and declaring the opinion of the council to be that the work was necessary, and that it would be inequitable to charge the whole cost of it upon the locality; and that the fact of there being a general by-law passed under section 612, sub-section 1 (*a*), for determining property to be benefited by a proposed local improvement was not sufficient; but, even if a by-law were unnecessary, the resolution was too indefinite, as it could not be gathered with certainty therefrom what portion of the cost was to be imposed on the property to be locally assessed.

An interim injunction was granted restraining the corporation from acting under the agreement. *Fleming* v. *City of Toronto*, 20 O. R. 547. Affirmed in appeal, 19 A. R. 318.

Quebec License Laws.]—By virtue of the first clause of a by-law passed under 55 & 56 Vict. ch. 51 (Q.), an Act consolidating the charter of the city of Sherbrooke, the appellant was taxed five cents on the dollar on the annual value of the premises in which he carried on his occupation as a dealer in spirituous liquors, and in addition thereto, under clause three of the same by-law, was taxed a special tax of two hundred dollars also for the same occupation. Sec. 55 of the Act 55 & 56 Vict. ch. 51 (Q.), enumerates in sub-sections from *a* to *j* the kinds of taxes authorized to be imposed, sub-section (*b*) authorizing the imposition of a business tax on all trades, occupations, etc., based on the annual value of the premises, and sub-section (*g*) providing for a tax on persons, among others, of the occupation of the petitioner. At the end of sub-section (*g*) is the following: "the whole, however, subject to the provisions of the Quebec License Act." The Quebec License Act (Art. 927 R. S. P. Q.) limits the powers of taxation for any municipal council of a city to $200 upon holders of licenses:—

Held, affirming the judgment of the Court below, that the power granted by 55 & 56 Vict. ch. 51 (Q.), to impose the several taxes was independent and cumulative, and as the special tax did not exceed the sum of $200, the by-law was *intra vires*, the proviso at the end of sub-section (*g*) not applying to the whole section. Taschereau and Gwynne, JJ., dissenting. *Webster* v. *City of Sherbrooke*, 24 S. C. R. 268.

Railway Companies.]—By 52 Vict. ch. 27, sec. 125 (N.B.), the agent or manager of any joint stock company or corporation established out of the limits of the Province, who has an office in the city of St. John for such company or corporation, may be assessed upon the gross income received for his principals with certain specified deductions therefrom, and to enable the assessors to rate such company or corporation the agent or manager is required, on May 1st of each year, to furnish them with a statement under oath in a form prescribed by the Act shewing such gross income for the year preceding, and the details of the deductions; in the event of neglect to furnish said statement the assessors may rate the agent or manager according to their best judgment, and there shall be no appeal from such rate. The general superintendent of the Atlantic Division of the C.P.R. has an office for the company in St. John, and was furnished by the assessors with a printed form to be filled in of the statement required by the Act; the form required him to state the gross and total income received for his company during the preceding year, as to which he stated that no such income had been received, and he erased the clause "this amount has not been reduced or offset by any losses," etc.; the other items were not filled in. This was handed to the assessors as the statement required and they treated it as neglect to furnish any statement, and rated the superintendent on a large amount as income received. The Supreme Court of New Brunswick refused to quash the assessment on *certiorari*:—

Held, reversing the decision of the Court below, Fournier and Taschereau, JJ., dissenting, that it was sufficiently shewn that the company had no income from its business in St. John liable to assessment; that the superin-

tendent was justified in departing from the prescribed form in order to shew the true state of the company's business; and that the assessors had no authority to disregard the statement furnished and arbitrarily assess the superintendent in any sum they chose without making inquiry into the business of the company as the statute authorizes:—

Held, further, that the provision that there shall be no appeal from an assessment where no statement is furnished only applies to an appeal against overvaluation under C. S. N. B. ch. 100, sec. 60, and not to an appeal against the right to assess at all:—

Held, per Gwynne, J., that sec. 125 of 52 Vict. ch. 27 (N.B.), does not apply to railway companies. *Timmerman* v. *City of St. John*, 21 S. C. R. 691.

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

Held, that after the termination of its franchise the company was not liable for these rates. *City of Toronto* v. *Toronto Street R. W. Co.*, 23 S. C. R. 198.

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

Held, affirming the judgment of the Court below, that the company was liable for the tax of $2.50 on each and every one of its horses. *Montreal Street R. W. Co.* v. *City of Montreal*, 23 S. C. R. 259.

Time for Making Assessment — "*May adopt.*"]—By section 52 of the Assessment Act, R. S. O. ch. 193, where the assessment in cities, towns, etc., is made by virtue of a by-law passed under that section, in the latter part of the year, such assessment *may* be adopted by the council of the following year:—

Held, that "may," as used here, is permissive only, and that the council of the following year are given the option of having a new assessment.

Overwhelmingly strong reasons of convenience in favour of having one assessment instead of two might justify the Court in giving to "may" the force of "must." *Re Dwyer and Town of Port Arthur*, 21 O. R. 175.

Time for Making Assessment — *Special Provisions for Taking Assessment in Autumn.*]—The "special provisions" in reference to municipal assessment contained in sec. 52 of the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.), do not permit such assessment to be levied for the current year, but the assessment so taken at the end of the year may be adopted by the council of the following year as the assessment on which the rate of taxation for such following year may be levied. *Dyer* v. *Town of Trenton*, 24 O. R. 303.

Windsor Water-works.]—The defendants were the owners of vacant land in the city of Windsor, abutting on streets in which mains and hydrants of the plaintiffs had been placed. The defendants had a water-works system of their own, and did not use that of the plaintiffs, though they could have done so had they wished. The commissioners imposed a water rate "for water supplied, or ready to be supplied," upon all lands in the city based upon their assessed value irrespective of the user or nonuser of water:—

Held, that this rate was, under 37 Vict. ch. 79, secs. 11, 12 (O.), validly imposed. *City of Windsor* v. *Canada Southern R. W. Co.*, 20 A. R. 388.

III. Collection of Rates.

Absence of By-law — *Demand of Payment.*]—The mere delivery to a ratepayer, in places other than cities and towns, of the statement of taxes due, is not sufficient evidence of the demand required to be made for the payment thereof, unless a by-law has been passed under the Consolidated Assessment Act, 1892, sec. 123, subsec. 2, empowering the collector to take that course. *McDermott* v. *Trachsel*, 26 O. R. 218.

Goods of Stranger.]—Premises in a city municipality were occupied, as tenants, by a firm of auctioneers, who, however, were not assessed in respect to them. Goods of the plaintiff left with the auctioneers to be sold by auction were distrained by the defendants for the taxes payable upon the premises for the current year:—

Held, that the distress was valid under section 124 of the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.). *Norris* v. *City of Toronto*, 24 O. R. 297.

Goods Subject to Distress — *Occupancy.*]—Section 124 of the Consolidated Assessment Act, 55 Vict. ch. 48 (O.), does not authorize a distress for non-payment of taxes of the goods of strangers on the premises, unless such goods are in the possession of the person who ought to pay the taxes or of a legal occupant of the property. *Christie* v. *City of Toronto*, 25 O. R. 425. Affirmed by the Divisional Court, 25 O. R. 606.

IV. Collectors.

Delivery of Roll to Collector.]—By section 119 of the Ontario Assessment Act, 55 Vict. ch. 48, provision is made for the preparation every year by the clerk of each municipality of a "collector's roll" containing a statement of all assessments to be made for municipal purposes in the year, and section 120 provides for a similar roll with respect to taxes payable to the treasurer of the Province. At the end of section 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first day of October." . . . :—

Held, affirming the decision of the Court of Appeal, 21 A. R. 379, that the provision as to delivery of the roll to the collector was imperative, and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes :—

Held, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as to that for provincial taxes. *Town of Trenton* v. *Dyer*, 24 S. C. R. 474.

Official Bond—*Non-disclosure.*]—In an action by a municipal corporation against the sureties to the bonds of a defaulting collector of taxes, for the due performance of his duties for 1886 and 1887, it appeared that there had been great laxity on the plaintiffs' part, but that shortly before the collector absconded, in 1888, a majority of the members of the corporation had confidence in his honesty; while the defendants had not sought information from the plaintiffs as to the way he had performed his duties in former years :—

Held, that the non-disclosure by the plaintiffs to the defendants of a motion having been made in council in 1885 that if the roll for 1884 was not returned by the next meeting, an enquiry before the County Court Judge would be asked for; or of a resolution in August, 1885, instructing the treasurer to take proceedings against the collector and his sureties for the balance due on the 1884 roll unless fully settled before September 10th, next, which it was; or of another like resolution in 1886, in reference to the taxes of 1885, which were afterwards, in 1888, paid over in full by him, and of the non-return by him of the 1885 roll until 1888, were not such non-disclosures as amounted to constructive fraud, on the plaintiffs' part, sufficient to relieve the defendants from liability on their bonds.

Township of Adjala v. *McElroy*, 9 O. R. 580, specially considered.

Decision of MacMahon, J., 20 O. R. 42, affirmed. *Town of Meaford* v. *Lang*, 20 O. R. 541.

Venue.]—A tax collector sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R. S. O. ch. 73, and under section 15 of that Act, and section 4 of R. S. O. ch. 55, a County Court action against him for replevin of goods seized by him and for damages for malicious seizure, must be brought in the county where the seizure and alleged trespass took place.

The Consolidated Rules as to venue do not override these statutory provisions.

Legacy v. *Pitcher*, 10 O. R. 620, distinguished. *Arscott* v. *Lilley*, 14 A. R. 283, applied.

Judgment of the County Court of Hastings reversed. *Howard* v. *Herrington*, 20 A. R. 175.

V. Exemptions.

Canadian Pacific R. W. Co.]—By the charter of the Canadian Pacific R. W. Co. the lands of the company in the North-West Territories, until they are either sold or occupied, are exempt from Dominion, provincial or municipal taxation for twenty years after the grant thereof from the Crown :—

Held, affirming the judgment of the Court below, that lands which the company have agreed to sell, and as to which the conditions of sale have not been fulfilled, are not lands "sold" under this charter :—

Held, further, that the exemption attaches to lands allotted to the company before the patent is granted by the Crown. Lands which were in the North West Territories when allotted to the company did not lose their exemption on becoming, afterwards, a part of the Province of Manitoba. *Municipality of Cornwallis* v. *Canadian Pacific R. W. Co.*, 19 S. C. R. 702.

Crown.]—The Crown is not liable for municipal taxes assessed upon real property belonging to the Dominion of Canada. *City of Quebec* v. *The Queen*, 2 Ex. C. R. 450.

Crown—*Beneficial Interest in Land.*]—Property of a bank became vested in the Dominion Government, and a piece of land included therein was sold and a mortgage taken for the purchase money, the mortgagor covenanting to pay the taxes. Not having done so, the land was sold for non-payment. In an action to set aside the tax sale :—

Held, affirming the judgment of the Court of Appeal, 17 A. R. 421, *sub. nom. Regina* v. *County of Wellington*, that the Crown having a beneficial interest in the land it was exempt from taxation as Crown lands. R. S. O. ch. 193, sec. 7, sub-sec. 1. *Quirt* v. *The Queen*, 19 S. C. R. 310.

Extension of Limits.]—The lands owned by the defendants were originally part of the township of Sandwich West, and by a by-law of that township, confirmed by special legislation, were exempted from taxation for ten years from the 1st of January, 1883. In 1888 the limits of the (then) town of Windsor were under the provisions of R. S. O. ch. 184, sec. 22, extended so as to embrace the lands in question :—

Held, that assuming that the water rate in question was a species of taxation, the effect of R. S. O. ch. 184, sec. 54, was to put an end to the exemption.

Municipality of Cornwallis v. *Canadian Pacific R. W. Co.*, 19 S. C. R 702, distinguished.

Judgment of County Court of Essex affirmed. *City of Windsor* v. *Canada Southern R. W. Co.*, 20 A. R. 388.

Nova Scotia Railway Act.]—By R. S. N. S., 5 ser., ch. 53, sec. 99, sub-sec. 30, the road-bed, etc., of all railway companies in the Province is exempt from local taxation. By section 1 the first part of the Act, from sections 5 to 33 inclusive, applies to every railway constructed and in operation, or thereafter to be constructed, under the authority of any Act of the Legislature, and, by section 4, part two applies to all railways constructed under authority of any special Act, and to all companies incorporated for their construction and working. By section 5, sub-section 15, the expression "the company" in the Act means the company or party authorized by the special Act to construct the railway :—

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that part one of this Act applies to all railways constructed under provincial statutes, and is not exclusive of those mentioned in part two; that

a company incorporated by an Act of the Legislature as a mining company with power "to construct and make such railroads and branch tracks as might be necessary for the transportation of coal from the mines to the place of shipment, and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another Act [43 Vict. ch. 45 (N.S.)], to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with, and subject to the provisions of part second of ch. 53, R. S. N. S. 5 ser., entitled 'Of railways,'" is a railway company within the meaning of the Act; and that the reference in 49 Vict. ch. 145, sec. 1 (N.S.), to part two does not prevent said railway from coming under the operation of the first part of the Act. *International Coal Co.* v. *County of Cape Breton*, 22 S. C. R. 305.

Right to Repeal—*By-law Exempting Manufactory.*]—A by-law, on the faith of which land had been purchased and a manufactory erected, was passed by a municipal council, under section 366 of the Municipal Act, R. S. O. ch 184, by which the property was exempted from all taxation, etc., for a period of ten years from the date at which the by-law came into effect.

The council subsequently, within the period of exemption, on the alleged ground that it was "expedient and necessary to promote the interests of the ratepayers," passed another by-law repealing the exempting by-law. The Court, being of opinion, on the facts as set out in the case, that the repealing by-law was passed in bad faith, to enable the council to collect taxes upon a property which was exempt under the section, and, in the absence of any forfeiture by the applicant of his rights, quashed the by-law as not within the powers of the council.

In this application a ground relied on by the council was that the applicant had erected more than two dwelling-houses on the exempted lands, whereby, under the terms of the by-law, the exemption ceased. This was done through oversight, and on the applicant's attention being called thereto, and on his undertaking to pay taxes thereon, a by-law was passed agreeing thereto and validating the exempting by-law; but, through inadvertence, was not sealed. The dwellings were subsequently assessed, and the taxes paid on them:—

Held, that the corporation by their acts and conduct were precluded from now setting this up as a breach of the by-law.

Semble, the words "manufacturing establishment" in the exempting by-law included land and everything necessary for the business.

Semble, also, the period of exemption was within the statute. *Alexander* v. *Village of Huntsville*, 24 O. R. 665.

Water Supply—*Discrimination.*]—Under the authority given to municipal corporations to fix the rate or rent to be paid by each owner or occupant of a building, etc., supplied by the corporation with water, the rates imposed must be uniform. Patterson, J., dissenting.—A by-law of the city of Toronto excepting Government institutions from the benefit of a discount on rates paid within a certain time is invalid as regards such exception. Patterson, J. dissenting. Decisions of the Courts below, 20 O. R. 19, and 18 A. R. 622, reversed. *Attorney-General of Canada* v. *City of Toronto*, 23 S. C. R. 514.

VI. Sale of Land for Taxes.

Irregularities—*Validating Acts.*]—Lands in Manitoba assessed for the years 1880-81, were sold in 1882 for unpaid taxes. The statute authorizing the assessment required the municipal council, after the final revision of the assessment roll in each year, to pass a by-law for levying a rate on all real and personal property mentioned in said roll, but no such by-law was passed in either of the years 1880 or 1881. The lands so assessed and sold were formerly Dominion lands which were sold and paid for in 1879, but the patent did not issue until April, 1881. The patentee sold the lands, and after the tax sale a mortgage thereon was given to R. who sought to have the tax sale set aside as invalid. 45 Vict. ch. 16, sec. 7 (Man.), provides that every deed made pursuant to a sale for taxes shall be valid, notwithstanding any informality in or preceding the sale, unless questioned within one year from its execution, and 51 Vict. ch. 27, sec. 58 (Man.), provides that "all assessments heretofore made and rates struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby":—

Held, affirming the judgment of the Court below, Patterson J., dissenting, that the assessments for the years 1880-81 were illegal for want of a by-law and the sale of taxes thereunder was void. If the lands could be taxed the defect in the assessments was not cured by 45 Viet. ch. 16, sec. 7, or by 51 Vict. ch. 27, sec. 58, which would cure irregularities but could not make good a deed that was a nullity as was the deed here:—

Held, per Gwynne, J., Patterson, J., contra, that the patents for the lands not having issued until April, 1881, the said taxes accrued due while the lands vested in the Crown, and so were exempt from taxation:—

Held, per Strong, J., following *McKay* v. *Crysler*, 3 S. C. R. 436, and *O'Brien* v. *Cogswell*, 17 S. C. R. 420, that the operation of 45 Vict. ch. 16, sec. 7, is restricted to curing the defects in the proceedings for the sale itself as distinguished from the proceedings in assessing and levying the taxes which led to the sale. *Whelan* v. *Ryan*, 20 S. C. R. 65.

Limitation of Time.]—At the time of the conveyances to the plaintiff's predecessor in title and to himself, the defendant was in adverse occupation of lands sold for arrears of taxes, having a *bonâ fide* claim or right thereto, derived mediately under the sale for taxes:—

Held, that, although the sales may have been invalid, section 191 of R. S. O. ch. 193 applied to them, and the conveyances, as regards the lands sold for taxes, were void; and want of knowledge of the adverse occupation, on the part of the plaintiff and his predecessor, could not alter their effect. *Hyatt* v. *Mills*, 20 O. R. 351. *See* the next case.

Right to Attack.]—A parcel of land was described in the patent and in the books of the county treasurer as "the north part of lot number thirteen . . . containing sixty acres of land, be the same more or less." The parcel contained in fact eighty-two acres. In 1868 there were sold for taxes fifty acres described thus:—"Commencing at the north-east angle of said north part at the limit between said north part of lot number thirteen and lot number fourteen, thence along said limit taking a proportion of the width corresponding in quantity with the proportion of the said north part of lot number thirteen in regard to its length and breadth sufficient to make fifty acres of land." Then in 1871 there was sold for taxes a parcel described thus: "The whole of said southerly part of the north half of said lot number thirteen . . . containing ten acres, and being part not sold for taxes in 1868":—

Held, that the sale of 1871 could not be limited to ten acres to be located by the Court "in such manner as is best for the owner," but was, the taxes being properly chargeable against the whole of the unsold portion, a sale of the whole of that unsold portion and could not, in consequence of the provisions of R. S. O. ch. 193, sec. 191, be attacked by the plaintiff, a purchaser from the owner after the time of the tax sale who then had a mere right of entry.

Application and effect of this section considered.

Judgment of the Queen's Bench Division, 20 O. R. 351, reversed. *Hyatt* v. *Mills*, 19 A. R. 329.

Setting Aside.]—The provisions of section 121 of the Consolidated Assessment Act as to entering on the roll, by the clerk of the municipality, opposite to each lot or parcel, all the rates or charges with which the same is chargeable in separate columns for each rate is imperative, and non-compliance therewith renders such roll a nullity. And where the amount of such rates or taxes for one year was entered on the roll in one sum, and the roll was so transmitted to the treasurer of the county, a tax sale founded thereon was held invalid.

The provision of section 141 of the said Act, which requires a true copy of the lists returned by the assessors to the clerk to be furnished to the county treasurer certified to by the clerk under the seal of the corporation, and that of section 142 which requires an assessor's certificate to each list, are also imperative.

The principle of the decision in *Town of Trenton* v. *Dyer*, 21 A. R. 379, 24 S. C. R. 474, followed. *Love* v. *Webster*, 26 O. R. 453.

VII. Miscellaneous Cases.

Constitutional Law—*Penalty for not Paying Taxes.*]—The Municipal Act of Manitoba provides that persons paying taxes before December 1st in cities and December 31st in rural municipalities shall be allowed 10 per cent. discount; that from that date until March 1st the taxes shall be payable at par; and after March 1st 10 per cent. on the original amount of the tax shall be added:—

Held, reversing the judgment of the Court below, Gwynne, J., dissenting, that the 10 per cent. added on March 1st was only an additional rate of tax imposed as a penalty for non-payment, which the local Legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of section 91 of the B. N. A. Act. *Ross* v. *Torrance*, 2 Legal News 186, overruled. *Lynch* v. *Canada N. W. Land Co.*, *South Dufferin* v. *Morden*, *Gibbins* v. *Barber*, 19 S. C. R. 204.

Covenant to Pay Taxes—*Interest in Land.*]—A lessee covenanted, pursuant to the Short Form of Leases Act, to pay all taxes "to be charged upon the said demised premises or upon the said lessor on account thereof." The premises consisted of a building with a lane to the rear, described as being "north of the premises hereby demised," over which the lease provided that the lessee might at any time erect a building or extension provided the same was always nine feet above the ground, and in accordance with which the lane was built over. The lease also provided that if the lessors elected not to renew, they were to pay a fair valuation for the buildings which should at that time be erected "on the lands and premises hereby demised and over the said lane":—

Held, that the words "demised premises" in the covenant referred only to the building lot itself, and not to the interest in the lane which passed by the lease.

Semble, where a tenant agrees to pay taxes on the land demised to him, the omission of the assessor to enter his name on the assessment roll, or that of the landlord to resort to the Court of Revision to have the omission rectified, would not relieve him from his obligation:—

Held, also, that the interest of the defendant in the lane was clearly an interest in land.

And *semble*, even if it were not separately assessable, this would not excuse the defendant from repaying the lessor what he had to pay for taxes in respect to it. *Janes* v. *O'Keefe*, 26 O. R. 489. *See* this case in appeal, 23 A. R. 129.

Remainderman.]—As between a tenant for life in possession and a remainderman of property, part of which is productive and part unproductive, the life tenant will not be permitted to receive rents from part of the property while he allows taxes to accumulate on the vacant portion.

Order made for a receiver of the estate of the tenant for life to pay the arrears of taxes out of the rents. *Re Denison*, *Waldie* v. *Denison*, 24 O. R. 197.

Vendor and Purchaser—*Local Improvement Rates.*]—In a contract for sale and exchange of certain lands free from incumbrances, it was provided that "unearned fire insurance premium, interest, taxes and rental" should be "proportioned and allowed to date of completion of sale":—

Held, notwithstanding, that special frontage rates imposed for local improvements and construction of sewers by by-law passed prior to the contract, the period for payment of which had not expired, were incumbrances to be discharged by the vendors respectively:—

Held, also, that the vendors were likewise bound to discharge a special frontage rate imposed by a by-law passed subsequently both to

the date of the contract and the date fixed for the completion of the sale, inasmuch as the work was actually done and the expenditure actually made before the contract, the council having first done the work and then passed the by-law to pay for it under 53 Vict. ch. 50, sec. 38 (O.).

The substantial charge as a whole came into existence upon the finishing of the work.

Cumberland v. *Kearns*, 18 O. R. 151; 17 A. R. 281, commented on and distinguished. *Re Graydon and Hammill*, 20 O. R. 199.

Vendor and Purchaser *Local Improvement Rates.*] A contract for the sale of land provided for the payment of the purchase money in quarterly instalments; when half was paid the vendor was to convey and give the usual statutory covenants; the purchaser was to pay taxes from the date of the contract.

In an action to recover instalments under the contract:—

Held, that local improvement rates imposed by municipal by-laws after, the work having been done before, the date of the contract, were incumbrances to be discharged by the vendor; but rates imposed and work done after the contract were not so.

Re Graydon and Hammill, 20 O. R. 199, followed.

Ecclésiastiques de St. Sulpice de Montreal v. *City of Montreal*, 16 S. C. R. 400, distinguished:—

Held, also, that the covenant for payment of the instalments and the covenant against incumbrances were independent; and the vendor was entitled to judgment for the instalments; but the purchaser was entitled to shew the existence of incumbrances as an equitable ground of relief, and, the time for completion of the contract not having arrived, to pay into Court so much of his purchase money as might be necessary to protect him against the incumbrances.

McDonald v. *Murray*, 11 A. R. 101, and *Tisdale* v. *Dallas*, 11 C. P. 238, distinguished. *Armstrong* v. *Auger*, 21 O. R. 98.

Vendor and Purchaser—*Taxes Due up to Time of Sale.*]—A mortgagee, under two mortgages, sold the land under the power of sale in the second, and by his conditions of sale stipulated, amongst other things, that he was selling merely all his estate or interest under the second, subject to the first mortgage and interest; that if a second mortgage was taken for part of the purchase money, it should be a first lien after the first mortgage and interest; that if no objection was made within a certain time the vendor's title was to be held good and considered accepted by the purchaser, and the vendor entitled to the consideration; and further, that the said first mortgage could be paid off:—

Held, that taxes due up to the sale should be paid by the vendor. *Re Wilson and Houston*, 20 O. R. 532.

ASSIGNMENT OF MORTGAGE.

See MORTGAGE, XVIII.

ATTACHMENT OF DEBTS.

I. WHAT MAY BE ATTACHED.

Amount Actually Due.] — A garnishee order binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order *nisi* is obtained and served.

Where a final order for payment over has been issued and it afterwards appears that the debt was assigned before the attaching order was moved for, the final order should be rescinded. *Beaty* v. *Hackett*, 14 P. R. 395.

Damages.]—The judgment of the Judge who tries the cause, with a jury or without one, is now an effective judgment from the day on which it is pronounced; and where damages are awarded thereby, they are attachable as a debt without the formal entry of judgment. *Holthy* v. *Hodgson*, 24 Q. B. D. 103, followed. *Davidson* v. *Taylor*, 14 P. R. 78.

Foreign Corporation — *Debt Due to Two Persons Jointly.*]—A foreign corporation incorporated under the laws of one of the United States, and not shewn to carry on one of the principal parts of its business in this Province, is not "within Ontario" within the meaning of Rule 935, and is not subject to garnishment process under that Rule.

Canada Cotton Co. v. *Parmalee*, 13 P. R. 308, followed.

County of Wentworth v. *Smith*, 15 P. R. 372, distinguished.

A debt due to a judgment debtor jointly with another person cannot be attached.

Macdonald v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535, followed. *Parker* v. *Odette*, 16 P. R. 69.

Foreign Corporation — *Doing Business in Ontario.*] — Canadian banking corporations authorized by Parliament to do business in Ontario, although having their head offices in another Province, are to be deemed resident "within Ontario" within the meaning of Rule 935, and moneys deposited with them at branches within Ontario may be attached in their hands as debts due to the depositors. *County of Wentworth* v. *Smith*, 15 P. R. 372.

Husband and Wife—*Purchase of Land by Wife—Action to Set Aside Fraudulent Transfer.*] —D. having entered into an agreement to purchase land had the conveyance made to his wife, who paid the purchase money and obtained a certificate of ownership from the registrar of deeds, D. having transferred to her

all his interest by deed. She sold the land to M. and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not, in fact, paid. M.'s solicitors were also solicitors of certain judgment creditors of D., and judgment having been obtained on their debts the purchase money of said transfer was attached in the hands of M. and an issue was directed as between the judgment creditors and the wife of D. to determine the title to the money under the garnishee order, and the money was, by consent, paid into Court. The judgment creditors claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the statute of Elizabeth, and that she therefore held the land and was entitled to the purchase money on the resale as trustee for D. :—

Held, reversing the decision of the Supreme Court of the North-West Territories, that under the evidence given in the case, the original transfer to the wife of D. was *bonâ fide* ; that she paid for the land with her own money and bought it for her own use; and that if it was not *bonâ fide* the Supreme Court of the Territories, though exercising the functions and possessing the powers formerly exercised and possessed by Courts of Equity, could not, in these statutory proceedings, grant the relief that could have been obtained in a suit in equity :—

Held, further, also reversing the judgment appealed from, that even if the proceedings were not *bonâ fide* the garnishee proceedings were not properly taken ; that the purchase money was to have been paid by M. on delivery of deed of transfer, and the vendor never undertook to treat him as a debtor ; that if there was a debt it was not one which D., the judgment debtor as against whom the garnishee proceedings were taken, could maintain an action in his own right and for his own exclusive benefit ; that D.'s wife was not precluded, by having assented to the issue and to the money being paid into Court, from claiming that it could not be attached in these proceedings; and that the only relief possible was by an independent suit. *Donohoe* v. *Hull*, 24 S. C. R. 683.

Insurance Loss.]—A claim under an insurance policy for a loss, the amount of which has been settled and adjusted, is not a debt which can be attached under sec. 178 of R. S. O. ch. 51 ; and Con. Rule 935 does not apply to Division Courts.

Semble, even if it did, that such a claim could not be attached so long as the insurance company's right to have the money applied in rebuilding was open. *Simpson* v. *Chase*, 14 P. R. 280.

Legacy.]—An order may be made attaching the amount, if any, coming to a judgment debtor as residuary legatee under a will, although it is undetermined whether anything, and, if anything, how much, is due to him.

Upon an enquiry as to whether anything is due to a judgment debtor as residuary legatee, where he also has the character of executor, the legatees and creditors ought to be before the Court ; and the way to bring them before the Court is by administration proceedings.

Quære, whether the assignee of the judgment would be entitled to administration.

The assignee of a judgment appointed receiver by way of equitable execution to receive whatever interest the judgment debtor might have as residuary legatee. *McLean* v. *Bruce*, 14 P. R. 190.

Promissory Note.]—The enlarged provisions of Rule 935 do not extend the right of attachment of debts to the case of moneys payable on negotiable securities ; the claim of a judgment debtor to be paid the amount of a promissory note is not dependent on the doctrines of equitable execution.

Jackson v. *Cassidy*, 2 O. R. 521, followed.

What is to be garnished is not the note itself, but the money payable thereunder ; therefore the maker of the note, and not the person holding it for the judgment debtor, should be made garnishee ; and there is no warrant in the practice for ordering the holder to hand the note over to the judgment creditor. *Exley* v. *Dey*, 15 P. R. 353. *See* the next case.

Promissory Note.]—After the discharge of the attaching order the plaintiff, two days before the maturity of the promissory note in question, obtained a new order attaching the same debt, making the holder of the note and the makers garnishees.

Upon a motion for payment over by the garnishees or for alternative relief, an order was made appointing the plaintiff receiver of all moneys due or accruing due upon the note, to apply on the judgment, and restraining the garnishees from paying over the moneys otherwise, and from parting with the note. *Hyam* v. *Freeman*, 35 Sol. J. 87, followed. *Exley* v. *Dey* (No. 2), 15 P. R. 405.

Rents.]—The plaintiff, having an unsatisfied judgment against the defendant in the High Court, obtained from the Master in Chambers, *ex parte*, two orders, under Rules 935 and 940, attaching as debts due to the defendant certain rents owing by his tenants, the garnishees, and summoning them to appear before a County Court Judge to shew cause why such rents should not be paid over to the plaintiff. Upon the application of a company, mortgagees of the demised premises, who had served notice upon the garnishees to pay the rent to them, the Master made an order rescinding the attaching orders :—

Held, that if the garnishees, upon the return of the summons, neglected to suggest to the Court the claim of the company, as provided by Rule 944, they would not be protected by an order to pay to the plaintiff.

The Leader, L. R. 2 Ad. & Ec. 314, followed.

And, therefore, the company was not a "party affected" by the *ex parte* orders, within the meaning of Rule 536.

No fraud or imposition was practised upon the Court in not informing the Master of the claim which might be set up by the garnishees or the company ; it was a matter for hearing and adjudication before the County Court Judge. *Parker* v. *McIlwain*, 16 P. R. 555. Reversed in appeal, 17 P. R. 84.

Salary.]—The salary of a judgment debtor, not actually due or accruing due at the time of

service of the attaching order, but which may thereafter become due, cannot be attached to answer the judgment debt; and the enlarged provisions of Rule 935 have made no difference in this respect.

The salary of a police magistrate appointed by the Crown, but paid by a municipality, cannot, on grounds of public policy, be attached; Hagarty, C.J.O., expressing no opinion on this point. *Central Bank* v. *Ellis*, 20 A. R. 364.

Sale of Lands —*Interest of Tenant by the Curtesy—Action to Set Aside Fraudulent Transfer.*]—A judgment debtor, having a supposed interest as tenant by the curtesy in certain land, which was not and never had been claimed by him, joined in a conveyance thereof by his daughter to a purchaser, in which it was recited that he was entitled to that estate. A judgment creditor of his thereupon attempted to garnish the purchase money in the hands of the solicitor who acted for the daughter, the latter claiming the whole of the purchase money, while the judgment debtor now expressly disclaimed any interest therein, he having joined in the conveyance at the instance of the solicitor for the purchaser, who was also the solicitor for the judgment creditor:—

Held, that the money in the hands of the daughter's solicitor could not be garnished by the judgment creditor

Per Armour, C.J.—Assuming that the judgment debtor was tenant by the curtesy of the land sold, upon its sale he became entitled only to a life use of the purchase money, and this use could not be reached by garnishee process in the manner attempted.

Per Street, J.—There was no debt due from the solicitor to the judgment debtor, nor could it be said that the moneys in the hands of the former were subject to any trust in favour of the latter, nor that any claim on his part affecting them existed. If he had an interest in the lands, he, in effect, released it to his daughter without any consideration, and the money was hers unless the release to her should be set aside as voluntary and a fraud upon his creditors. *Palmer* v. *Lovett*, 14 P. R. 415.

II. Who May Attach.

Judgment for Costs only—*Assignee of Judgment.*]—Under Rule 935 an order to attach debts may be founded on a judgment for costs only

Trontman v. *Fisken*, 13 P. R. 153, distinguished.

Under the same Rule an assignee of a judgment, though not a party to the action, may apply to enforce the judgment by attachment. *McLean* v. *Bruce*, 14 P. R. 190.

III. Practice.

Appeal from County Court.]—*See Henderson* v. *Rogers*, 15 P. R. 241; and *Teskey* v. *Neil*, 15 P. R. 244, *post*, County Court.

Final Order for Payment by Garnishee—*Notice to Judgment Debtor.*]—Where a judgment creditor obtains an order attaching debts due to the judgment debtor, notice of the application for a final order for payment over by the garnishee should be served upon the judgment debtor.

Ferguson v. *Carman*, 26 U. C. R. 26, specially referred to. *Beaty* v. *Hackett*, 14 P. R. 395.

Judgment Debt — *Execution — Solicitor's Lien.*]—A sheriff's return to a writ of *fi. fa.* goods set forth that he was notified that the amount of the judgment to be executed had been attached by a judgment creditor of the execution creditor, and that the execution debtor (the garnishee) had thereupon satisfied the claim of the garnishor. In fact there was only an order to attach and a summons to pay over, but no order absolute:—

Held, that the return was insufficient in substance, because it shewed that the writ remained unexecuted without legal excuse; a garnishee order absolute would have operated as a stay of execution, but not so the attaching order and summons: the duty of the garnishee was to pay the sheriff, advising him at the same time of the existence of the attaching order, and this would have been equivalent to a payment into Court.

It appeared that the solicitor for the execution creditor had a lien for his costs upon the judgment obtained by his client, and also an assignment of the judgment, whereof the garnishor and garnishee both had notice:—

Held, that the garnishor and garnishee should not have settled the amount garnished between themselves; and that the solicitor should have intervened and had the attaching order set aside by disclosing the assignment to himself of the debt attached. *Grenge* v. *Freeman*, 14 P. R. 330.

Security for Costs.]—The judgment creditor obtained an attaching order, which was set aside by the local Judge who granted it; the judgment creditor then appealed to a Judge in Chambers unsuccessfully, and had given notice of a further appeal to a Divisional Court, when his proceedings were stayed by an order of the Master in Chambers requiring him to give security for costs, on the ground that he was insolvent and was proceeding for the benefit of another.

Held, that the order for security could not be sustained; the judgment creditor was not proceeding either by action or petition; and there was no authority for ordering security.

Re Rees, 10 P. R. 425, overruled. *Palmer* v. *Lovett*, 14 P. R. 415.

Stay of Execution—*Security Given on Appeal—No Right to take Attachment Proceedings.*] —*Vigeon* v. *Northcote*, 15 P. R. 171, *post*, Execution, V.

See, also, Execution, II.

ATTORNEY.

See Solicitor.

ATTORNEY-GENERAL.

Damages Against Relators—*Pleading.*]—In an action brought in the name of the Attorney-General upon the relation of certain persons to restrain the defendants from collecting tolls or keeping their toll-gates closed upon their roads, the defendants alleged, by way of defence, certain wrongful acts of the relators, and by way of counterclaim asked damages against them:—

Held, by Winchester, Official Referee, that the relators were not in any sense plaintiffs; and the allegations against them must be struck out.

An appeal to Galt, C. J., was dismissed. *Attorney-General* v. *Vaughan Road Co.*, 14 P. R. 516. *See* this case, 21 O. R. 507, 19 A. R. 234, as to the right of the Attorney-General to maintain such an action.

Information—*Code of Civil Procedure, Art. 997—Power of Attorney-General to Discontinue.*]—Article 997 of the Civil Procedure Code relates on its true construction, not to every illegal act done by an association therein mentioned, but only to such acts as are professedly or manifestly done in the assertion of some special power, franchise, or privilege not conferred upon it by law.

Where an information under that Article alleged that the respondent company had closed a public lane under the pretext that they had acquired private interests therein which entitled them so to do, *held* that this did not amount to an allegation that they closed it in the exercise of any power, franchise, or privilege within the meaning of the Article:—

Held, also, that the Court has jurisdiction under Article 998 to prohibit the issue of a writ of information under Article 997; but that after issue the Attorney-General is *dominus litis*, and can discontinue proceedings or control their conduct and settlement independently of any private relator. *Casgrain* v. *Atlantic and North-West R. W. Co.*, [1895] A. C. 282.

Injunction—*Breach of Charter.*]—The defendants were incorporated by letters patent under the Street Railway Act, R. S. O. ch. 171, which authorized them to construct and operate (on all days except Sundays) a street railway:—

Held, Maclennan, J. A., dissenting, that an action would not lie by the Crown to restrain the defendants from operating the road on Sunday, the restriction against their doing so being at most an implied one, and no substantial injury to the public or any interference with proprietary rights being shewn. Judgment of the Common Pleas Division, 19 O. R. 624, affirmed. *Attorney-General* v. *Niagara Falls, Wesley Park and Clifton R. W. Co.*, 18 A. R. 453.

Joint Stock Company—*Dominion Charter—Forfeiture.*]—Proceedings to set aside the charter of a company incorporated by Act of the Dominion Parliament may be taken by the Attorney-General of Canada. *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada*, 21 S. C. R. 72.

AUCTION AND AUCTIONEER.

Assignee of Insolvent.—*Selling Estate of Insolvent by Auction.*]—A by-law of a county municipality passed under sub-section 2 of section 495 of the Municipal Act, R. S. O. ch. 184, enacted that it should not be lawful for any person or persons to act as auctioneers, or to sell or put up for sale any goods, etc., "by public auction," unless duly licensed:—

Held, that the agent of an assignee of an insolvent estate, selling without a license the stock-in-trade of an insolvent who had carried on business in the county, was rightly convicted of a breach of the by-law, although it was the only occasion he had so acted in the municipality. *Regina* v. *Rawson*, 22 O. R. 467.

Lease of Premises as Dwelling and "Gents' Furnishing Store"—*Right to have Auction Sales.*]—By a lease under seal the defendant rented from the plaintiff certain premises for three months. The lease contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling and "gents' furnishing store":—

Held, that the carrying on by the lessee of auction sales of his stock, on the premises, was a breach of the covenant restrainable by injunction. *Cockburn* v. *Quinn*, 20 O. R. 519.

Municipal Corporation—*Right to Issue License.*]—Section 495, sub-section 2 of the Municipal Act, R. S. O. ch. 184, which empowers any city, etc., to pass by-laws for the "licensing, regulating, and governing of auctioneers," etc., is only for the purpose of raising a revenue and does not confer any right of prohibition so long as the applicant is willing to pay the sum fixed for the license. Where, therefore, a city refused to license the plaintiff as an auctioneer on the ground that he was a person of a notoriously bad character and ill-repute, a mandamus was granted, compelling the issue of the license to him. *Merritt* v. *City of Toronto*, 25 O. R. 256. Affirmed in appeal, 22 A. R. 205. *See* now 57 Vict. ch. 50, sec. 8 (O.).

AVERAGE.

See INSURANCE, VI.

AWARD.

See ARBITRATION AND AWARD, III.

BAIL.

See CRIMINAL LAW, III.

BAILIFF.

See DISTRESS.

BAILMENT.

Crown.]—Liability of Crown as bailee for goods stolen from customs warehouse. *Corse* v. *The Queen*, 3 Ex. C. R. 13, *post* 294.

Delivery of Seed on Contract to Plant—*Damages to Land from Impurity of Seed.*]—Where seed is delivered by one person to another without any warranty, honestly believing it to be clean, to be grown on the land of the latter, the produce thereof to be returned and paid for at a fixed price per bushel, the transaction is a bailment and not a sale; and damages arising from other innocuous seed having been mixed therewith, and on harvesting having become scattered on the ground and coming up the following year on the land, are too remote, and not within the rule laid down in *Hadley* v. *Baxendale*, 9 Exch. 341, and *Cory* v. *Thames Ironworks Co.*, L. R. 3 Q. B. 181.

McMullen v. *Free*, 13 O. R. 57, and *Smith* v. *Green*, 1 C. P. D. 92, distinguished.

The plaintiff, having received seed from the defendant to be grown under the circumstances and conditions above mentioned, became aware while it was growing that vetches were coming up with it, but did not inform the defendant of the fact, and permitted them to grow, and delivered the produce mixed to the defendant, and was paid for it:—

Held, that he could not recover damages for an injury which his own conduct was responsible for.

McCollum v. *Davis*, 8 U. C. R. 150, specially referred to. *Stewart* v. *Scuthorp*, 25 O. R. 544.

Jus Tertii—*Eviction of Bailee by Title Paramount—Liability of Bailee to Bailor.*]—Where a bailee accepts a bailment and undertakes to redeliver to his bailor, but is evicted by title paramount, he is not, unless there is a special contract or he is in some way to blame for the loss, responsible to the bailor for injury suffered by the latter. *Biddle* v. *Bond*, 6 B. & S. 225, followed. Judgment of the Court of Appeal for Ontario affirmed. *Ross* v. *Edwards*, 11 R. (Dec.) 9.

Storage of Wheat—"*At Owner's Risk*"—*Loss by Fire.*]—A quantity of wheat was delivered by the plaintiff to the defendant, a miller, under a receipt stating that the same was received in store "at owner's risk," and that the plaintiff was entitled to receive the current market price therefor when he called for his money. The wheat to the plaintiff's knowledge was mixed with wheat of the same grade and ground into flour. The mill with all its contents was subsequently destroyed by fire, but there had always been in store a sufficient quantity of wheat to answer plaintiff's receipt:—

Held, that the receipt and the facts in connection therewith constituted a bailment of the wheat and not a sale.

South Australian Ins. Co. v. *Randall*, L. R. 3 P. C. 101, distinguished. *Clark* v. *McClellan*, 23 O. R. 465.

Warehouseman—*Collapse of Warehouse.*]—A building erected for a billiard table manufactory was converted into a warehouse and used as such for about nine months, when the rear portion of it collapsed through the breaking of a beam supporting the ground floor, occasioned by dry rot in one of the beams, and a quantity of goods stored therein was damaged. No negligence was shewn in the construction of the building or the selection of the material used therein, or in not discovering the existence of the dry rot, and except therefor the building would have been capable of sustaining the weight put on it, as the front portion with a greater weight in it remained intact.

In actions for the damages sustained to the goods warehoused in the building:—

Held, that the defendant was not liable. *Paye* v. *Defoe*, *Brown* v. *Defoe*, *Ashdown* v. *Defoe*, 24 O. R. 569. *See* this case in appeal, 21 A. R. 466.

See, also, CARRIERS.

BALLOT.

See MUNICIPAL CORPORATIONS, VIII.

BANKRUPTCY AND INSOLVENCY.

I. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. *Construction and Effect of.*

Alimony.]—An assignment for the benefit of creditors does not take precedence over a registered judgment for alimony. *Abraham* v. *Abraham*, 18 A. R. 436, affirming S. C. 19 O. R. 256.

Assent of Creditors.]—*See Ball* v. *Tennant*, 25 O. R. 50, *post* 67.

Benevolent Society—*Interest of Debtor in Fund.*]—An assignment by a debtor of all his estate for the benefit of his creditors under R. S. O. ch. 124, is a voluntary assignment in the sense that it is optional with the debtor whether he makes it or not; but the form in which it is made and the effect of such form not being optional with him, in this sense it is not voluntary; and having regard to the provision of section 11 of the Benevolent Societies Act, R. S. O. ch. 172, such an assignment does not pass to the assignee the benefit to which the

debtor is entitled in the fund of a society properly incorporated under that Act. *Re Built and Prott*, 23 O. R. 78.

Bills of Sale Acts—*Nova Scotia.*]—As to assignment being within. *See Archibald* v. *Hubley*, 18 S. C. R. 116, *post* 105.

Covenant of Indemnity.]—The benefit of a covenant by a third person to indemnify the assignor against a mortgage made by him does not pass to his assignee under an assignment for the general benefit of creditors, at all events not where there has been no breach of the covenant before the making of the assignment.

Per Maclennan, J. A.—Even if the covenant passed, the assignee would hold it as bare trustee for the assignor, or for the mortgagees if subsequently assigned to them by the assignor.

Judgment of the Queen's Bench Division, 25 O. R. 50, reversed on this point. *Ball* v. *Tennant*, 21 A. R. 602.

Creditors' Relief Act.]—*See Roach* v. *McLachlan*, 19 A. R. 496, and *Brithaupt* v. *Marr*, 20 A. R. 689, *post*, EXECUTION, I.

Division Court—*Garnishment.*]—An assignment for the benefit of creditors by a primary debtor after a garnishing summons has been duly served upon him and the garnishee, and judgment has been obtained thereon against the debtor, does not intercept or take precedence of the attachment of the debt, and the primary creditor may obtain judgment against, and enforce payment thereof by, the garnishee. *Wood* v. *Joselin*, 18 A. R. 59.

Landlord and Tenant—*Forfeiture.*]—The provisions of section 11 of R. S. O. ch. 143, do not extend to a forfeiture of the term under a stipulation in the lease that if the lessees should make any assignment for the benefit of creditors the term should immediately become forfeited, and such forfeiture is therefore enforceable without notice served upon the lessees. *Argles* v. *McMath*, 26 O. R. 224. Affirmed in appeal, 23 A. R. 44.

Priority over Execution—*Purchase Money of Land Sold Under Mortgage.*]—Where, after a sale of mortgaged premises in an action for that purpose, the mortgagor made an assignment for the benefit of his creditors under R. S. O. ch. 124, before certain prior execution creditors had established their claims in the Master's Office to the balance of purchase money, after satisfying the amount of the mortgage:—

Held, that the assignee for creditors was entitled to such balance freed from any liability to satisfy the executions out of it. *Carter* v. *Stone*, 20 O. R. 340.

Several Property of Partners—*Assent of Creditors.*]—An assignment under R. S. O. ch. 124, for the general benefit of creditors, made by the members of a trading partnership, in the words mentioned in section 4, vests in the assignee all the properties of each of the partners, several as well as joint.

Where such an assignment has been acted upon by the creditors, it is not open to the objection, even if made by an execution creditor, that no creditor executed it.

Cooper v. *Dixon*, 10 A. R. 50, distinguished.

Judgment of Robertson, J., varied. *Ball* v. *Tennant*, 25 O. R. 50. Reversed in appeal on another ground, 21 A. R. 602.

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2. *Costs.*

Assignee's Liability.]—An assignee for the benefit of creditors may be ordered to pay the costs of the action personally as any other unsuccessful litigant may be.

Judgment of the Common Pleas Division affirmed. *Macdonald* v. *Balfour*, 20 A. R. 404.

Disputed Claim.]—An assignee for the benefit of creditors, on instructions of the inspectors, contested the plaintiff's claim, who then brought an action, which was dismissed with costs, but, on appeal to the Divisional Court, this decision was reversed, with costs to be paid by the defendant, the assignee. The creditors, after taking counsel's opinion, resolved to appeal to the Court of Appeal, but the appeal to that Court was dismissed with costs. The assignee charged against the estate the total sum he had to pay in respect of the costs of these proceedings:—

Held, that he was entitled so to do.

Decision of Robertson, J., affirmed. *Smith* v. *Beal*, 25 O. R. 368.

Removal of Assignee.]—Where a Judge of a County Court, acting under R. S. O. ch. 124, sec. 6, orders the removal of an assignee, he exercises a statutory jurisdiction as *persona designata*, and has no power to order payment of costs.

The proceedings in such a case are not in any Court; and Rule 1170 (a) does not apply to them.

Re Pacquette, 11 P. R. 463, followed.

Re Young, 14 P. R. 303. *See* now 56 Vict. ch. 13 (O.).

Solicitor and Client — *Taxation.*]—*See Re Rogers and Farewell*, 14 P. R. 38, *post* 79.

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3. *Partnership and Separate Estate.*

Former Joints Debts.]—Where an assignment for the benefit of creditors is made by an assignor carrying on business by himself, creditors having claims against him for goods sold to a firm in which he was formerly a partner are entitled to rank against his estate rateably with creditors having claims for goods sold to the assignor alone.

Section 5 of R. S. O. ch. 124, does not apply to such a case, but only to the case of an assignor who has both separate estate and joint estate. *Macdonald* v. *Balfour*, 20 A. R. 404.

See Ball v. *Tennant*, 25 O. R. 50; 21 A. R. 602, *ante* 67; and *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152, *post* 153.

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4. *Preferences.*

Antecedent Agreement.]—A chattel mortgage given in pursuance of a previous agreement

therefor to cover an antecedent debt and advance made at the time of the agreement, both the mortgagor and mortgagee believing the former to be solvent when the mortgage was actually made, was impeached within the sixty days provided for by sec. 2, sub-sec. (*a*), of 54 Vict. ch. 20 (O.), amending R. S. O. ch. 124 :—

Held, that the mortgage was valid.

Lawson v. *McGeoch*, 22 O. R. 474. Affirmed in appeal, 20 A. R. 464.

Book Debts — *Insolvency.*]— One N. owed defendants a sum of money which he was unable to pay in full, and he assigned to defendants all his book debts and accounts, the assignment providing that the book debts should be placed in the hands of a firm of financial agents for collection, who should account to the defendants for the proceeds, less the commission, and whatever amount remained in defendants' hands after their debts were paid should be paid over to N. Plaintiffs, judgment creditors of N., brought an action to set aside this assignment as having the effect of hindering, delaying and defeating them in the recovery of their claim and giving defendants a preference over other creditors, and so being void under R. S. O. ch. 118, as amended by 48 Vict. ch. 26, sec. 2 (O.):—

Held, affirming the judgment of the Court of Appeal, 15 A. R. 324, and of the Divisional Court, 14 O. R. 288, Gwynne, J., dissenting, that N. being unable to meet the demands of his creditors for payment must be deemed insolvent within the meaning of the said Act; that book debts are a species of property included in the provisions of 48 Vict. ch. 26, sec. 2 (O.), and that the assignment by N. to the defendants was void under that section. *Kloepfer* v. *Warnock*, 18 S. C. R. 701.

Confession of Judgment.]—A withdrawal of defence under section 113 of the Division Courts' Act, R. S. O. ch. 51, is not a confession of judgment or *cognovit actionem* within the meaning of section 1 of the Assignments and Preferences Act, R. S. O. ch. 124.

Judgment of Armour, C.J., affirmed. *Bailey* v. *Bank of Hamilton*, 21 A. R. 156.

Knowledge by Grantee of Insolvency — *Actual Intent to Defraud.*]—The fact that the grantors in a deed were to the knowledge of the grantee insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S. O. ch. 124 (following *Molson's Bank* v. *Halter*, 18 S. C. R. 88), and where valuable consideration has been given clear evidence of actual intent to defraud the creditors of the grantor is necessary to have the deed declared void under the statute of 13 Elizabeth, ch. 5.

Judgment of the Common Pleas Division, affirming the judgment of Armour, C.J., reversed. *Hickerson* v. *Parrington*, 18 A. R. 635.

Partial Avoidance.]—Section 2 of R. S. O. ch. 124, which makes void a transfer of goods, etc., by an insolvent with intent to, or having the effect of, hindering, delaying or defeating creditors or giving one or more creditors a preference over the others, does not apply to a chattel mortgage given in consideration of an actual *bonâ fide* advance by the mortgagee without knowledge of the insolvency of the mortgagor or of any intention on his part to defeat, delay or hinder his creditors. If part of the consideration for a chattel mortgage is a *bonâ fide* advance and part such as would make the conveyance void as against creditors, the mortgage is not void as a whole, but may be upheld to the extent of the *bonâ fide* consideration. *Commercial Bank* v. *Wilson*, 3 E. & A. 257, decided under the statute of Elizabeth, is not law under the Ontario statute. Decision of the Court of Appeal, 18 A. R. 646, *sub nom. Campbell* v. *Roche*, *McKinnon* v. *Roche*, following that case overruled, but the judgment sustained on the ground that it was proved that no part of the consideration was *bonâ fide*. *Campbell* v. *Patterson*, *Mader* v. *McKinnon*, 21 S. C. R. 645.

Pledge — *Warehouse Receipt — Arts. 1035, 1036, 1059 C.C.*]—W. E. E., connected with two business firms in Montreal, viz., the firm of W. E. Elliott & Co., oil merchants, of which he was the sole member, and Elliott, Finlayson & Co., wine merchants, made a judicial abandonment on the 18th August, 1889, of his oil business. Both firms had kept their accounts with the Bank of Commerce. The bank discounted for W. E. Elliott & Co., before his departure for England on the 30th June, a note of $5,087.50, due 1st October, signed by John Elliott & Co., and indorsed by W. E. Elliott & Co. and Elliott, Finlayson & Co., and on the 5th July took, as collateral security from Finlayson, who was also W. E. Elliott's agent during his absence, a warehouse receipt for 292 barrels of oil, and the discount was credited to Elliott, Finlayson & Co. On and about the 9th July, 146 barrels were sold, and the proceeds, viz., $3,528.30, were subsequently, on the 9th August, credited to the note of $5,087.50. On the 30th July McDougall, Logie & Co., failed, and W. E. E. was involved in the failure to the extent of $17,000, of which amount the bank held $7,559.30, and on the 16th July Finlayson, as agent for W. E. E., left with the bank as collateral security against W. E. E.'s indebtedness of $7,559.30 on the paper of McDougall, Logie & Co., customers' notes to the amount of $2,768.28, upon which the bank collected $1,603.43, and still kept a note of J. P. & Co. unpaid of $1,165.32. On the return of W. E. E. another note of John Elliott & Co. for $1,101.33, previously discounted by W. E. E., became due at the bank, thus leaving a total debit of the Elliott firms, on their joint paper, of $2,660.53. The old note of $5,087.50, due 1st October, and the one of $1,101.33, were signed by John Elliott & Co., and on the 10th August were replaced by two notes signed by Elliott, Finlayson & Co., and secured by 200 barrels of oil, 146 barrels remaining from the original number pledged, and an additional warehouse receipt of 54 barrels of oil, indorsed over by W. E. E. to Finlayson, Elliott & Co., and by them to the bank. The respondents, as curator for the estate of W. E. Elliott & Co., claimed that the pledge of the 200 barrels of oil on the 10th August, and the giving of the notes on the 16th July to the bank, were fraudulent preferences. The Superior Court held that the bank had knowledge of W. E. E.'s insolvent condition on or about the 13th of July, and declared that they had received fraudulent preferences by

receiving W. E. E.'s customers' notes and the 200 barrels of oil, but the Court of Appeal, reversing in part the judgment of the Superior Court, held that the pledging of the 200 barrels of oil by Elliott, Finlayson & Co. on the 10th August was not a fraudulent preference. On an appeal and cross-appeal to the Supreme Court :—

Held, 1st, that the finding of the Courts below of the fact that the bank's knowledge of W. E. Elliott's insolvency dated from the 13th July, was sustained by evidence in the case, and there had therefore been a fraudulent preference given to the bank by the insolvent in transferring over to it all his entsomers' paper not yet due. Art. 1036 C.C. Gwynne, J., dissenting. 2nd, that the additional security given to the bank on the 10th of August of 54 barrels of oil for the substituted notes of Elliott, Finlayson & Co. was also a fraudulent preference. Art. 1035 C.C. Gwynne, J., dissenting. 3rd, reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court, that the legal effect of the transaction of the 10th August was to release the pledged 146 barrels of oil, and that they became immediately the property of the insolvent's creditors, and could not be held by the bank as collateral security for Elliott, Finlayson & Co.'s substituted notes. Arts. 1169 and 1035 C.C. Gwynne and Patterson, JJ., dissenting. *Stevenson* v. *Canadian Bank of Commerce*, 23 S. C. R. 530.

Pressure—*Collusion.*]—In an action to have a chattel mortgage made by a debtor to certain creditors declared fraudulent and void as against other creditors, it was found at the trial that at and before the time of the execution of the mortgage, the debtor was in insolvent circumstances and unable to pay his debts in full, as he well knew ; that the mortgagees were well aware of the fact and took the mortgage with full knowledge of it ; that their object in taking the mortgage was to obtain security for their debt ; that the necessary effect was to defeat, delay, and prejudice the creditors of the mortgagor, and to give the mortgagees a preference over the other creditors ; and that the mortgagees at and before the execution of the mortgage knew that it would have such effect. It also appeared that the property covered by the chattel mortgage was all that the debtor had, and that he knew that he had many creditors who could not be paid :—

Held, per Armour, C.J., at the trial, following *Molsons Bank* v. *Halter*, 18 S. C. R. 88, that the mortgage was not assailable under R. S. O. ch. 124, sec. 2, notwithstanding the findings of fact, because the mortgagees had requested the debtor to give them the security.

The judgment was reversed in the Divisional Court.

Per Falconbridge, J.—It follows from the findings of fact that the pressure was merely a sham pressure—a piece of collusion.

Per Street, J.—There was *bonâ fide* pressure, but the doctrine of pressure does not apply where the debtor has transferred the whole of his property. *Davies* v. *Gillard*, 21 O. R 131. Reversed in appeal, 19 A. R. 432.

Pressure—*Criminal Liability.*]—R. S. O. ch. 124, sec. 2, makes void any conveyance of property by a person in insolvent circumstances made "with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect" :—

Held, affirming the judgment of the Court of Appeal, 16 A. R. 323, Fournier and Patterson, JJ., dissenting, that the words "or which has such effect" in this section apply only to the case of "giving any one or more of (his creditors) a preference over his other creditors or over any one or more of them" :—

Held, further, that the preference provided against in the statute is a voluntary preference and a conveyance obtained by pressure from the grantee would not be within its terms.

W. having become insolvent, and wishing to secure to an estate of which he was an executor moneys which he had used for his own purposes, gave his co-executors a mortgage on his property for the purpose, and proceedings were taken by a creditor to set aside this mortgage under the above section :—

Held, Fournier and Patterson, JJ., dissenting, that the mortgage was not void under the statute :—

Held, per Strong, Taschereau, and Gwynne, JJ., that there was no preference under the statute, as the persons for whose benefit the security was given were not creditors of the grantor, but they stood in the relation of trustee and *cestui que trust* :—

Held, also, per Strong and Taschereau, JJ., that the grantor, being criminally responsible for misappropriating the money of the estate of which he was executor, the fear of penal consequences was sufficient pressure on him to take from the mortgage the character of a voluntary preference. *Molsons Bank* v. *Halter*, 18 S. C. R. 88.

Pressure—*Intent.*]—By the Manitoba Act, 49 Vict. ch. 45, sec. 2, "Every gift, conveyance, etc., of goods, chattels or effects . . . made by a person at a time when he is in insolvent circumstances . . . with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void" :—

Held, Patterson, J., dissenting, that the word "preferenee" in this Act imports a voluntary preference, and does not apply to a case where the transfer has been induced by the pressure of the creditor :—

Held, further, that a mere demand by the creditor, without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference. The words "or which has such effect" in the Act apply only to a case where that has been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the Act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. *Molsons Bank* v. *Halter*, 18 S. C. R. 88, approved and followed.

Held, per Patterson, J., that any transfer by an insolvent debtor which has the effect of giving one creditor a priority over the others in payment of his debt, or which is given with the intent that it shall so operate, is void under the-

statute, whether or not it is the voluntary act of the debtor or given as the result of pressure. *Stephens* v. *McArthur*, 19 S. C. R. 446.

Pressure—*No Knowledge of Insolvency.*]—A mortgage given by a debtor who knows that he is unable to pay all his debts in full is not void as a preference to the mortgagee over other creditors if given as a result of pressure and for a *bona fide* debt and if the mortgagee is not aware of the debtor being in insolvent circumstances. *Molsons Bank* v. *Halter*, 18 S. C. R. 88, and *Stephens* v. *McArthur*, 19 S. C. R. 446, followed. *Gibbons* v. *McDonald*, 20 S. C. R. 587, affirming 18 A. R. 159.

Presumption]—Where an instrument made by a person in insolvent circumstances has the effect of giving one creditor a preference over others, and the instrument is attacked within sixty days after it is made, there is under the amended enactment, 54 Viet. ch. 20 (O.), an incontrovertible statutory presumption that the instrument has been made with intent to give an unjust preference and it is void. *Cole* v. *Porteous*, 19 A. R. 111.

Presumption—*Onus of Proof.*]—Held, per Hagarty, C.J.O. (*hesitante*), and Burton, J.A.—The presumption spoken of in sub-sections 2 (*a*) and 2 (*b*) of section 2 of R. S. O. ch. 124, "An Act respecting Assignments and Preferences by Insolvent Persons," as amended by 54 Viet. ch. 20 (O.), is a rebuttable one, the onus of proof being shifted in cases within the sub-sections.

Per Maclennan, J.A.—The presumption is limited to cases of pressure, and as to that is irrebuttable.

Per Osler, J.A.—The presumption is general and is irrebuttable; but the security in question is supportable under the previous promise.

Cole v. *Porteous*, 19 A. R. 111, distinguished.

Judgment of the Common Pleas Division, 22 O. R. 474, affirmed. *Lawson* v. *McGeoch*, 20 A. R. 464.

Surety.]—To avoid a transfer as a fraudulent preference under R. S. O. ch. 124, sec. 2, the person to whom it is made must be a creditor in respect of the transaction attacked; and a surety for an insolvent who has not paid the debt for which he is surety is not a creditor within the meaning of the Act. *Hope* v. *Grant*, 20 O. R. 623. *See* 55 Viet. ch. 25 (O.), and *Kerry* v. *James*, 21 A. R. 338, *post* 73.

See also FRAUDULENT CONVEYANCE.

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5. Proof of Claims.

Action to Prove Claim—*Jurisdiction.*]—An action asking for a declaration of right to rank on an insolvent estate is not within the jurisdiction of the County Court.

Judgment of the County Court of Huron affirmed, Hagarty, C.J.O., dissenting. *Whidden* v. *Jackson*, 18 A. R. 439.

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6. Rights and Liabilities.

(a) *Of Assignee.*

Agreement to Give Security—*Notice.*]—As against an assignee for the benefit of creditors, an oral agreement, of which he has notice, by the assignor to give to an endorser a chattel mortgage to secure him against liability, will be enforced. *Kerry* v. *James*, 21 A. R. 338.

Book Debts.]—An assignee for creditors under R. S. O. ch. 124, and amendments, is not in the position of a purchaser for value without notice, and takes no higher rights under the assignment than his assignor had.

Where, therefore, certain book debtors were notified by the assignee for creditors under the Act, of the assignment to him, before notification by certain creditors to whom such debts had been previously assigned, it was held that he did not gain priority thereby.

Decision of Boyd, C., affirmed. *Thibaudeau* v. *Paul*, 26 O. R. 385.

Chattel Mortgage.]—An assignee for the general benefit of creditors is, by virtue of 55 Viet. ch. 26, sec. 2 (O.), entitled to take advantage of irregularities or defects in a chattel mortgage made by the assignor to the same extent as an execution creditor where such mortgage is by reason of such defect "void against creditors." *Kerry* v. *James*, 21 A. R. 338.

Chattel Mortgage—*Possession.*]—N. executed a chattel mortgage of his effects, and shortly afterwards made an assignment to one of the mortgagees, in trust for the benefit of his creditors. The assignee took possession under the assignment:—

Held, affirming the decision of the Supreme Court of Nova Scotia, that there was no delivery to the mortgagees under the mortgage, which transferred to them the possession of the goods. *Reid* v. *Creighton*, 24 S. C. R. 69.

Chattel Mortgage—*Possession.*]—The creditors against whom, by sec. 4 of 55 Viet. ch. 26 (O.), taking possession under a defective chattel mortgage, is declared to be of no avail, are creditors having executions in the sheriff's hands at the time possession is taken, or simple contract creditors who, at that time, have commenced proceedings on behalf of themselves and other creditors to set aside the mortgage, or an assignee for the general benefit of creditors, who, however, stands in no better position; and possession taken before the assignment cures all formal defects. Judgment of MacMahon, J., reversed, Hagarty, C. J. O., dissenting. *Clarkson* v. *McMaster*, 22 A. R. 138. Reversed by the Supreme Court, 25 S. C. R. 96.

Chattel Mortgage—*Renewal.*]—An assignee for the benefit of creditors, under a general assignment made and registered pursuant to the Assignments and Preferences Act, R. S. O. ch. 124, may renew a chattel mortgage made in favour of his assignor, without the execution and registration of a specific assignment of that mortgage. A renewal statement, in itself in proper form, alleging title through the assignment for the benefit of creditors, is sufficient.

Judgment of the County Court of Simcoe affirmed. *Fleming* v. *Ryan*, 21 A. R. 39. *See* now 57 Viet. ch. 37, sec. 18 (O.).

Chattel Mortgage—*Renewal.*]—Section 2 of 55 Viet. ch. 26 (O.), does not enable an assignee for the general benefit of creditors to question

the validity of the renewal of a chattel mortgage. *Tallman* v. *Smart*, 25 O. R. 661.

Costs.]—*See Macdonald* v. *Balfour*, 20 A. R. 404, *ante* 68; *Smith* v. *Beal*, 25 O. R. 368, *ante* 68; and *Re Rogers and Farewell*, 14 P. R. 38, *post* 79.

Crown—*Chose in Action.*]—Where a chose in action was assigned, *inter alia*, for the general benefit of creditors, all the parties interested being before the Court, and the Crown making no objection, the Court gave effect to such assignment.

Quære, In the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown? *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

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

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

Lien.]—The plaintiff was employed to manufacture bricks for another in a brickyard belonging to the latter, of which, however, the plaintiff held possession for the purpose of his contract, and remained and was in possession of the bricks at the time of their seizure by the sheriff under an execution against the owner of the brickyard, who, immediately after such seizure, made an assignment for the benefit of creditors :—

Held, that the plaintiff was entitled to a lien upon the bricks in priority to the execution and assignment for the benefit of creditors, and also in priority to the claim of a chattel mortgagee, though his mortgage covered brick in course of manufacture during its continuance. *Roberts* v. *Bank of Toronto*, 25 O. R. 194. Affirmed in appeal, 21 A. R. 629.

Pledge—*Right of Curator to Impugn Transaction.*]—L. borrowed a sum of money from a savings bank which he agreed to repay with interest, transferring in pledge, as collateral security, letters of credit on the government of Quebec. L. having become insolvent, the bank filed its claim for the amount of the loan, with interest, with the curator of the estate, and on appeal the appellants, as creditors of L., contested on the ground that the said securities were not of the class mentioned in the Act relating to savings banks (R. S. C. ch. 122, sec. 20), and the bank's act in making said loan was *ultra vires* and illegal :—

Held, that L., having received good and valid consideration for his promise to repay the loan, could not, nor could the appellants, his creditors, who had no other rights than the debtor himself had, impugn the contract of loan, or be admitted to assail the pledge of the securities. Assuming that the act of the bank in lending the money, on the pledge of such securities was *ultra vires*, although this might affect the pledge as regards third parties interested in the securities, it was not, of itself and *ipso facto*, a radical nullity of public order of such a character as to disentitle the bank under Articles 989 and 990 C. C., from claiming back the money with interest. *Bank of Toronto* v. *Perkins*, 8 S. C. R. 903, distinguished. *Rolland* v. *Caisse d'Economie de Quebec*, 24 S. C. R. 405.

Pledge of Shares—*Right of Curator.*]—*See Société Canadienne Française de Montreal* v. *Duvelay*, 20 S. C. R. 449, *post* 138.

Purchasing Goods.]—A., doing business under the name of J. A. & Sons, assigned all his property and effects to H. for benefit of creditors. H., by power of attorney, authorized A. to collect all moneys due his estate, etc., and to carry on the business if expedient. A. continued the business as before, and in the course of it purchased goods from F., to whom, on some occasions, he gave notes signed "J. A. & Sons, H. trustee per A." All the goods so purchased from F. were charged in his books to J. A. & Sons, and the dealings between them after the assignment continued for five years. Finally, A. being unable to pay what was due to F. the latter brought an action against H. on notes signed as above, and for the price of goods so sold to A. :—

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that the evidence at the trial of the action clearly showed that the credit for the goods sold was given to A. and not to H.; that A. did not carry on the business after the assignment at the instance or as the agent of H., nor for the benefit of his estate; that A. was not authorized to sign H.'s name to notes as he did; and that H. was not liable either as the person to whom credit was given, or as an undisclosed principal :—

Held, further, that if H. was guilty of a breach of trust in allowing A. full control over the estate, that would not make him liable to F. in this action. *Hechler* v. *Forsyth*, 22 S. C. R. 489.

Purchase of Trust Property.]—A purchase by the assignee for the benefit of creditors of the assets of the estate, made by him at the request of the inspectors of the estate after futile efforts to sell at auction and by private tender, and after a circular letter had been sent by the inspectors to each creditor stating that the sale would be made unless objection were taken, was set aside, there being evidence that at the time of the purchase the assignee knew of and was negotiating with, a possible purchaser to whom he afterwards resold at a large profit, and had not disclosed this information to the inspectors. *Morrison* v. *Watts*, 19 A. R. 622.

Selling Estate of Insolvent by Auction.]—A by-law of a county municipality passed under sub-section 2 of section 495 of the Municipal Act, R. S. O. ch. 184, enacted, that

it should not be lawful for any person or persons to act as auctioneers, or to sell or put up for sale any goods, etc., "by public auction" unless duly licensed :—

Held, that the agent of an assignee of an insolvent estate selling without a license the stock-in-trade of an insolvent who had carried on business in the county, was rightly convicted of a breach of the by-law, although it was the only occasion he had so acted in the municipality. *Regina* v. *Rawson*, 22 O. R. 467.

Service Out of Jurisdiction — *Preferential Transfer of Goods.*]—An action by an assignee under R. S. O. ch. 124 against persons residing in the Province of Quebec to set aside a transfer of goods effected in this Province, as a fraudulent preference, which goods have afterwards been removed to Quebec, is founded on a "tort committed within the jurisdiction," within the meaning of Rule 271 (*e*), as amended by Rule 1309. *Clarkson* v. *Dupré*, 16 P. R. 521.

Status of Assignee.]—*See Seysworth* v. *Anderson*, 23 O. R. 573, *post* 78; *Central Bank* v. *Garland*, 20 O. R. 142, 18 A. R. 438, *post* 135; *Campbell* v. *Hully*, 22 A. R. 217, *post* 77; *Wood* v. *Reesor*, 22 A. R. 57, *post* 78; and *Doull* v. *Kopman*, 22 A. R. 447, *post* 78. *See*, also, *Clarkson* v. *McMaster*, 25 S. C. R. 96.

(b) Of Creditors.

Action by Creditors to Set Aside Fraudulent Transaction — *Right to Continue after Assignment for Benefit of Creditors.*]—An action begun by creditors of an insolvent to set aside a transaction in fraud of creditors, before an assignment by the insolvent for the benefit of creditors under R. S. O. ch. 124, can be prosecuted by the creditors after an assignment has been made; for the assignment has not the effect under section 7, sub-section (1), of transferring the existing cause of action to the assignee.

Section 7, sub-section (2), may be read so as to apply to pending litigation instituted by the assignee or into which he has been introduced; and an order was made under that enactment in an action begun by creditors before an assignment, in which the assignee was after the assignment added as a co-plaintiff, authorizing the original plaintiffs and other creditors to continue the action as constituted for their own benefit, upon indemnity to the assignee. *Gage* v. *Douglas*, 14 P. R. 126.

Compromise by Assignee—*Action by Creditors.*]—Where a creditor obtains an order under sub-section 2 of section 7 of the Assignments and Preferences Act, R. S. O. ch. 124, authorizing him to bring an action in the assignee's name, the action as brought must be such as is justified by the scope of the order.

A creditor suing in the name of the assignee under this sub-section cannot attack the *bona fides* of a compromise entered into before his action was brought between the assignee and the defendant, when the defendant cannot be restored to his original position.

Whether sub-section 2 is not confined to cases in which an exclusive right of suing is given to the assignee by sub-section 1: *quere*.

Judgment of the Queen's Bench Division reversed, Maclennan, J.A., dissenting. *Campbell* v. *Hully*, 22 A. R. 217.

Election of Remedies — *Inconsistent Remedies.*]—A creditor cannot take the benefit of the consideration for a transfer of goods and at the same time attack the transfer as fraudulent.

An assignee for the benefit of creditors has no higher right in this respect.

A creditor suing in the name of the assignee obtained judgment against third persons, for the payment to him as part of the debtor's estate of the proceeds of promissory notes given to the latter for part of the purchase money of his stock-in-trade :—

Held, that it was then too late for him to attack the sale as fraudulent. *Bremer* v. *Oliver*, 10 A. R. 656, referred to. *Wood* v. *Reesor*, 22 A. R. 57.

Purchase of Assets.]—*Semble*, per Armour, C.J., that a private sale by an assignee to any creditor, without the consent of the others, would be open to objection. *Thompson* v. *Clarkson*, 24 O. R. 421.

Purchase of Insolvent Estate—*Liability to Account.*]—An insolvent trader having made an assignment of all his estate for the benefit of his creditors, under R. S. O. ch. 124, his stock-in-trade was purchased by his wife from the assignee; the defendants, who were creditors of his, and one of them the sole inspector of the estate, becoming responsible to the assignee for payment of the purchase money, and, by a secret arrangement made beforehand, receiving security from the wife upon the goods purchased by her, not only for the amount for which they had become responsible, but also for the full amount of their claims as creditors of the husband.

In an action by another creditor for an account :—

Held, that the estate was entitled to the benefit of whatever advantage the defendants derived from the transaction, and that they should account to the assignee for the difference between the amount of their claims and the amount they would have received by way of dividend from the estate :—

Held, also, that the assignee was a necessary party to the action. *Seysworth* v. *Anderson*, 23 O. R. 573.

Upon appeal to the Court of Appeal this judgment was reversed, 21 A. R. 242, but upon further appeal to the Supreme Court of Canada the plaintiffs were held entitled to relief and the defendants were ordered to account for the profit, if any, derived by them from the transaction. 24 S. C. R. 699.

Undisclosed Assets—*Release.*]—A creditor may, after an assignment for the benefit of creditors, and after the execution by him and the other creditors of the assignor of a release of their debts in consideration of payment of a composition, bring an action in the assignee's name to recover goods fraudulently concealed by the assignor at the time of the assignment.

Such an action may be brought with the assignee's consent in his name without any order under sub-section 2 of section 7 of the Assignments Act, but without such an order

the recovery will be for the benefit of the estate.

Judgment of the County Court of York reversed. *Doull* v. *Kopman*, 22 A. R. 447.

(e) *Of Inspectors.*

Disposing of Estate.]—The inspectors of an insolvent estate have no power, unless specially authorized by the creditors, to bind the latter by anything they do in disposing of the estate. The disposal of it is in the hands of the creditors, and in default of directions by them, in the hands of the Judge of the County Court. *Morrison* v. *Watts*, 19 A. R. 622.

Purchase of Estate.]—An inspector of an insolvent estate, appointed by the creditors under R. S. O. ch. 124, who acts towards the assignee in an advisory capacity, cannot become a purchaser of the estate at a private sale thereof. *Thompson* v. *Clarkson*, 21 O. R. 421.

See, also, *Segsworth* v. *Anderson*, 23 O. R. 573, 21 A. R. 242, 24 S. C. R. 699, *ante* 78.

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7. *Set-off.*

Judgments.]—After recovery of judgment by the defendants against the plaintiff for a debt and costs, the plaintiff recovered judgment against the defendants in a separate action for damages for malicious prosecution and costs. Before the verdict for damages was actually given, the plaintiff executed an assignment to a trustee for the benefit of his creditors of the amount of any verdict which he might recover, but this assignment was not delivered until after the verdict had been rendered and an order for the entry of judgment upon it made by the trial Judge:—

Held, that at the time the assignment was delivered the claim to damages had become a judgment debt, and, as such, a debt which should be set off under the principle of section 23 of R. S. O. ch. 124; and, upon the application of the defendants, an order directing a set-off was made. *Moody* v. *Canadian Bank of Commerce*, 14 P. R. 258.

Sale of Debts—*Action by Purchaser—Set-off of Barred Claim.*]—R. S. O. ch. 124, sec. 20, sub-sec. 5, which provides that where a claim against the estate is contested by the assignee the same shall be for ever barred of any right to rank thereon if an action is not brought against the assignee to establish the claim within a limited time, only applies to the right to rank on the estate, and does not affect the right to set-off the claim so barred in an action against the claimant by the assignee of the estate, or any one claiming through him. *Johnston* v. *Burns*, 23 O. R. 179. Affirmed by the Divisional Court, 23 O. R. 582.

Solicitor and Client—*Taxation of Bill of Costs by Assignee for Creditors of Client.*]—The parties who initiate and intervene upon the taxation of a solicitor's bill of costs become personally liable to pay the costs of taxation.

And where solicitors rendered to the assignee of an insolvent their bill for services to the insolvent, and the assignee taxed the bill and had it reduced by more than one-sixth:—

Held, that he had a right personally to recover from the solicitors the costs of the taxation, and that there should be no set-off against the amount coming to the solicitors from the estate of the insolvent as a dividend upon their bill. *Re Rogers and Farewell*, 14 P. R. 38.

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8. *Valuing Security.*

Collateral Security—*Collocation—Joint and Several Liability.*]—Held, affirming the judgment of the Court below, that a creditor who by way of security for his debt holds a portion of the assets of his debtor, consisting of certain goods and promissory notes endorsed over to him for the purpose of effecting a pledge of the securities, is not entitled to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sum of money he may have received from other parties liable upon such notes or which he may have realized upon the goods.

Fournier, J., dissenting, on the ground that the notes having been endorsed over to the creditor as additional security, all the parties thereto became jointly and severally liable and that under the common law the creditor of joint and several debtors is entitled to rank on the estate of each of his co-debtors for the full amount of his claim until he has been paid in full without being obliged to deduct therefrom any sum received from the estates of the co-debtors jointly and severally liable therefor.

Gwynne, J., dissenting on the ground that there being no insolvency law in force the respondent was bound upon the construction of the agreement between the parties, viz., the voluntary assignment, to collocate the appellants upon the whole of their claim as secured by the deed. *Benning* v. *Thibaudeau*, 20 S. C. R. 110.

Guarantee—*Floating Balance—Ultimate Balance.*]—The plaintiff's testator gave a guarantee in the following form: "In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold; provided I shall not be called on in any event to pay a greater amount than $2,500."

M. made an assignment for the benefit of his creditors, being then indebted to the guaranteed creditors in the sum of $5,556.23. They filed their claim therefor with the assignee and afterwards received from the plaintiff the full amount covered by the testator's guarantee.

The plaintiff contended that he was entitled to rank upon the estate for so much of the debt as had been thus paid by him:—

Held, Osler, J.A., dissenting, that the guarantee was one of the whole debt incurred, or to be incurred, with a limitation of the liability to $2,500, and, therefore, that the plaintiff was not subrogated to the rights of the secured

creditors or entitled to receive the dividends in respect of that part of the debt which he had paid off under the guarantee.

Per Osler, J.A.: The guarantee was a continuing guarantee, limited in amount, to secure a floating balance, and so a guarantee of part of the debt only, the dividends on which, the surety having paid it, he was entitled to receive. *Ellis* v. *Emmanuel*, 1 Ex. D. 157, considered.

Judgment of the Queen's Bench Division, 20 O. R. 257, reversed, and that of Street, J., at the trial, 19 O. R. 230, restored. *Martin* v. *McMullen*, 18 A. R. 559.

Right of Retainer.]—Under their father's will, two of his sons were to receive a share of the proceeds of certain land to be sold on the death of his widow, who was still alive. They also owed the testator a certain debt, which, by the will, was to be payable in five yearly instalments from the time of his death.

About two years subsequent thereto the sons made an assignment for the benefit of their creditors under R. S. O. ch. 124:—

Held, (1) that the effect of the assignment was by virtue of sec. 20, sub-sec. 4, of that Act, to accelerate payment of the debt due to the estate. (2) That the executors being also trustees of the land of which the sons were to receive shares when sold under the will, held security for their claim within the meaning of that Act, having (because of the Devolution of Estates Act) the right to impound the sons' shares under the will as against their debt to the estate. This security the executors and trustees should value pursuant to R. S. O. ch. 124. *Tillie* v. *Springer*, 21 O. R. 585.

See, also, COLLATERAL SECURITY.

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9. *Miscellaneous Cases.*

Application of Act.]—54 Viet. ch. 20, the "Act to amend the Act respecting Assignments and Preferences by Insolvent Persons," R. S. O. ch. 124, is not retrospective, and does not apply to any gift, transfer, etc., made before the passing thereof, and no inference that the Legislature intended it to be retrospective is to be drawn from the language of section 3, providing that nothing therein should affect any action pending, etc. *Ormsby* v. *Jarvis*, *Chapman* v. *Jarvis*, 22 O. R. 11.

Company—*Assignment by.*]—Section 9 of the Dominion Winding-up Act gives a wide discretionary power to the Court to grant or refuse a winding-up order; and where, upon an application for such an order it appeared that the company had previously made a voluntary assignment for the benefit of creditors, and that it was the desire of the great majority in number and value of the creditors that liquidation should be proceeded with under the assignment, the application was refused. *Wakefield Rattan Co.* v. *Hamilton Whip Co.*, 24 O. R. 107.

Hindering and Delaying Creditors—*Statute of Elizabeth.*]—In an assignment for the benefit of creditors one preferred creditor was to receive nearly $300 more than was due him from the assignor on an understanding that he would pay certain debts due from the assignor to other persons amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to nor named in the deed of assignment:—

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignor who had parted with all his property, they would be hindered and delayed in the recovery of their debts and the deed was, therefore, void under the Statute of Elizabeth. *McDonald* v. *Cummings*, 24 S. C. R. 321.

Interpleader Issue.]—An interpleader issue to determine the rights of a claimant under a chattel mortgage and an execution creditor is a "proceeding" taken to impeach the mortgage. *Cole* v. *Porteous*, 19 A. R. 111.

Payment of Money to a Creditor—*Transfer of Cheque.*]—The handing by a debtor to his creditor of the cheque of a third person upon a bank in the place where the creditor lives, the maker of the cheque having funds there to meet it, is a "payment of money to a creditor" within the meaning of R. S. O. ch. 124, sec. 3, sub-sec. 1. *Armstrong* v. *Henstreet*, 22 O. R. 336.

Retrait Successoral—*Sale by Curator before Partition.*]—When a co-heir has assigned his share in a succession before partition any other co-heir may claim such share upon reimbursing the purchaser thereof the price of such assignment and such claim is imprescriptible so long as the partition has not taken place. Article 710 C. C.—A sale by a curator of the assets of an insolvent, even though authorized by a Judge, which includes an undivided share of a succession of which there has been no partition does not deprive the other co-heirs of their right to exercise by direct action against the purchaser thereof the *retrait successoral* of such undivided hereditary rights. The heir exercising the *retrait successoral* is only bound to reimburse the price paid by the original purchaser and not bound in his action to tender the moneys paid by the purchaser. *Baxter* v. *Phillips*, 23 S. C. R. 317.

Sheriff—*Statute of Frauds.*]—A sheriff, selling lands as assignee for creditors, under R. S. O. ch. 124, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not, as in the latter case, agent for both vendor and purchaser. *McIntyre* v. *Faubert*, 26 O. R. 427.

II. COMPOSITION AGREEMENT.

Loan to Effect Payment—*Secret Agreement.*]—On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at 4, 8 and 12 months. At the time L. was indebted to the Exchange Bank (in liquidation), who did not sign the composition deed, in a sum of $14,000. B. *et al.*, the appellants, were at that time

accommodation endorsers for $7,415 of that amount, but held as security a mortgage dated the 5th September, 1881, on L.'s real estate. The bank having agreed to accept $8,000 cash for its claim, D. *et al.*, on the 8th of January, 1884, advanced $3,000 to L. and took his promissory notes and a new mortgage registered on the 13th of January for the amount, having discharged and released on the same day the previous mortgage of the 5th September, 1881. This new transaction was not made known to D. *et al.*, the respondents, who, on the 14th of January, 1884, advanced a sum of $3,000 to L. to enable him to pay off the Exchange Bank and for which they accepted L.'s promissory notes. L., the debtor, having failed to pay the second instalment of his notes, D. *et al.*, who were not originally parties to the deed of composition, brought an action to have the transaction between L. and the appellants set aside and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors :—

Held, reversing the judgments of the Courts below, that the agreement by the debtor L. with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition. The Chief Justice and Taschereau, J., dissenting.

Per Fournier, J.—The mortgage having been registered on the 13th of January, 1884, the respondent's right of action to set aside the mortgage was prescribed by one year from that date : Article 1040 C. C. *Brossard* v. *Dupras*, 19 S. C. R. 531.

Release of Debt — *Promise to Pay.*]—An advance of money by a creditor to a debtor whose debt has been released by a composition agreement is sufficient consideration for notes given by that debtor and his partner to the creditor for part of the released debt.

A consideration is necessary to support a subsequent promise to pay a debt or the balance of a debt which has been released by the creditor or discharged by a deed of composition or discharge.

Austin v. *Gordon*, 32 U. C. R. 621, observed upon.

Judgment of the Common Pleas Division, 24 O. R. 486, reversed. *Samuel* v. *Fairgrieve*, 21 A. R. 418. Reversed in the Supreme Court on another point, *sub nom.* *Craig* v. *Samuel*, 24 S. C. R. 278.

Resolution of Creditors—*Fraud.*]—A resolution passed and signed by creditors at a meeting called to consider the debtor's position, that the debtor "be allowed a settlement at six, nine and twelve months, at the rate of twenty-five cents in the dollar in equal payments without interest" does not, in itself, operate as satisfaction of their claims. Payment in accordance with its terms is essential.

A creditor who assents to and signs the resolution, but before doing so makes a secret bargain with the debtor for payment of his claim in full is not debarred from suing the debtor for the original indebtedness upon default in payment of the composition according to the terms of the resolution, the debt not being in fact released or otherwise discharged ; Hagarty, C.J.O., dissenting on this point.

Per Hagarty, C.J.O.—The general doctrine as to "fraud on compositions" applies to a case of this kind, although there is no formal release under seal.

Judgment of the County Court of York reversed, Hagarty, C.J.O., dissenting. *Wrong* v. *Banfield*, 22 A. R. 489.

III. Insolvent Acts.

Insolvent Act of 1865.]—The assignee in insolvency, under the Insolvent Act of 1865, of the plaintiffs' mortgagor, in 1869 conveyed in part satisfaction of his claim, without covenants on either side, the mortgaged property to a subsequent mortgagee, who had valued his security, the plaintiffs' mortgages being referred to in a recital. The subsequent mortgagee shortly afterwards conveyed the property to a third person, but notwithstanding this conveyance continued to pay interest to the plaintiffs till within ten years of this foreclosure action :—

Held, on a case stated in the action for the opinion of the Court, with liberty to draw inferences of law and fact, that it was proper to infer that the provisions of section 19 of the Insolvent Act of 1865 had been complied with ; that under that section the subsequent mortgagee taking over his security would be primarily bound to pay off the prior incumbrances ; and that therefore his payments kept alive the plaintiffs' rights.

Judgment of the Chancery Division, 21 O. R. 571, reversed, Osler, J.A., dissenting. *Trust and Loan Co.* v. *Stevenson*, 20 A. R. 66.

Insolvent Act of 1875.]—A final judgment of the Court of Queen's Bench for Lower Canada (appeal side), upon a claim of a creditor filed with the assignee of an estate under the Insolvent Act of 187. , is not appealable to the Supreme Court of Canada, the right of appeal having been taken away by 40 Vict. ch. 41, sec. 28 (D.). *Cushing* v. *Dupuy*, 5 App. Cas. 409, followed. *Seath* v. *Hagar*, 18 S. C. R. 715.

See Constitutional Law.

BANKS.

I. Agents, Managers and Officers.

Agent—*Excess of Authority—Dealing with Funds Contrary to Instructions.*]—K., agent of a bank and also a member of a business firm,

procured accommodation drafts from a customer of the bank, which he discounted as such agent, and, without indorsing the drafts, used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full, a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty as creating a debt due to it from his firm, the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment:—

Held, affirming the judgment of the Court below, Gwynne, J., dissenting, that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed.

Per Ritchie, C.J.—K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm and when the firm received that money they became debtors to the bank for the amount.

Per Strong and Patterson, JJ.—The agent being bound to account to the bank for the funds placed at his disposal, he became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he failed to account. Whether or not the bank had a right to elect to treat the act of the agent as a tort was not important as in any case there was a debt due.

Per Gwynne, J.—The evidence does not establish that these drafts were anything else than paper discounted in the ordinary course of banking business, as to which the bank had its recourse against all persons whose names appeared on the face of the paper and were not obliged to look to any other for payment. *Merchants' Bank of Halifax* v. *Whidden*, 19 S. C. R. 53.

II. Bills, Cheques and Notes.

Cheques—*Rights of Payee Endorsing for Collection.*]—The Dominion Government having a deposit account of public moneys with the Bank of Prince Edward Island upon which they were entitled to draw at any time, the Deputy Minister of Finance drew an official cheque thereon for $30,000, which, together with a number of other cheques, he sent to the branch of the Bank of Montreal at Ottawa, at which branch bank the Government had also a deposit account. The said branch bank thereupon placed the amount of the cheque to the credit of the Dominion Government on the books of the bank, the manager thereof endorsing the same in blank and forwarding it to the head office of his bank at Montreal. The cheque was then sent forward by mail from the head office of the Bank of Montreal to the Bank of Prince Edward Island for collection, but was not paid by the latter bank, which, subsequently to the presentment of the cheque, suspended payment generally:—

Held, (1). That the Bank of Montreal were mere agents for the collection of this cheque, and that, although the proceeds of the cheque had been credited to the Government upon the books of the bank, it never was the intention of the bank to treat the cheque as having been discounted by them; consequently, as the bank did not acquire property in the cheque, and were never holders of it for value, they were entitled on the dishonour of the cheque to reverse the entry in their books and charge the amount thereof against the Government. *Giles* v. *Perkins*, 9 East 12; *Ex parte Barkworth*, 2 De G. & J. 194, referred to.

(2). That the mode of presenting a cheque on a bank by transmitting it to the drawee by mail, is a legal and customary mode of presentment. *Heywood* v. *Pickering*, L. R. 9 Q. B. 428; *Prideaux* v. *Criddle*, L. R. 4 Q. B. 455, referred to.

(3). That although a collecting bank cannot enlarge the time for presentment by circulating a bill or cheque amongst its branches, yet, if it has been endorsed to and transmitted through them for collection, the different branches or agencies are to be regarded as separate and independent endorsers for the purpose of giving notice of dishonour. *Clode* v. *Bayley*, 12 M. & W. 51; *Brown* v. *London & N. W. R. W. Co.*, 4 B. & S. 326, referred to.

(4). That the defendants, whether considered as mere agents for collection, or as holders, of the cheque for value, were, as regards the drawer, only called upon to shew that there was no unreasonable delay in presentment and in giving notice of non-payment; and, no such delay having occurred, the Crown was not relieved from liability as drawer of the cheque.

(5). In a letter from the manager of the Bank of Montreal, at Ottawa, to the Deputy Minister of Finance, which the defendants put in evidence as a notice to the Crown—the drawer—of the dishonor of the cheque by the drawees—the Bank of Prince Edward, Island, the fact of non-payment was stated as follows:—"I am now advised that it has not yet been covered by Bank of Prince Edward Island. In case of it being returned here again unpaid I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the Department":—

Held, that the words "not covered," as used in this letter, were equivalent to "not paid" or to "unpaid;" and, being so construed, the letter was a sufficient legal notice of dishonour. *Bailey* v. *Porter*, 14 M. & W. 44; *Paul* v. *Joel*, 27 L. J. Exch. 383, referred to. *The Queen* v. *Bank of Montreal*, I Ex. C. R. 154.

Lien on Assets—*Priority of Note Holders.*]—Under section 79 of the Bank Act, R. S. C. ch. 120, the note holders have the first lien on the assets of an insolvent bank in priority to the Crown. Strong and Taschereau, JJ., dissenting. But see the present Bank Act, 53 Vict. ch. 31, sec. 53 (D.), passed since this decision. *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, 20 S. C. R. 695.

Partnership—*Fraud Against Partners.*]—E. was a member of the firm of S. C. & Co., and

also a member of the firm of E. & Co., and in order to raise money for the use of E. & Co. he made a promissory note which he signed with the name of the other firm, and indorsing it in the name of E. & Co. had it discounted. The officers of the bank which discounted the note knew the handwriting of E. with whom the bank had had frequent dealings. In an action against the makers of the note C. pleaded that it was made by E. in fraud of his partners and the jury found that S. C. & Co. had not authorized the making of the note but did not answer questions submitted as to the knowledge of the bank of want of authority :—

Held, reversing the judgment of the Court below, that the note was made by E. in fraud of his partners and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry the bank could not recover against C. *Creighton* v. *Halifax Banking Co.*, 18 S. C. R. 140.

Principal and Agent—*Bills of Exchange and Promissory Notes — Payment — Set-off.*]—Bankers are subject to the principles of law governing ordinary agents, and, therefore, bankers to whom as agents a bill of exchange is forwarded for collection, can receive payment in money only, and cannot bind the principals by setting off the amount of the bill of exchange against a balance due by them to the acceptor.

Judgment of the County Court of York affirmed. *Donogh* v. *Gillespie*, 21 A. R. 292.

See, also, BILLS OF EXCHANGE AND PROMISSORY NOTES.

III. COLLATERAL SECURITY.

Bank Stock.]—The Exchange Bank in advancing money to F. on the security of Merchants Bank shares caused the shares to be assigned to their managing director, and an entry to be made in their books that the managing director held the shares in question on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. Later on the managing director pledged these shares to another bank for his own personal debt and absconded :—

Held, affirming the judgment of the Court below, that upon repayment by F. of the loan made to him the Exchange Bank was bound to return the shares or pay their value. The prohibition to advance upon security of shares of another bank contained in the amendment to the general Banking Act applies to the bank and not to the borrower.

Per Patterson, J.—Assuming that the subsequent amendment of the general Banking Act forbade the taking of such security by any bank, the amendment did not alter the charter of the Exchange Bank, 35 Vict. ch. 51 (D.), under which the Exchange Bank had power to take the shares in question in its corporate name as collateral security. To take such security may have become an offence against the banking law, punishable from the beginning as a misdemeanour and subject to a pecuniary penalty, but it was not *ultra vires*. Article 14 C. C., which declares that prohibitive laws import nullity has no application to such a case. *Exchange Bank* v. *Fletcher*, 19 S. C. R. 278.

Bill of Lading.]—A bank in this Province, under an agreement with a customer, domiciled here, advanced money to him to enable him to buy cattle in this Province, which, under the agreement, when purchased were to be forwarded by rail by him to Montreal, and to be shipped by steamship thence to Liverpool, the bank having no control over the cattle until they reached the vessel, when they were to be received by the steamship for the bank, and the customer's possession and control over them was to end ; bills of lading therefor in favour of the bank being then signed. The cattle were purchased and sent to Montreal as agreed on. On arriving at the steamship, and before the bills of lading had been made out, a creditor of the customer attached the cattle under a writ of *saisie-arret*, but the steamship owners, disregarding the writ, signed the bills of lading and conveyed the cattle to their destination. The creditor subsequently recovered a judgment for the value of the cattle, in the Province of Quebec, against the steamship owners, which the latter, having paid, sought to prove on the estate of the bank in winding-up proceedings, but the claim was disallowed by the Master.

On appeal from him it was :—

Held, that, apart from the Banking Act, R. S. C. ch. 120, by virtue of the agreement between the bank and its customer the possession and a special property in the goods passed to the bank, of which the steamship owners were aware, and having assented thereto upon receipt of the cattle, before any process was served, must be taken to have held the cattle for the bank.

The agreement having been made, and the parties to it being domiciled in this Province, the rights of the parties to it must be determined by the laws of this Province and not those of Quebec, which, however, were not shewn to be different :—

Held, also, that the rights of the parties were entirely governed by the provisions of the Banking Act and following, though not altogether approving, *Merchants Bank* v. *Suter*, 24 Gr. 356, that under section 53, sub-section 4 of the Act, the bank had, under the agreement and the facts proved, an equitable lien upon the cattle from the time of the making of the agreement, which prevailed over the attachment :—

Held, lastly, that the bank "acquired" the bills of lading within the meaning of the Banking Act as soon as the cattle were received by the steamship, although it did not at that time actually "hold" the bills. The appeal was therefore dismissed. *Re Central Bank, Canada Shipping Company's Case*, 21 O. R. 515.

Bill of Lading—*Pledge—Sale.*]—The plaintiffs sued a bank to recover the price paid the bank for certain goods which, owing to a customs seizure and forfeiture, the plaintiffs never received.

The bank was never in actual possession of the goods, but a bill of lading was endorsed to them as security for advances, and this bill of lading was endorsed and delivered by the bank directly to the plaintiffs.

The jury found that it was the bank which sold the goods to the plaintiffs ; that they pro-

fessed to sell with a good title; that they had not a good title; and that the plaintiffs could not by any diligence have obtained the goods:—

Held, that upon these findings and the evidence, and having regard to the provisions of the Bank Act, R. S. C. ch. 120, the transaction must be regarded as a sale by the bank as pledgees with the concurrence of the pledgor, and not as a mere transfer of the interest of the bank under the bill of lading; and that the plaintiffs were entitled to recover the price as upon an implied warranty of title and a failure of consideration.

Morley v. *Attenborough*, 3 Ex. 500, commented on and distinguished:—

Held, also, per Robertson, J., that the trial Judge was within his right and duty in sending the jury back to reconsider their findings after pointing out their inconsistency: *Peachin* v. *Imperial Bank*, 20 O. R. 325.

Contemporaneous Advance — *Renewal — Substitution of Securities.*]—A renewal of a note is not a negotiation of it within the meaning of section 75 of the Bank Act, 53 Vict. ch. 31 (D.), so as to support a security taken at the time of the renewal in substitution for a previously existing security.

Judgment of Armour, C.J., affirmed. *Bank of Hamilton* v. *Shepherd*, 21 A. R. 156.

Discount of Promissory Notes—*Accessory Securities.*]—A tradesman sold goods to customers taking promissory notes for the price and also hire receipts by which the property remained in him till full payment was made. The notes were discounted through the medium of a third person by the plaintiffs, who were made aware when the line of discount was opened in the course of dealing, and of the securities held. They were not, however, put in actual possession of the securities, and there was no express contract in regard to them.

In an action to recover the securities, or their proceeds from the assignee for creditors of the tradesman:—

Held, that the securities were accessory to the debt; that in equity the transfer of the notes was a transfer of the securities; that the defendant was in no higher position than his assignor, and could not resist the claim to have the receipts accompany the notes; and that it was not material that the relation of assignor and assignee did not immediately exist between the tradesman and the plaintiffs. *Central Bank* v. *Garland*, 20 O. R. 142. Affirmed in appeal, 18 A. R. 438.

Mortgage of Real Estate.]—A mortgage upon land given to secure endorsations upon negotiable paper to be made by the mortgagee for the benefit of the mortgagor becomes operative only upon the endorsements being made; and an assignment of such mortgage to a bank before the making of the endorsements is not a violation of section 45 of the Banking Act, R. S. C. ch. 120. *Re Essex Land and Timber Co. Trout's Case*, 21 O. R. 307.

Payments on—*Credit on Principal Debt.*]—The plaintiffs gave the defendants a line of credit "to be secured by collections deposited," in pursuance of which notes of defendants' customers were from time to time deposited by defendants with plaintiffs as collateral to the defendants' own notes. These collaterals at maturity were dealt with by defendants, and when paid the proceeds went to their credit and were at their disposal. The defendants failed and plaintiffs recovered judgments against them on the earlier maturing notes of the defendants. Both before and after such judgments the plaintiffs had collected on the collaterals large sums, considerably less than the whole claim, which they carried to a suspense account, and refused to credit any part on their judgments. An issue was directed on the application of defendants to try whether plaintiffs had received any payments which they should have credited on the judgments, and judgment therein was given in the plaintiffs' favour. Subsequently the plaintiffs brought this action for the balance of their claim and refused to credit the collateral suspense account:—

Held, that the decision in the issue although *res judicata* was not conclusive in this action, and that the plaintiffs' course in those proceedings amounted to an election to apply the amount of the suspense account upon that portion of the debt not then due and that they were bound to credit the amount of the suspense account in this action. *Molsons Bank* v. *Cooper*, 26 O. R. 575. Reversed in appeal, 23 A. R. 146.

Pledge—*Right of Curator to Impugn.*]—L. borrowed a sum of money from a savings bank which he agreed to repay with interest, transferring in pledge as collateral security letters of credit on the government of Quebec. L. having become insolvent the bank filed its claim for the amount of the loan, with interest, with the curator of the estate, and on appeal the applicants, as creditors of L., contested on the ground that the said securities were not of the class mentioned in the Act relating to savings banks, R. S. C. ch. 122, sec. 20, and the bank's act in making said loan was *ultra vires* and illegal:—

Held, that L., having received good and valid consideration for his promise to repay the loan, could not, nor could the applicants, his creditors, who had no other rights than the debtor himself had, impugn the contract of loan, or be admitted to assail the pledge of the securities. Assuming that the act of the bank in lending the money, on the pledge of such securities, was *ultra vires*, although this might affect the pledge as regards third parties interested in the securities, it was not, of itself and *ipso facto*, a radical nullity of public order of such a character as to disentitle the bank under Articles 989 and 990 C. C. from claiming back the money with interest. *Bank of Toronto* v. *Perkins*, 8 S. C. R. 903, distinguished. *Rolland* v *Caisse d'Economie Notre Dame de Quebec*, 24 S. C. R. 405.

Release of Security—*Rights of Surety.*]—The plaintiffs, who held a number of promissory notes of a customer, endorsed by various parties, and also a mortgage from the customer on certain lands to secure his general indebtedness, sued the defendant as endorser of one of the notes. Before action brought, they had released certain of the mortgaged lands, without the consent of the defendant:—

Held, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make them account for their deal

ings with the mortgaged property when the security had answered its purpose, or the debt had been paid by the sureties, or when in any other event the application of the moneys from the security could be properly ascertained.

Decision of Robertson, J., 25 O. R. 503, modified. *Molsons Bank* v. *Heilig*, 26 O. R. 276.

Warehouse Receipts.]—Although warehouse receipts granted to itself by a firm which has not the custody of any goods but its own are not negotiable instruments within the meaning of the Mercantile Amendment Act, R. S. O. ch. 122 :—

Held, that the Dominion Bank Act, R. S. C. ch. 120 (D.), while it was in force dispensed with that limitation, validated such receipts, and transferred to the endorsees thereof the property comprised therein. *Tennant* v. *Union Bank of Canada*, [1894] A. C. 31 ; affirming 19 A. R. 1.

See Stevenson v. *Canadian Bank of Commerce*, 23 S. C. R. 530, *ante* 70.

See, also, COLLATERAL SECURITY.

IV. DEPOSITS.

Attachment of Deposits.]—*See County of Wentworth* v. *Smith*, 15 P. R. 372, *ante* 58.

Deposit After Suspension.]—A person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit. *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152.

Special Deposit—*Wrongful Refusal to Pay Out—Damages.*]—The damages recoverable by a non-trading depositor in the savings bank department of a bank who has made his deposit subject to special terms, on the wrongful refusal of the bank to pay it to him personally, are limited to the interest on the money.

Marzetti v. *Williams*, 1 B. & Ad. 415; and *Rolin* v. *Steward*, 14 C. B. 594, distinguished.

A bank having received a deposit subject to certain notice of withdrawal, if required, cannot set up as a defence to an action for the deposit the absence of such notice, unless the refusal to pay was based on that ground.

The defendants having paid into Court twenty cents less than the correct amount due by them, the plaintiff was held entitled to full costs. *Henderson* v. *Bank of Hamilton*, 25 O. R. 641. Appealed as to the question of costs and affirmed, 22 A. R. 414.

Transfer of Deposit by Husband to Wife.]—*See Sherratt* v. *Merchants Bank of Canada*, 21 A. R. 473, *post*, HUSBAND AND WIFE, IV.

V. TRUSTS.

Execution of Trust—*Registration of Transfer of Shares—Notice of Trust.*]—Where the respondent bank (incorporated by 18 Vict. ch. 202) registered an absolute transfer of its shares, which had been executed by trustees and executors under a will to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatees' lawful issue at his death, and the transferee disposed of the shares so as to defeat the rights of the issue :—

Held, that such registration, unless with actual knowledge of a breach of trust, was not wrongful, having regard to section 36 of the Act, which enacts that the bank is not bound to see to the execution of any trusts, express, implied, or constructive, to which any of its shares may be subject.

Notice that the shares were held by the trustees and executors in trust; possession by the bank of a copy of the will; the facts that transfers of other of its shares by the same trustees to other residuary legatees contained notice of substitution, that the president of the bank was also an executor of the will, and that the law agent of the bank was also law agent of the executors :—

Held, to be insufficient to affect the bank with the knowledge of the particular trusts sought to be enforced. *Simpson* v. *Molsons Bank*, [1895] A. C. 270.

Shares in Trust.]—The curator to the substitution of W. Petry paid to the respondents the sum of $8,632, to redeem 34 shares of the capital stock of the Bank of Montreal entered in the books of the bank in the name of W. G. P. in trust, and which the said W. G. P. one of the *grevés* and manager of the estate had pledged to respondents for advances made to him personally. J. H. P. *et al.*, appellants, representing the substitution, by their action demanded to be refunded the money which they alleged H. J. P., one of them, had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to shew they formed part of the estate, and no *acte d' emploi* or *remploi* to shew that they were acquired with the assets of the estate :—

Held, per Ritchie, C.J., and Fournier and Taschereau, JJ., affirming the judgment of the Court below, that the debt of W. G. P. having been paid by the curator with full knowledge of the facts, the appellants could not recover. Articles 1047, 1048 C.C.

Per Strong and Fournier, JJ.—That bank stock cannot be held as regards third parties in good faith to form part of substituted property on the ground that it has been purchased with the moneys belonging to the substitution without an act of investment in the name of the substitution and a due registration thereof. Articles 931, 938, 939 C.C. (Patterson, J., dissenting.) *Petry* v. *Caisse d'Economie de Notre-Dame de Quebec*, 19 S. C. R. 713.

VI. WINDING-UP.

Appointment of Liquidators — *Right to Appoint Another Bank.*]—The Winding-up Act provides that the shareholders and creditors of a company in liquidation shall severally meet and nominate persons who are to be appointed liquidators, and the Judge having the appointment shall choose the liquidators from among

such nominees. In the case of the Bank of Liverpool the Judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank :—

Held, affirming the judgment of the Court below, 22 N.S. Rep. 97, that there is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators; that a bank may be appointed liquidator; and that if any appeal lies from the decision of the Judge in exercising his judgment as to the appointment, such discretion was wisely exercised in this case. *Forsythe* v. *Bank of Nova Scotia. In re Bank of Liverpool*, 18 S. C. R. 707.

Contributories—*Shares—Transfers.*]—After a winding-up order has been made, it is too late for holders of shares, entered as such in the books of the bank, to escape liability by shewing irregularities in transfers to more or less remote predecessors in title.

A loan company which advances money on the security of shares, which are transferred to it, and accepted by it, in the ordinary absolute form, cannot escape liability on the ground that it is merely a trustee for the borrower.

Judgment of Robertson, J., affirmed. *In re Central Bank of Canada. Home Savings and Loan Company's Case*, 18 A. R. 489.

Liquidators' Commission on Set-off.]—In fixing the liquidators' commission or compensation in the winding-up proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set-off, but not actually received by the liquidators; and in this case a commission of two and a-quarter per cent. having been allowed on the gross amount of moneys actually collected, a further commission of one and a-quarter per cent. on a sum of $231,000, consisting of amounts adjusted or set-off was allowed.

So far as possible, the amount allowed as compensation to liquidators in such winding-up proceedings should be evenly spread over the whole period of the liquidation, so as to ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators, when more than one. *In re Central Bank, Lye's Claim*, 22 O. R. 247.

Winding-up of Companies.] — *See* COMPANY, VIII.

BARGAIN AND SALE.

See SALE OF GOODS—SALE OF LAND.

BARRISTER-AT-LAW.

See COSTS, VI.—SOLICITOR.

BASTARD.

Evidence of Illegitimacy—*Declaration of Deceased.*]—In answer to a claim of heirship to one S., a witness, who had known him in England as a boy, before he came to Canada, alleged that S. had always been reputed to be illegitimate, and had been left by his mother on the parish, and that he had also known his reputed father, who bore a different surname. Another witness stated that S. had told him that one H. was his father, and that S. on his return from a visit to England said he had seen the place where his mother met with her misfortune :—

Held, sufficient evidence of illegitimacy to displace the claim of heirship. *In re Starely, Attorney-General* v. *Brunsden*, 24 O. R. 324.

BENEFICIAL INTEREST.

See COVENANT.

BENEVOLENT SOCIETIES.

Assignment for the Benefit of Creditors—*Interest of Debtor in Fund.*]—An assignment by a debtor of all his estate for the benefit of his creditors under R. S. O. ch. 124, is a voluntary assignment in the sense that it is optional with the debtor whether he makes it or not; but the form in which it is made and the effect of such form not being optional with him, in this sense it is not voluntary; and having regard to the provision of section 11 of the Benevolent Societies Act, R. S. O. ch. 172, such an assignment does not pass to the assignee the benefit to which the debtor is entitled in the fund of a society properly incorporated under that Act. *Re Unitt and Pratt*, 23 O. R. 78.

Change of Beneficiary.]—An endowment certificate issued in 1889 by a benevolent society to a member, and payable on his death, half to his father and half to his mother, contained a provision that should there be any change in the name of the payee, the secretary should be notified, and an endorsement thereof made on the certificate. The member subsequently married, when he informed his wife that he would have the certificate changed, as he intended it for her, giving her the certificate, which she deposited in a trunk used by both in common, he continuing to pay the premium :—

Held, that this was not sufficient to displace the terms of the contract, as manifested on the face of the certificate; and, further, so far as the mother was concerned, she was amply protected, 53 Vict. ch. 39, sec. 5 (O.), which applied to the certificate in question, creating a trust in her favour.

That statute is retrospective as to current policies, issued before it came into force. *Simmons* v. *Simmons*, 24 O. R. 662.

Expulsion of Member.]—The plaintiff, as executor of his deceased son, sued the defendants, an incorporated benefit society, to recover the money benefit accruing upon the death of a member. Before the death the defendants had passed a resolution removing the son from the list of members, on the ground that he had given untruthful answers to questions as to his state of health put to him upon his admission.

The complaints against him had been referred to the committee of management, who had reported in his favour, but the society at a meeting refused to adopt the report, and, in the absence of the deceased, without any notice to him or opportunity of appearing, accepted an *ex parte* statement made by a member present at the meeting, which had not been before the committee, and acted upon it by forthwith passing the resolution referred to. By the rules of the society it was provided that if it should be established that a new member had not answered truthfully, he should *ipso facto* be excluded from the society; and also that if it was proved after his admission that he had not answered truthfully, he should, by reason thereof, be struck off the list of members. The committee of management was the body appointed under the rules to take the evidence and find the facts, their report being subject to confirmation or rejection by the society:—

Held, that upon the principles governing such an inquiry, the person accused should not be condemned without a fair chance of hearing the evidence against him, and of being heard in his own defence; that the action of the defendants was contrary to these principles and to their own rules; and, therefore, the expulsion was not legally accomplished, and the plaintiff was entitled to recover. *Gravel* v. *L'Union St. Thomas*, 24 O. R. 1.

Foreign Benevolent Society—*Rules of Society.*]—A policy upon the life of the plaintiff's deceased husband was issued before his marriage by a foreign benevolent society not incorporated or registered under any Act of this Province, payable to his mother, who predeceased him, or his executors. By one of the by-laws of the society it was provided that where the insured married after the date of the policy, it *ipso facto* became payable to the widow, "unless otherwise ordered after date of such marriage." Under another by-law the policy could be made payable only to a wife, an affianced wife, a blood relation, or a person dependent on the assured, and was not to be willed or transferred to any other person. By his will the deceased purported to give to his widow the amount of this and another insurance, subject, however, to the payment of his debts:—

Held, that the policy was capable of being controlled by conditions not set out upon its face, because section 4 of 52 Vict. ch. 32 (O.), amending the Ontario Insurance Act, R. S. O. ch. 167, applies only to the companies to which the latter Act applies; and as the insurance and the rights of the parties under it did not depend upon anything contained in the Act to secure to wives and children the benefit of life insurance, R. S. O. ch. 136, it was not necessary to consider whether it was brought within the scope of that Act by its amendment by 51 Vict. ch. 22, sec. 2 (O.); and, therefore, the binding terms of the contract were to be found upon its face and in the rules of the society, which formed part of the contract:—

Held, also, that under the terms upon which the society agreed to pay this money, the insured had no power to bequeath any part of it to his executors or his creditors, and the society had the right to say that their contract was to pay the money only within a certain class; that the insured had no right to substitute a beneficiary outside that class; and therefore the money belonged to the widow free from the obligation to pay debts. *Morgan* v. *Hunt*, 26 O. R. 568.

Initiation—*Condition Precedent.*]—Where the constitution of a benevolent society provides that beneficiary certificates may be granted to persons who take a certain degree, all the steps laid down in the constitution in connection with the taking of that degree must be complied with before any beneficiary certificates can be legally issued.

Where, therefore, the holder of a certificate, though in all other respects duly qualified and accepted as a member of the degree in question, dies before actually going through the ceremony of initiation, the certificate is not enforceable.

Judgment of Street, J., affirmed. *Devins* v. *Royal Templars of Temperance*, 20 A. R. 259.

Insurance Act.]—The defendant, with the alleged object of starting a branch of a society, called the "International Fraternal Alliance," having its head office in the United States, while in this Province induced a number of persons to make application for membership therein, and to pay a joining fee of $5, which in addition to certain alleged social benefits entitled a member on application therefor, and on payment of certain fees, to pecuniary benefits, namely, a certificate entitling the member to a weekly payment in case of sickness or accident and certain other sums in case of death on or after a stated period. The defendant gave the applicants a receipt acknowledging the payment of the $5 for, as stated, the purposes mentioned in an agreement written thereunder, namely, to forward to the head office the application on signature thereof, and if declined to return amount paid; but, if accepted, the payer was constituted a member, etc., entitled to the full benefits of all social, etc., advantages; and thereafter might secure all the pecuniary benefits on application therefor:—

Held, that the defendant was carrying on the business of accident insurance without having obtained the necessary license therefor contrary to section 49 of the Insurance Act, R. S. C. ch. 124: and that no protection was afforded by section 43, relating to fraternal, etc., societies, the scheme not being an insurance of the lives of the members exclusively; and the conviction therefor of the defendant for carrying on such business was therefore affirmed. *Regina* v. *Stapleton*, 21 O. R. 679.

Payment Into Court.]—On an application by a benevolent society for leave to pay insurance money into Court, claimed by different parties:—

Held, that sub-section 5 of section 53 of the Judicature Act extends the benefit of the Act for the relief of trustees to such cases, and that the society was entitled to pay the money in.

Decision of Ferguson, J., reversed. *Re Bajus*, 24 O. R. 397.

See INSURANCE, V.

BETTING.

See GAMING.

BICYCLE.

Riding on Sidewalk.]—A bicycle is a "vehicle," and riding it on the sidewalk is "encumbering" the street within the meaning of sub-section 27 of section 496 of the Consolidated Municipal Act, and of a by-law of a municipality passed under it.

A *certiorari* to bring up a conviction under the by-law was refused.

Regina v. *Plummer*, 30 U. C. R. 41, approved. *Regina* v. *Justin*, 24 O. R. 327.

BIGAMY.

See CONSTITUTIONAL LAW—CRIMINAL LAW.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. DEFENCES TO ACTIONS.

Accommodation—*Company—Payment into Court.*]—In an action upon a promissory note the only fact shewn by the defendants, an incorporated company, as the basis of a defence, was that they made the note for the accommodation of one of their directors. They did not shew that the plaintiffs were not holders for value in due course without notice; while the plaintiffs swore that the note was discounted before maturity in the usual course of their banking business; and it was admitted that one of the trustees for the defendants, who were insolvent, had offered to the plaintiffs the compromise of fifty cents on the dollar, which the undoubted creditors were accepting:—

Held, upon a motion for summary judgment under Rule 739, that the defence alleged was not founded upon any known facts, but was mere guess work, and unless the defendants paid into Court a substantial portion of the plaintiffs' claim as a condition of being allowed to defend, the motion should be granted.

The presumption that value has been given may be done away with in the case of notes, which have had their origin in actual fraud, but not in the case of notes made for the accommodation of others; and even where accommodation notes are made by an incorporated company, the onus of shewing value is not shifted over to the plaintiffs.

Re Peruvian Railways Co., L. R. 2 Ch. 617, followed.

Millard v. *Badeley*, [1884] W. N., p. 98, and *Fuller* v. *Alexander*, 47 L. T. N. S. 443, distinguished. *Merchants' National Bank* v. *Ontario Coal Co.*, 16 P. R. 87.

Accommodation.]—*See Bank of Nova Scotia* v. *Fish*, 24 S. C. R. 709; and *St. Stephen's Bank* v. *Bonness*, 24 S. C. R. 710.

Bad Faith of Holder — *Conspiracy.*] — P. indorsed a note for the accommodation of the maker, who did not pay it at maturity, but having been sued with P. he procured the latter's indorsement to another note, agreeing to settle the suit with the proceeds if it was discounted. He applied to a bill broker for the discount, who took it to M. a solicitor, between whom and the broker there was an agreement by which they purchased notes for mutual profit. M. agreed to discount the note. M.'s firm had a judgment against the maker of the note, and an arrangement was made with the broker by which the latter was to delay paying over the money so that proceedings could be taken to garnish it. This was carried out; the broker received the proceeds of the discounted note, and while pretending to pay it over was served with the garnishee process, and forbidden to pay more than the balance after deduction of the amount of the judgment and costs; and he offered this amount to the maker of the note which was refused. P., the indorser, then brought an action to restrain M. and the broker from dealing with the discounted note, and for its delivery to himself:—

Held, affirming the decision of the Court of Appeal, that the broker was aware that the note was indorsed by P. for the purpose of settling the suit on the former note; that the broker and M. were partners in the transaction of discounting the note, and the broker's knowledge was M.'s knowledge; that the property in the note never passed to the broker, and M. could only take it subject to the conditions under which the broker held it; that the broker, not being the holder of the note, there was no debt due from him to the maker, and the garnishee order had no effect as against P.; and that the note was held by M. in bad faith, and P. was entitled to recover it back. *Millar* v. *Plummer*, 22 S. C. R. 253.

Consideration.]—C having purchased Y.'s interest in certain lands which were in the city of Montreal, and upon which there was a mortgage of $80,000, gave his promissory notes to Y. for the balance of the purchase price. Subsequently C. failed, and Y. being liable for the mortgage, C. agreed to take the necessary steps to obtain Y.'s discharge from the mortgagees on a payment of one thousand dollars, and Y. signed a document *sous seing privé*, dated 18th February, 1879, agreeing that all parties should be in the same position as if the deed of sale had never been passed. The mortgagees subsequently gave a discharge to Y. in conformity with the above agreement. In an action taken by Y. against C. on his promissory note:—

Held, affirming the judgments of the Courts below, that there was no consideration given for the notes, and that C. was discharged from all liability under the document of the 18th February, 1879. *See* 33 L. C. Jur. 106. *Yon* v. *Cassidy*, 18 S. C. R. 713.

Consideration — *Purchase Money of Machine—Alleged Defects.*]—*See Esson* v. *McGregor*, 20 S. C. R. 176.

Election Law—*Illegality.*]—S. (appellant's husband), brought an action against St. L. Bros. on a promissory note for $4,000, a renewal of a note for the same amount made by S., endorsed by him and handed to St. L. Bros., alleging that the original note had been made and discounted for the accommodation of St. L. The evidence shewed that the proceeds of the note were paid over to one D., as agent for S., to be used as a portion of a provincial election fund controlled by S.:—

Held, affirming the judgment of the Court below, that the plaintiff could not recover, even assuming a promise to pay on the part of St. L. Bros., the transaction being illegal under 38 Vict. ch. 7, sec. 266 (P.Q.), now R. S. Q., Article 425, which makes void any contract, promise or undertaking, in any way relating to an election under the said Act. *Dansereau* v. *St. Louis*, 18 S. C. R. 587.

Mortgage—*Collateral Security—Discharge.*]—A. and B., partners in business, borrowed money from C., giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved, A. assumed all the liabilities of the firm, and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note:—

Held, affirming the decision of the Court of Appeal, 20 A. R. 695, that the note having been given for the mortgage debt C. could not recover without being prepared, upon payment, to convey to B. the mortgaged lands which he had incapacitated himself from doing:—

Held, also, that by the terms of the dissolution of partnership the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change, his release of the principal, A., discharged B., the surety, from the liability for the debt. *Allison* v. *McDonald*, 23 S. C. R. 635.

Partnership—*Use of Firm Name.*]—E. was a member of the firm of S. C. & Co., and also a member of the firm of E. & Co., and in order to raise money for the use of E. & Co. he made a promissory note which he signed with the name of the other firm, and indorsing it in the name of E. & Co. had it discounted. The officers of the bank which discounted the note knew the handwriting of E., with whom the bank had had frequent dealings. In an action against the makers of the note C. pleaded that it was made by E. in fraud of his partners, and the jury found that S. C. & Co. had not authorized the making of the note, but did not answer questions submitted as to the knowledge of the bank of want of authority:—

Held, reversing the judgment of the Court below, that the note was made by E. in fraud of his partners, and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry the Bank could not recover against C. *Creighton.* v *Halifax Banking Co.*, 18 S. C. R. 140.

Patent Right.]—A promissory note, made before the coming into force of the Bills of Exchange Act, 1890, the consideration of which was the purchase money of a patent right, without having the words "given for a patent right" written or printed across its face when taken by the payee, or when transferred by him, as required by R. S. C. ch. 123, secs. 12, 14, was held void in the hands of an endorsee for value, with notice of the consideration.

Judgment of the County Court of Lennox and Addington reversed. *Johnson* v. *Martin*, 19 A. R. 592.

Patent Right.]—Where part of the consideration for the transfer of a patent right from one partner to another was the giving, at the plaintiffs' suggestion, of the notes of the firm for the individual debt of the transferor to the plaintiffs:—

Held, that under sub-section 4 of section 30 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), the words "given for a patent right" should have been written across the notes so given: and in the absence thereof the plaintiffs could not recover. *Samuel* v. *Fairgrieve*, 24 O. R. 486.

This decision was reversed by the Court of Appeal, 21 A. R. 418, but was restored by the Supreme Court, *sub nom. Craig* v. *Samuel*, 24 S. C. R. 278.

Striking Out Defence.]—Upon a summary application under Rule 1322 (387), to strike out defences on the ground that they disclose "no reasonable answer," the Court is not to look upon the matter with the same strictness as upon demurrer; a party should not be lightly deprived of a ground of substantial defence by the summary process of a judgment in Chambers.

And in an action upon a promissory note, alleged by defendants to have been taken by plaintiffs after maturity, defences of payment, estoppel by conduct, and a claim for equitable protection arising out of agreement, were allowed to remain on the record. *Bank of Hamilton* v. *George*, 16 P. R. 418.

Surety—*Discharge of Maker.*]—Where the holder of a promissory note had agreed to accept a third party as his debtor in lieu of the maker:—

Held, affirming the judgment of the Court of Appeal, 20 A. R. 298, *sub nom Holliday* v. *Hogan*, that, as according to the evidence, there was a complete novation of the maker's debt secured by the note, and a release of the maker in respect thereof, the indorsers on the note were also released. *Holliday* v. *Jackson*, 22 S. C. R. 479.

Transfer After Maturity—*Equity Attaching.*]—An agreement between the maker and payee of a promissory note that it shall only be used for a particular purpose, constitutes an equity which, if the note is used in violation of that agreement, attaches to it in the hands of a *bonâ fide* holder for value who takes it after dishonour. Strong, C.J. and Taschereau, J., dissenting. *MacArthur* v. *MacDowall*, 23 S. C. R. 571.

II. Form.

Lien Note.]—An instrument in the form of a promissory note, given for part of the price of

an article, with the added condition "that the title and right to the possession of the property for which this note is given shall remain in (the vendors) until this note is paid" is not a promissory note or negotiable instrument, and the holder thereof takes it subject to any defence available to the maker against the vendors.

Judgment of the First Division Court of Peel reversed. *Dominion Bank* v. *Wiggins*, 21 A. R. 275.

Undertaking.]—Judgment was recovered in a Division Court for $108.63 being $100 balance due and $8.63 interest on a document signed by defendants, namely: "To G. T., we hereby undertake to pay the executors of the late J. D. K., the sum of $375 on a mortgage they hold against the Royal Hotel property, Streetsville, thereby reducing the amount to $2,000":—

Held, that the document, even if a note, under sec. 82 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), which was doubtful, only enured to the benefit of the executors and not to G. T.; and therefore the action being merely for breach of contract, the judgment was in excess of the jurisdiction which is limited to $100, but that prohibition would only go for the excess. *Trimble* v. *Miller*, 22 O. R. 500.

III. Parties Liable.

Agent—*Endorsement "per pro."*]—Where an agent accepts or endorses "per pro," the taker of a bill or note so accepted or endorsed is bound to inquire as to the extent of the agent's authority, and where an agent has such authority, his abuse of it does not affect a *bonâ fide* holder for value. *Bryant* v. *Banque du Peuple*. *Bryant* v. *Quebec Bank*, [1893] A. C. 170.

Attorney—*Husband and Wife.*]—Where by a document indorsed "procuration générale et spéciale," a wife being sole owner constituted her husband "son procureur général et spécial," to administer her affairs, specifying such acts as drawing bills of exchange and making promissory notes:—

Held, that the wife's liability extended to all promissory notes granted by the husband, and was not limited by Article 181 of the Civil Code to such notes as were required for the purposes of the administration. *Banque D'Hochelaga* v. *Jodoin*, [1895] A. C. 612.

Company—*Descriptive Words—Liability of Members.*]—The manager of an incorporated company, in payment for goods purchased by him as such, gave a promissory note beginning "sixty days after date we promise to pay" and signed "R., manager O. L. Co." In an action against the individual members of the company the defence was that R. alone was liable on the note and that the words "manager," etc., were merely descriptive of his business:—

Held, affirming the decision of the Court below, that as the evidence established that both R. and the payees of the note intended to make the company liable; and as R. had authority, as manager, to make a note on which the company would be liable; and as the form of the note was sufficient to effect that purpose; the defence could not prevail and the holders of the note were entitled to recover. *Fairchild* v. *Ferguson*, 21 S. C. R. 484.

Company—*Discount—Company's Benefit.*]—One S., president and treasurer of a cheese company, kept an account with the defendants, private bankers, on behalf of the company, headed "S., president of B. Cheese Company," upon which he drew from time to time by cheques signed "S., president." The account being overdrawn, the defendants, in good faith, at the request of S., discounted a note in their own favour signed "S., president," with the seal of the company attached (but made without the knowledge or authority of the directors, by whom with the president under the by-laws of the company its affairs were to be managed), and placed the proceeds to the credit of the account, which were afterwards chequed out by S. to pay creditors of the company. At this time S. was a defaulter to the company to a larger amount than the note. In the meanwhile after two renewals the note was charged up by the defendants to the account, with the consent of S. but without the authority of the directors who were unaware that S. was a defaulter, but knew that he kept the bank account in his own name as president, depositing therein the proceeds of sales of cheese and drawing upon it to pay the company's creditors. The company now sued to recover the amount of the note from the defendants, who did not plead fraud, but alleged they had fully accounted:—

Held, that the plaintiffs were bound to affirm or disaffirm the transaction altogether and could not repudiate the liability upon the note and at the same time take the benefit of it.

Decision of Street, J., reversed. *Bridgewater Cheese Factory Co.* v. *Murphy*, 26 O. R. 327. Affirmed in appeal, 23 A. R. 66.

Endorsement by Stranger.]—Where a promissory note payable to a named payee is indorsed by another person before delivery of the note to the payee, the former is liable as indorser to a holder in due course by virtue of sections 56 and 88 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.).

Judgment of the County Court of York reversed. *Duthie* v. *Essery*, 22 A. R. 191.

Maker or Endorser—*Intention.*]—W. having agreed to become security for a debt, wrote his name upon the back of a promissory note drawn in favour of the creditors and signed by the debtor. The note was not endorsed by the payees, and no notice of the dishonour was given to W. when it matured and was not paid. An action was brought against W. as maker of the note jointly with the debtor, on the trial of which a nonsuit was entered with leave reserved to plaintiffs to move for judgment in their favour, if there was any evidence to go to the jury as to W.'s liability:—

Held, affirming the judgment of the Court below, that there was no evidence to go to the jury that W. intended to be as a maker of the note, and plaintiffs were rightly nonsuited. *Ayr American Plough Co.* v. *Wallace*, 21 S. C. R. 256

Maker or Endorser—*Intention.*]—A promissory note, for value received, at three months, was made by one of the defendants to the order of the testator of the plaintiffs. Some years afterwards the maker conveyed his farm to his son, the other defendant, on a verbal understanding, unknown to the payee, that the son was to pay the father's debts, including the note. After the conveyance, the payee having pressed the father for security, the son, without any endorsement of the note by the payee, wrote his name on the back of it, all parties supposing that he had thereby rendered himself liable as endorser. Subsequently he made a payment on account to the payee.

In an action against father and son :—

Held, that no liability attached to the son, either as endorser or guarantor, or as trustee of the property conveyed to him. *Robertson* v. *Lonsdale*, 21 O. R. 660.

Partners.]—*See Wigle* v. *Williams*, 24 S. C. R. 713.

IV. Presentment and Notice of Dishonour.

Cheques—*Presentation by Post—Sufficiency of Notice of Dishonour.*]—The Dominion Government having a deposit account of public moneys with the Bank of P. E. I. upon which they were entitled to draw at any time, the Deputy Minister drew an official cheque thereon for $30,000 which, together with a number of other cheques, he sent to the branch of the Bank of Montreal at O., at which branch bank the Government had also a deposit account. The said branch bank thereupon placed the amount of the cheque to the credit of the Dominion Government on the books of the bank, the manager thereof endorsing the same in blank and forwarding it to the head office of his bank at Montreal. The cheque was then sent forward by mail from the head office of the Bank of Montreal to the Bank of P. E. I. for collection, but was not paid by the latter bank which, subsequently to the presentment of the cheque, suspended payment generally :—

Held, (1). That the Bank of Montreal were mere agents for the collection of this cheque and that, although the proceeds of the cheque had been credited to the Government upon the books of the bank, it never was the intention of the bank to treat the cheque as having been discounted by them; consequently, as the bank did not acquire property in the cheque, and were never holders of it for value, they were entitled on the dishonour of the cheque to reverse the entry in their books and charge the amount thereof against the Government. *Giles* v. *Perkins*, 9 East 12; *Ex parte Barkworth*, 2 De G. & J. 194, referred to. (2.) That the mode of presenting a cheque on a bank by transmitting it to the drawee by mail, is a legal and customary mode of presentment. *Heywood* v. *Pickering*, L. R. 9 Q. B. 428; *Prideaux* v. *Criddle*, L. R. 4 Q. B. 455, referred to. (3.) That although a collecting bank cannot enlarge the time for presentment by circulating a bill or cheque amongst its branches, yet, if it has been endorsed to and transmitted through them for collection, the different branches or agencies are to be regarded as separate and independent endorsers for the purpose of giving notice of dishonour. *Clode* v. *Bayley*, 12 M. & W. 51; *Brown* v. *London & N. W. Ry. Co.*, 4 B. & S. 326, referred to. (4.) That the defendants, whether considered as mere agents for the collection, or as holders, of the cheque for value, were, as regards the drawer, only called upon to shew that there was no unreasonable delay in presentment and in giving notice of non-payment; and, no such delay having occurred, the Crown was not relieved from liability as drawer of the cheque. (5.) In a letter from the manager of the Bank of Montreal, at Ottawa, to the Deputy Minister of Finance, which the defendants put in evidence as a notice to the Crown—the drawer—of the dishonour of the cheque by the drawees—the Bank of P. E. I., the fact of non-payment was stated as follows :—"I am now advised that it has not yet been covered by Bank of P. E. Island. In case of it being returned here again unpaid I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the Department" :—

Held, that the words "not covered," as used in this letter, were equivalent to "not paid," or to "unpaid;" and, being so construed, the letter was a sufficient legal notice of dishonour. *Bailey* v. *Porter*, 14 M. & W. 44; *Paul* v. *Joel*, 27 L. J. Ex. 383, referred to. *The Queen* v. *Bank of Montreal*, 1 Ex. C. R. 154.

Cheque of Third Person—*Delay in giving Notice of Dishonour.*]—Where the cheque of a third person is received from a debtor as conditional payment of an antecedent debt, the creditor must without undue delay present the cheque for payment, and if it is dishonoured notify the debtor of the fact and claim recourse against him on the original indebtedness. Unless this is done the creditor will be taken to have accepted the cheque in payment of the debt and the debtor is discharged.

Judgment of the First Division Court of Wentworth affirmed. *Sawyer* v. *Thomas*, 18 A. R. 129.

Waiver.]—A statement by the endorser of a dishonoured note to the holder that he would see the maker about it, and his subsequent statement that he had seen the maker who promised to pay as soon as he could, with a request not to "crowd the note," are not in themselves sufficient evidence of waiver of notice of dishonour.

What is sufficient evidence of such waiver discussed. *Britton* v. *Milsom*, 19 A. R. 96.

BILLS OF LADING.

See In re Central Bank of Canada; Canada Shipping Company's Case, 21 O. R. 515, and *Peuchen* v. *Imperial Bank*, 20 O. R. 325, *ante* 88.

BILLS OF SALE.

I. Generally.

Assignment for the Benefit of Creditors.]—An assignment of personal property in trust to sell the same and apply the proceeds to the payment of debts due certain named creditors of the assignor is a bill of sale within section 4 of the Nova Scotia Bills of Sale Act, R. S. N. S. 5th ser. ch. 92, it not being an assignment for the general benefit of creditors and so excepted from the operation of the Act by section 10. *Archibald* v. *Hubley*, 18 S. C. R. 116.

Consideration Not Truly Stated.]—*See Marthinson* v. *Patterson*, 20 O. R. 125, 20 O. R. 720, 19 A. R. 188, *post* 107.

Foreign Contract as to Chattels in Ontario.]—Held, following *River Stave Co.* v. *Sill*, 12 O. R. 557, that goods which were in Ontario at the time of the execution of a document of hypothecation of them were subject to the provisions of R. S. O. ch. 125, although the parties thereto were at the time domiciled in a foreign country: *Marthinson* v. *Patterson*, 20 O. R. 720; 19 A. R. 188.

Time for Payment.]—Where a chattel mortgage is taken to secure a debt, the time for payment may be extended beyond a year. *Kerry* v. *James*, 21 A. R. 338.

II. Affidavit of Bona Fides.

Adherence to Statutory Form.]—The omission of the date and the words "before me" from the jurat of an affidavit accompanying a bill of sale under section 4 of the Nova Scotia Act makes such affidavit void and the defect cannot be supplied by parol evidence in proceedings by a creditor of the assignor against the mortgaged goods. *Archibald* v. *Hubley*, 18 S. C. R. 116.

Adherence to Statutory Form.]—Where an affidavit of *bona fides* to a bill of sale stated that the sale was not made for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, while the form given in the statute uses the words "against any creditors of the bargainor," such violation did not avoid the bill of sale as against execution creditors, the two expressions being substantially the same. Gwynne, J., dissenting.

The statute requires the affidavit to be made by a witness to the execution of the bill of sale, but as attestation is not essential to the validity of the instrument its execution can be proved by any competent witness. *Emerson* v. *Bannerman*, 19 S. C. R. 1.

Adherence to Statutory Form.]—The Act in force in Nova Scotia relating to bills of sale, R. S. N. S. 5th ser. ch. 92, requires by section 4 that every such instrument shall be accompanied by an affidavit by the grantor, and section 11 provides that the affidavit shall be, as nearly as may be, in the form given in schedules to the Act. The form prescribed begins as follows: "I, A. B., of ....., in the County of .....(occupation), make oath and say." An affidavit accompanying a bill of sale having omitted to state the occupation of the grantor:—

Held, per Strong, Gwynne and Patterson, JJ., that as the affidavit referred in terms to the instrument itself, in which the occupation of the deponent was stated, the statute was complied with.

Per Taschereau, J.—The onus was upon the persons attacking the bill of sale to prove, by direct evidence, that the grantor had an occupation, which they had failed to do. The judgment of the Supreme Court of Nova Scotia was reversed. *Smith* v. *McLean*, 21 S. C. R. 355.

Adherence to Statutory Form.—By R. S. N. S. 5th ser. ch. 92, sec. 4, every chattel mortgage must be accompanied by an affidavit of *bona fides*, "as nearly as may be" in the form given in a schedule to the Act. The form of the jurat to such affidavit in the schedule is: "Sworn to at.....in the county of....., this .... day of ..... A.D. .... Before me ....., a commissioner," etc. :—

Held, reversing the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that where the jurat to an affidavit was "sworn to at Middleton this 6th day of July, A.D. 1891, etc., without naming the county, the mortgage was void, notwithstanding the affidavit was headed "in the county of Annapolis." *Archibald* v. *Hubley*, 18 S. C. R. 116, followed; *Smith* v. *McLean*, 21 S. C. R. 355, distinguished. *Morse* v. *Phinney*, 22 S. C. R. 563.

Adherence to Statutory Form.]—The Bills of Sale Act, Nova Scotia, R. S. N. S. 5th ser. ch. 92, by section 4 requires a mortgage given to secure an existing indebtedness to be accompanied by an affidavit in the form prescribed in a schedule to the Act, and by section 5, if the mortgage is to secure a debt not matured the affidavit must follow another form. By section 11 either affidavit must be, "as nearly as may be," in the forms prescribed. A mortgage was given to secure both a present and future indebtedness, and was accompanied by a single affidavit combining the main features of both forms:—

Held, affirming the decision of the Court below, Gwynne, J., dissenting, that this affidavit was not "as nearly as may be" in the form prescribed; that there would have been no difficulty in complying strictly with the requirements of the Act; and though the legal effect might have been the same the mortgage was void for want of such compliance. *Reid* v. *Creighton*, 24 S. C. R. 69.

Designation of Commissioner — *Solicitor's Power to take Affidavit.*]—An affidavit of *bona fides* in a chattel mortgage sworn before a person who is in fact a commissioner authorized to take affidavits in and for the High Court, but who places after his signature in the jurat only the words "A Comr., etc.," is good.

Such an affidavit may be made before a solicitor employed in the office of the mortgagees' solicitors. *Canada Permanent Loan and Savings Co.* v. *Todd*, 22 A. R. 515.

Incorporated Company — *Officer—Agent—Authority.*]—Where the affidavit of *bona fides* of a chattel mortgage to an incorporated trading company was made by the secretary-treasurer, who was also a shareholder in the company and had an important share in the management of its affairs, there being, however, a president and vice-president:—

Held, that the affiant was to be regarded not as one of the mortgagees, but as an agent, and, as no written authority to him was registered, as required by R. S. O. ch. 125, sec. 1, the mortgage was invalid as against creditors.

Bank of Toronto v. *McDougall*, 15 C. P. 475, distinguished.

Freehold Loan Co. v. *Bank of Commerce*, 44 U. C. R. 284, followed. *Greene and Sons Co.* v. *Castleman*, 25 O. R. 113.

Omission of Statement of Indebtedness.]—A mortgagee under a chattel mortgage to secure an existing indebtedness made the affidavit of *bona fides* required by the sixth section of R. S. O. ch. 125, for a mortgage to secure future advances instead of the affidavit required by the second section:—

Held, that the affidavit was defective in not stating "that the mortgagor was justly and truly indebted to the mortgagee," and that the mortgage could not be looked at to aid the affidavit in this requirement. *Midland Loan and Savings Co.* v. *Corrieson*, 20 O. R. 583.

Statement of Consideration.]—The affidavit of *bona fides* on a bill of sale, which the evidence shewed was taken in satisfaction of a previous loan from the bargainee to the bargainor, stated that the sale was *bonâ fide* and for good consideration, namely, $830 (which was the consideration expressed in the bill of sale), advanced by the bargainee by way of a loan:—

Held, Street, J., dissenting, that the affidavit substantially complied with section 5 of R. S. O. ch. 125, and that the addition of the words "advanced, etc., by way of a loan," did not render the affidavit defective. *Ormsby* v. *Jarvis*, *Chapman* v. *Jarvis*, 22 O. R. 11.

III. Change of Possession.

Assignee for the Benefit of Creditors—*Effect of Taking Possession.*]—*See Reid* v. *Creighton*, 24 S. C. R. 69, *ante* 74; and *see*, also, 55 Vict. ch. 26 (O.), and *Clarkson* v. *McMaster*, 25 S. C. R. 96.

Defect—*Subsequent Mortgage—Consideration.*]—A defect in a chattel mortgage is not cured, as against a subsequent mortgagee, by taking possession of the chattels, where the subsequent mortgage was made before such possession, although at the time of the seizure there was no default under the subsequent mortgage, and the mortgagor was by the terms of it entitled to retain possession until default.

Where the full amount mentioned in a chattel mortgage is not actually advanced at the date at which it is given, it should, nevertheless, in the absence of fraudulent intent or bad faith, stand as against a subsequent mortgagee as a security for the amount actually advanced at the time when the subsequent mortgagee's rights accrued.

Marthinson v. *Patterson*, 20 O. R. 125. *See* the next two cases.

Defect—*Subsequent Mortgage—Consideration.*]—Held, that the plaintiff could not under his prior chattel mortgage, by taking possession of the mortgaged chattels, after the execution and filing of a subsequent chattel mortgage to the defendant, although before the time at which the defendant could have taken possession, hold the mortgaged goods against the defendant, where the plaintiff's mortgage did not comply with the Act, if the defendant's mortgage had complied therewith.

Judgment of Street, J., 20 O. R. 125, affirmed on these points.

But where the amount of the consideration for the defendant's mortgage was less than the amount expressed therein and sworn to by the defendant in his affidavit of *bona fides* as the true amount:—

Held, that the defendant's mortgage did not comply with the Act, and the plaintiff, by reason of taking possession as before mentioned, could hold the goods against the defendant.

Robinson v. *Paterson*, 18 U. C. R. 55, followed. *Hamilton* v. *Harrison*, 46 U. C. R. 127, not followed.

Judgment of Street, J., reversed on this point:—

Held, also, that the "subsequent purchasers or mortgagees" referred to in section 4 of R. S. O. ch. 125, are those whose purchases or mortgages are accompanied by an immediate delivery and followed by an actual and continued change of possession, or who have complied with the provisions of the Act; and as neither the plaintiff nor the defendant came within the words, the plaintiff, being prior in point of time, had priority; but if the defendant could be treated as a subsequent mortgagee, he was not a subsequent mortgagee in good faith, by reason of the falsity of his mortgage:—

Held, lastly, doubting, but following *Moffatt* v. *Coulson*, 19 U. C. R. 341, that notice of the plaintiff's mortgage when he took his own was not a reason for depriving the defendant of the status of a subsequent mortgagee in good faith. *Marthinson* v. *Patterson*, 20 O. R. 720. *See* the next case.

Defect—*Subsequent Mortgage—Consideration.*]—Taking possession of the mortgaged chattels does not make good a defective chattel mortgage as against a subsequent validly registered *bonâ fide* chattel mortgage existing at the time such possession is taken.

Per Burton and Maclennan, JJ.A.—It is immaterial whether the subsequent mortgage has been validly registered or not, or whether there has or has not been notice of the prior mortgage.

Per Hagarty, C.J.O.—If neither mortgage has been validly registered, that which is prior in date will prevail.

Per Hagarty, C.J.O., Osler and Maclennan, JJ.A.—A misstatement of the consideration in

a chattel mortgage is not, in the absence of bad faith, *ipso facto* a fatal defect. It is merely an element to be considered in dealing with the question of *bona fides*.

Hamilton v. *Harrison*, 46 U. C. R. 127, and *Jaffray* v. *Robinson*, C.A., 16th September, 1878 (not reported), considered.

Judgment of the Queen's Bench Division, 20 O. R. 720, reversed, and that of Street, J., at the trial, 20 O. R. 125, restored. *Marthinson* v. *Patterson*, 19 A. R. 188.

Transfer from Husband to Wife.]—A sale of chattels, consisting of household furniture in their residence, between a married woman and her husband, living and continuing to live together, without a duly registered bill of sale, is void as against creditors, for in such a case there cannot be said to be an actual and continual change of possession open and reasonably sufficient to afford public notice thereof as required by the Bills of Sale Act. *Hogaboom* v. *Graydon*, 26 O. R. 298.

IV. Description of Goods.

Description.]—Section 6 of the North-West Territories Ordinance provides that: "All the instruments mentioned in this Ordinance whether for the mortgage or sale of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished." The description in a chattel mortgage was as follows: "All and singular the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors, used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of said mortgagors on the north-half of section six, township nineteen, range twenty-eight west of the fourth principal meridian":—

Held, affirming the decision of the Court below, 1 N. W. T. Rep. No. 1, p. 88, that the description was sufficient. *McCall* v. *Wolff*, 13 S. C. R. 130, distinguished. *Hovey* v. *Whiting*, 14 S. C. R. 515, followed. *Thomson* v. *Quirk*, 18 S. C. R. 695.

Description.]—"One piano, Dominion make, numbered 2773," is a sufficient description in a bill of sale.

Judgment of the County Court of Ontario affirmed. *Field* v. *Hart*, 22 A. R. 449.

V. Property Passing.

After Acquired Goods.]—A description in a chattel mortgage of after acquired goods as "all other ready-made clothing, tweeds, trimmings, gents' furnishings, furniture and fixtures and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on business," is sufficient and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage, and the amending Act 55 Vict. ch. 26 (O.), has not made any difference in this respect.

Judgment of MacMahon, J., affirmed. *Horsfall* v. *Boisseau*, 21 A. R. 663.

Book Debts.]—Book debts are not within the Chattel Mortgage Act, R. S. O. ch. 125, and amending Act, 55 Vict. ch. 26, and a transfer of them does not require registration.

Decision of Boyd, C., affirmed. *Thibaudeau* v. *Paul*, 26 O. R. 385.

Crops.]—A mortgagor after default is, as far as crops growing upon the mortgaged land are concerned, in the position of a tenant at sufferance, and cannot by giving a chattel mortgage upon the crops confer a title thereto upon the chattel mortgagee to the prejudice of the mortgagee of the land, or any one claiming under him, who has entered into possession of the land before the crop is harvested.

Laing v. *Ontario Loan and Savings Co.*, 46 U. C. R. 114, explained.

Judgment of the County Court of Brant reversed. *Bloomfield* v. *Hellyer*, 22 A. R. 232.

Future Crops.]—Crops to be grown may be covered by a chattel mortgage and a chattel mortgage of "crops which may be sown during the currency of this mortgage," covers crops sown after the mortgage falls due but remains unpaid; Osler, J.A., dissenting.

Judgment of the County Court of York affirmed. *Canada Permanent Loan and Savings Co.* v. *Todd*, 22 A. R. 515.

VI. Renewal.

Assignee for the Benefit of Creditors.]—An assignee for the benefit of creditors under a general assignment made and registered pursuant to the Assignments and Preferences Act, R. S. O. ch. 124, may renew a chattel mortgage made in favour of his assignor, without the execution and registration of a specific assignment of that mortgage. A renewal statement, in itself in proper form, alleging title through the assignment for the benefit of creditors, is sufficient.

Judgment of the County Court of Simcoe affirmed. *Fleming* v. *Ryan*, 21 A. R. 39. *See* 57 Vict. ch. 37, sec. 18 (O.).

One Year from Date of Filing.]—The ordinance of the North-West Territories relating to chattel mortgages, Ordinance of 1881 No. 5, provides by section 9 that "every mortgage filed in pursuance of this ordinance shall cease to be valid as against the creditors of the person making the same after the expiration of one year from the filing thereof, unless a statement, etc., is again filed within thirty days next preceding the expiration of the said term of one year." A chattel mortgage was filed on August 12th, 1886, and registered at 4.10 p.m. of that day. A renewal of said mortgage was registered at 11.49 a.m. on August 12th, 1887:—

Held, affirming the decision of the Court below, that the renewal was filed within one year from the date of the filing of the original mortgage as provided by the ordinance.

Per Patterson, J.—In computing the time mentioned in this section the day of the original filing should be excluded and the mortgagee

would have had the whole of the 12th August, 1887, for filing the renewal. *Thomson* v. *Quirk*, 18 S. C. R. 695.

VII. Right to Possession.

Absence of Re-demise Clause.]—S., who was engaged in the lumber business, becoming indebted to the suppliants in a large sum of money, mortgaged to them by two separate instruments certain lumber, logs, and timber as security for the repayment of such indebtedness. The first mortgage was executed on the 18th December, 1876, and the second on the 11th May, 1877. By a collateral arrangement made at the time the first mortgage was executed, and by a proviso contained in the second indenture, S. was allowed to remain in possession of the property, and to attend to its manufacture and sale for the benefit of the suppliants. On the 15th day of May, 1878, S. became insolvent, but prior to such insolvency the suppliants had taken possession of the lumber, logs, and timber, and thereafter obtained a release of S.'s equity of redemption from his assignee. On the 6th June, 1877, while S. was in possession of the property in the manner above mentioned, by a letter addressed to the Minister of Inland Revenue, he offered and agreed to pay the Government the sum of $2 per 1,000 ft. b.m. on all lumber to be shipped by him through the canals during the then current season, and also the whole amount of his indebtedness for canal tolls and dues then in arrears. This offer was accepted by the Government, and the agreement was acted upon by S. during the season of 1877. In 1878, after the suppliants had taken possession of the property and began to ship the lumber for themselves without paying the sum agreed upon between S. and the Government, the collector of slide dues refused to allow such lumber to pass through the canals, and caused the same to be seized and detained until the amount due upon it in respect of said agreement was fully paid :—

Held, there being no re-demise clause or proviso in the mortgage of the 18th December, 1876, whereby the mortgagor might have remained in possession until default, the Judge, sitting in the Court of Exchequer, not as a Court of Appeal, but in an Ontario case to administer the law of Ontario, was bound by the decisions in *McAulay* v. *Allen*, 20 C. P. 417, and *Samuel* v. *Coulter*, 28 C. P. 240, to hold that, upon the execution of such mortgage, the suppliants were entitled to immediate possession of the property granted thereby, and might, if they had pleased, at any time have exercised their right to sell thereunder without the mortgagor's intervention or consent. But, while the terms of the second mortgage reserved to the suppliants the right to dictate into what description of lumber the logs should be manufactured, with whom alone contracts for the sale thereof might be entered into, and to whom upon sales it should be consigned, it was expressly provided therein that the business of such manufacture and sale should be transacted through the intervention of the mortgagor for the benefit of the suppliants. The effect and intent of the second mortgage, therefore was to make the suppliants principals and S., the mortgagor, their agent in carrying on the business thereafter with their property, and for their sole benefit, until the property should be sold or they were paid their claim. (2.) As such agent S. must be held to have had sufficient authority to bind the suppliants by his agreement with the Government, which under all the circumstances, was a reasonable and proper one and made in the interest of the suppliants. (3.) But whether S. was, or was not, authorized to make such an agreement with the Government, the suppliants adopted, ratified, and confirmed the agreement by acting under it and advancing moneys to pay the Government in accordance with its terms after they must be held to have had full knowledge of the nature and effect of it. *Merchants Bank of Canada* v. *The Queen*, 1 Ex. C. R. 1.

VIII. Who may Impeach.

Assignee.]—Section 2 of 55 Vict. ch. 26 (O.), does not enable an assignee for the general benefit of creditors to question the validity of the renewal of a chattel mortgage. *Tallman* v. *Smart*, 25 O. R. 661.

Assignee.]—An assignee for the general benefit of creditors is, by virtue of 55 Vict. ch. 26, sec. 2 (O.), entitled to take advantage of irregularities or defects in a chattel mortgage made by the assignor to the same extent as an execution creditor, where such mortgage is by reason of such defect "void against creditors."

As against such an assignee an oral agreement, of which he has notice, by the assignor to give to an endorser a chattel mortgage to secure him against liability, will be enforced.

Judgment of Rose, J., affirmed. *Kerry* v. *James*, 21 A. R. 338.

Assignee—*Creditors.*]—The creditors against whom by section 4 of 55 Vict. ch. 26 (O.) taking possession under a defective chattel mortgage is declared to be of no avail, are creditors having executions in the sheriff's hands at the time possession is taken, or simple contract creditors who, at that time, have commenced proceedings on behalf of themselves and other creditors to set aside the mortgage, or an assignee for the general benefit of creditors who, however, stands in no better position ; and possession taken before the assignment, cures all formal defects.

Judgment of MacMahon, J., reversed, Hagarty, C.J.O., dissenting. *Clarkson* v. *McMaster*, 22 A. R. 138. Reversed by the Supreme Court, 25 S. C. R 96.

Creditors.]—Where a sheriff seized goods under a writ of execution placed in his hands subsequently to the making of an unregistered chattel mortgage, and subsequently also to the mortgagee having, under the power therein in that behalf, taken possession of the goods, and having sold them to a purchaser, who had also gone into possession :—

Held, on interpleader, that the goods were not exigible by the sheriff, as against such purchaser.

"Actual and continued change of possession," which by 55 Vict. ch. 26, sec. 3 (O.), is to be

"open and reasonably sufficient to afford public notice thereof," has reference only to the "actual and continued change of possession," mentioned in sections 1 and 5 of the Chattel Mortgage Act, R. S. O. ch. 125, and does not refer to possession taken by a mortgagee after default.

The words "persons who become creditors" in 55 Viet. ch. 26, sec. 4, mean persons who become execution creditors as provided for in section 2 of that Act, unless they are simple contract creditors suing on behalf of themselves and other creditors as provided for in section 2. *Gillard* v. *Bollert*, 24 O. R. 147.

Creditors.]—"Void as against creditors" in section 2 of 55 Viet. ch. 26 (O.), which extends the provisions of the Act respecting Mortgages and Sales of Personal Property to simple contract creditors suing on behalf of themselves and other creditors, must be read "voidable as against creditors," and a sale of the mortgaged goods by the mortgagee before an election is made by the simple contract creditors commencing proceedings to attack the mortgage cannot be impeached.

Whether such an action can be brought by a simple contract creditor whose debt is not due, *quære*.

Judgment of Armour, C.J., reversed. *Meriden Britannia Co.* v. *Braden*, 21 A. R. 352.

See as to setting aside Bills of Sale as Preferences, BANKRUPTCY, I.

BOND.

Affidavit of Justification—*Cross-examination.*]—A surety on a bond, who is a member of a mercantile partnership, but justifies on his own individual property, not on his share in the partnership, is not compellable, upon cross-examination on his affidavit of justification, to disclose the liabilities of the partnership. *Douglas* v. *Blackey*, 14 P. R. 504.

Collector of Taxes—*Release of Sureties.*]—In an action by a municipal corporation against the sureties to the bonds of a defaulting collector of taxes for the due performance of his duties for 1886 and 1887, it appeared that there had been great laxity on the plaintiffs' part, but that shortly before the collector absconded, in 1888, a majority of the members of the corporation had confidence in his honesty; while the defendants had not sought information from the plaintiffs as to the way he had performed his duties in former years:—

Held, that the non-disclosure by the plaintiffs to the defendants of a motion having been made in council in 1885 that if the roll for 1884 was not returned by the next meeting, an enquiry before the County Court Judge would be asked for; or of a resolution in August, 1885, instructing the treasurer to take proceedings against the collector and his sureties for the balance due on the 1884 roll unless fully settled before September 10th, next, which it was; or of another like resolution in 1886, in reference to the taxes of 1885, which were afterwards, in 1888, paid over in full by him, and of the non-return by him of the 1885 roll until 1888, were not such non-disclosures as amounted to constructive fraud, on the plaintiffs' part sufficient to relieve the defendants from liability on their bonds.

Township of Adjala v. *McElroy*, 9 O. R. 580, specially considered.

Decision of MacMahon, J., 20 O. R. 42, affirmed. *Town of Meaford* v. *Lang*, 20 O. R. 541.

Condition—*Breach—Demand.*]—It is a condition precedent to the liability of the sureties in a bond conditioned for the delivery up by the principal *on demand* of all moneys received and not paid out by him, that a personal demand of payment should be made on him.

And where the principal in a bond so conditioned dies before any demand for payment is personally made on him, a demand on his personal representatives is insufficient to charge the sureties. *Port Elgin Public School Board* v. *Eby*, 26 O. R. 73.

Condition—*Mutuality.*]—H. tendered for the construction of a line of railway pursuant to an advertisement for tenders, and his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender and conditioned, within four days, to provide two acceptable sureties and deposit five per cent. of the amount of his tender in the Bank of Montreal, and also to execute all necessary agreements for the commencement and completion of the work by specified dates, and the prosecution thereof until completed. These conditions were not performed and the contract was eventually given to other persons. In an action against H. on the bond:—

Held, affirming the judgment of the Court of Appeal, 18 A. R. 415, that the agreement made by the bond was unilateral; that the railway company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the work were to be contemporaneous acts, and as no such agreement was entered into H. was not liable on the bond. *Brantford, Waterloo and Lake Erie R. W. Co.* v. *Huffman*, 19 S. C. R. 336.

Consideration—*Stifling Prosecution.*]—In an action on a bond executed by J. to secure an indebtedness of L. to plaintiff bank, the evidence shewed that L., who had married an adopted daughter of J., was agent of the bank, and having embezzled the bank funds the bond was given in consideration of an agreement not to prosecute:—

Held, affirming the judgment of the Court below, that the consideration for said bond was illegal and J. was not liable thereon. *People's Bank of Halifax* v. *Johnson*, 20 S. C. R. 541.

Duress—*Illegality.*]—A bond to secure the payment of the cost of maintaining at an industrial school a boy under fourteen years of age, convicted of larceny, and who otherwise came within the requirements of section 7 of the Act respecting Industrial Schools, given in consequence of the Judge's statement that in default the boy would be sent to the reformatory, is void, this being in law duress.

Per Osler, J.A.—The bond was also illegal and void on the ground that not being required

by law, it was given in order that the law might be put in force which ought to have been put in force and acted upon without it.

Judgment of the County Court of Elgin reversed, Hagarty, C. J. O., dissenting. *City of St. Thomas* v. *Yeorsley*, 22 A. R. 340.

Indemnity — *Payment.*] — The defendants, husband and wife, executed in favour of the plaintiff, the husband's retiring partner, a bond conditioned to be void if the husband should save, defend and keep harmless and fully indemnify the plaintiff from all loss, costs, charges, damages, and expenses which he might at any time sustain, or suffer, or be put to for or by reason of non payment by the husband of the liabilities of the firm as the same became due, it being the intention and the plaintiff was thereby "indemnified or intended so to be from all and every liability of every nature and kind soever of the said firm."

Judgments were recovered by creditors of the firm against them and the plaintiff now sued the defendants to recover the amount to pay these judgments, although he had not himself paid them :—

Held, that he was entitled to have the judgments and costs paid and the amounts necessary were for that purpose ordered to be paid into Court by the defendants.

Decision of Armour, C.J., reversed. *Boyd* v. *Robinson*, 20 O. R. 404.

Indemnity — *Payment—Condition Precedent.*] —Under a bond conditioned to be void if the person on whose behalf it is given "shall indemnify and save harmless (the obligee) from payment of all liability of every nature and kind whatsoever," a right of action against the sureties arises in favour of the obligee as soon as judgment is recovered against him on a claim coming within the security. Payment of such claim by him is not a condition precedent.

Boyd v. *Robinson*, 20 O. R. 404, approved.

Judgment of Armour, C.J., affirmed. *Mewburn* v. *Mackelcan*, 19 A. R. 729.

Interest—*Damages in Lieu of Interest.*]—*See The Queen* v. *Grand Trunk R. W. Co.*, 2 Ex. C. R. 132, *post*, INTEREST.

Penalty.]—A bond without a penalty may be good as a covenant or agreement. *Mewburn* v. *Mackelcan*, 19 A. R. 729.

Registrars — *Liability of Sureties.*]— Held, that the sureties to a bond, dated 8th January, 1886, given in accordance with Schedule A. of the Registry Act, R. S. O. ch. 114, for the performance of the duties, etc., of the registrar, being the form of bond prescribed by the Act in force prior to the introduction of the provisions giving the municipalities a share in the fees, were not liable for the non-payment over of such share.

Decision of Street, J., 19 O. R. 349, affirmed. *County of Middlesex* v. *Smallman*, 20 O. R. 487.

Replevin—*Form of Bond.*]—*See Krunin* v. *Macdonald*, 22 O. R. 484, *post*, DIVISION COURT, II.

BONUS.

By-Law—*Erasion of Act.*]—A municipal corporation cannot now grant a bonus for promoting any manufacture, and what it cannot do directly it will not be allowed to do indirectly or by subterfuge.

Therefore a by-law, valid on its face, purporting to purchase a water privilege for electric lighting purposes, but shewn to be really a by-law to aid the owner of the water privilege in rebuilding a mill, was quashed.

Scott v. *Corporation of Tilsonburg*, 13 A. R. 233, applied. *In re Campbell and Village of Lanark*, 20 A. R. 372.

Condition — *Breach — Change of Circumstances.*] — A railway company having obtained a bonus from the plaintiffs upon condition that its machine shops should be "located and maintained" within the city limits, did so erect and maintain them for some years, until authorized by legislation it amalgamated with and lost its identity in another company, all the engagements and agreements of the amalgamating companies being preserved. The amalgamated company was afterwards leased in perpetuity to a much larger railway company, who removed the shops outside the city limits :—

Held, that although all the engagements and agreements made by the original company were preserved, the amalgamation and leasing in perpetuity by the larger company of the smaller under the authority of Parliament imposed new relations upon the amalgamated road which worked a change in the policy as to the site and size of the machine shops, and that the engagement had been satisfied by the maintenance of the said shops by the original company during its independent existence. *City of Toronto* v. *Ontario and Quebec R. W. Co.*, 22 O. R. 344.

Condition — *Breach — Liquidated Damages.*]— In 1874 the county of Halton gave to the Hamilton and North-Western Railway Company a bonus of $65,000 to be used in the construction of the railway, upon the condition that the company should remain "independent" for twenty-one years. In 1888 the Hamilton and North-Western Railway Company became (as was on the facts held) in effect merged in the Grand Trunk Railway Company, and ceased to be an independent line :—

Held, affirming the judgment of the Common Pleas Division, and of Robertson, J., at the trial, that there had been a breach of the condition entitling the plaintiffs to recover the whole amount of the bonus as liquidated damages. *County of Halton* v. *Grand Trunk R. W. Co.*, 19 A. R. 252. Affirmed by the Supreme Court, 21 S. C. R. 716.

Condition — *Breach — Repayment.*] — The plaintiffs agreed to give to the defendants a bonus of $1,000 in five equal consecutive annual instalments of $200 each, in consideration of their establishing a factory and working it for ten years. The defendants covenanted to carry on the factory, and to employ therein continuously not less than twenty persons during the term. The agreement provided that the annual payments were to cease if the defendants ceased to carry on business within five years, but there was nothing in the agreement as to return of any part of the bonus in case of cesser after that time. The defendants were paid the full amount of the bonus, carried on business for six years, and then closed their factory. The

plaintiffs were unable to prove any specific substantial damage :—

Held, that the damages could not be assessed on the principle of apportioning the bonus with reference to the term and the period for which the business had been carried on :—

Held, also, that the plaintiffs were entitled to nominal damages at least, and, under the circumstances, the defendants having deliberately broken their covenant, to the costs of the action.

Judgment of Sir Thomas Galt, C.J., varied, Maclennan, J.A., dissenting. *Village of Brighton* v. *Auston*, 19 A. R. 305.

Condition — *Conditional Mortgage.*]- By a by-law passed by the city of Three Rivers on the 3rd March, 1886, granting a bonus of $20,000 to a firm for establishing a saw-mill and a box factory within the city limits, and a mortgage for a like amount of $20,000 granted by the firm to the corporation the 26th of November, 1886, it was provided that the entire establishment of a value equivalent to not less than $75,000 should be kept in operation for the space of four consecutive years from the beginning of said operation, and that 150 hands at least should be kept employed during the space of five months of each of the four years. The mill was in operation in June, 1886, and the box factory on the 2nd November, 1886. They were kept in operation, with interruptions, until October, 1889, and at least 600 men were employed in both establishments during that time. On a contestation by subsequent hypothecary claimants of an opposition *afin de conserver*, filed by the corporation for the amount of their conditional mortgage on the proceeds of sale of the property :—

Held, reversing the judgment of the Courts below, that even if the words "four consecutive years" meant four consecutive seasons, there was ample evidence that the whole establishment was not in operation as required until November, 1886, when the mortgage was granted, the mill only being completed and in operation during that season, and therefore there had been a breach of the conditions. Fournier, J., dissenting. *City of Three Rivers* v. *Banque du Peuple*, 22 S. C. R. 352.

See ASSESSMENT AND TAXES, V.

BOOK DEBTS.

See BANKRUPTCY AND INSOLVENCY, I.—BILLS OF SALE, V.

BOTTOMRY BOND.

See SHIP, III.

BOUNDARY.

See DEED, II.

BRIBERY.

See PARLIAMENTARY ELECTIONS, I.

BRIDGE.

Toll-Bridge — *Free Bridge.*]- By 44 & 45 Vict. (P.Q.) ch. 99, sec. 3, granting to respondent a statutory privilege to construct a toll bridge across the Chaudière river in the parish of St. George, it is enacted that "so soon as the bridge shall be open to the use of the public as aforesaid during thirty years no person shall erect, or cause to be erected, any bridge or bridges or works, or use or cause to be used any means of passage for the conveyance of any persons, vehicles or cattle for lucre or gain, across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll bridge or toll-bridges, or who shall use or cause to be used, for lucre or gain, any other means of passage across the said river for the conveyance of persons, vehicles or cattle, within such limits, shall pay to the said David Roy three times the amount of the tolls imposed by the present Act, for the persons, cattle or vehicles which shall thus pass over such bridge or bridges; and if any person or persons shall, at any time, for lucre or gain, convey across the river any person or persons, cattle or vehicles within the above mentioned limits, such offender shall incur a penalty not exceeding ten dollars for each person, animal or vehicle which shall have thus passed the said river; provided always, that nothing contained in the present Act shall be of a nature to prevent any persons, cattle, vehicles or loads from crossing such river within the said limits by a ford or in a canoe or other vessel without charge." After the bridge had been used for several years the appellant municipality passed a by-law to erect a free bridge across the Chaudière river in close proximity to the toll-bridge in existence; the respondent thereupon by petition for injunction prayed that the appellant municipality be restrained from proceeding to the erection of a free bridge :—

Held, affirming the judgment of the Court below, that the erection of the free bridge would be an infringement of the respondent's franchise of a toll-bridge, and the injunction should be granted. *Township of Aubert-Gallion* v. *Roy*, 21 S. C. R. 456.

See MUNICIPAL CORPORATIONS.

BRITISH NORTH AMERICA ACT, 1867.

See CONSTITUTIONAL LAW, II.

BROKER.

Gaming Contracts.]—Article 1927 of the Civil Code does not differ substantially from 8 & 9 Vict. ch. 109, sec. 18 (Imp.), and renders null and void all contracts by way of gaming and wagering.

A broker was employed to make actual contracts of purchase and sale, in each case completed by delivery and payment, on behalf of a principal whose object was not investment but speculation :—

Held, that these were not gaming contracts within the meaning of the Code. *Forget* v. *Ostigny*, [1895] A. C. 318.

BUILDING SOCIETIES.

Moneys Deposited upon Savings Bank Account—*Petition—Costs.*]—A person died in the United States of America having moneys to his credit deposited upon savings bank account with two building societies doing business in Ontario, incorporated under R. S. O. ch. 169. An administrator appointed by a Court in the foreign country applied to the building societies to have the moneys transferred to him, but the societies, entertaining doubts whether the words of section 47 of R. S. O. ch. 169, "share, bond, debenture, or obligation," applied to a savings bank account, petitioned the Court under section 49 :—

Held, that the word "obligation" covered the liability of the petitioners to repay the amount deposited with them :—

Held, also, that the doubts of the petitioners were reasonable and they were entitled to costs. *Re Ging*, 20 O. R. 1.

BUTTER FACTORIES.

Act to Prevent Frauds against Cheese Factories.]—A conviction under section 1 of 52 Vict. ch. 43 (D.), for supplying to a cheese factory milk from which the cream had been removed, was quashed, as neither in the evidence or in the conviction was any offence against the Act shewn, it not having been proved that the milk was supplied to be manufactured; but without costs. *Regina* v. *Westgate*, 21 O. R. 621.

Act to Prevent Frauds against Cheese Factories.]—The Act 52 Vict. ch. 43 (D.), an Act to provide against frauds in the supplying of milk to cheese factories, etc., is *intra vires* the Dominion Parliament. *Regina* v. *Stone*, 23 O. R. 46.

BY-LAWS.

I. Of Corporations Generally—*See* Company.

II. Of Municipal Corporations—*See* Municipal Corporations.

III. Relating to the Sale of Liquor—*See* Intoxicating Liquors.

IV. Relating to Schools—*See* Public Schools.

Ambiguity.]—A by-law against preaching in public parks is not void for uncertainty as to the day of the week intended by reason of the use of the term "Sabbath-day." *Re Cribbin and City of Toronto*, 21 O. R. 325.

Ambiguity.]—In describing lands for assessment, "the north-east part," even with the addition of the acreage, is an ambiguous description; and *quære* as to the effect upon the validity of a by-law. *Re Jenkins and Township of Enniskillen*, 25 O. R. 399.

Connection with Drain—*Permission of Engineer—Resolution of Council.*]—Where a by-law provided that no connection should be made with a sewer, except by permission of the city engineer, a resolution of the city council granting an application for such connection on terms which were complied with, and the connection made, was a sufficient compliance with said by-law. *Lewis* v. *Alexander*, 24 S. C. R. 551.

Construction — *Public Morals — By-law against Swearing in Street or Public Place—Private Office in Custom House.*]—A city by-law enacted that no person should make use of any profane swearing, obscene, blasphemous or grossly insulting language, or be guilty of any other immorality or indecency in any street or public place :—

Held, that the object of the by-law was to prevent an injury to public morals, and applied to a street or a public place *ejusdem generis* with a street, and not to a private office in the custom house. *Regina* v. *Bell*, 25 O. R. 272.

Description of Land—*Clerical Error—Publication—Semi-monthly Newspaper.*]—A municipal by-law establishing a public highway is not void for uncertainty when the boundaries of the land so declared are described in the by-law with sufficient precision to enable them to be traced upon the ground, and if so properly described, it is not necessary when private ground has been taken to distinguish it as such.

The fact that one of two parallel courses in a description has by obvious clerical error been incorrectly given in the published notice is not a valid objection to such a by-law.

Where there is no paper published in the township weekly or oftener, it is not obligatory to publish the required statutory notice of the by-law in a paper issued therein semi-monthly. *Re Chambers and Township of Burford*, 25 O. R. 276.

Motion to Quash—*Recognizance.*]—A condition precedent to the entertaining of a motion to quash a municipal by-law is the entering into, allowance, and filing of a recognizance, in the manner provided by section 332 of the Municipal Act, 55 Vict. ch. 42 (O.); and a bond, even though allowed by a County Court Judge, cannot be effectively substituted for a recognizance. *Re Burton and Village of Arthur*, 16 P. R. 160.

Penalty.]—A by-law omitting to provide any penalty for its violation is not necessarily bad. *In re Local Option Act*, 18 A. R. 572.

Publication.] Two of the days of publication of a by-law were Christmas and New Years :—

Held, that the fact of publication on the days named did not render the publication invalid: publication not being a judicial act so as to prevent publication on those days. *Brunker* v. *Township of Mariposa*, 22 O. R. 120.

Publication — *Polling Places.*]—Notice of intention to submit a local option by-law to the votes of the township electors was given in proper form and for the requisite number of times in a paper published in an incorporated village, the bounds of which did not actually touch, though they came close to those of the township in question. This paper was the nearest paper; it had a large circulation in the township, and was that in which the township council had been in the habit of publishing their notices and by-laws. No paper was published in the township in question.

One of the polling places was described merely as being "at or near" a certain village. It was shewn that this village was a very small one, and that the description was the same as that used in the by-laws appointing the places for holding municipal elections. It was also shewn that the poll was held in a house close to the house in which the poll had been held in the next preceding municipal election, that house itself having been moved away.

Another polling place was specifically described by place, lot and concession, but there was an error in the number of the concession.

It was shewn that all the proceedings had been taken in good faith, that the poll was very large, and it did not appear that any one had been misled by any of these informalities:—

Held, therefore, reversing the judgment of Sir Thomas Galt, C.J., that the Court might, in the exercise of its discretionary power so to do, refuse to quash the by-law in question. *In re Huson and Township of South Norwich*, 19 A. R. 343. Affirmed by the Supreme Court, 21 S. C. R. 669.

Removal of Clerk —*Seal.*]—The removal of a clerk of a municipal corporation may be by a resolution, it not being essential that a by-law should be passed for such a purpose.

Vernon v. *Town of Smith's Falls*, 21 O. R. 331, followed.

When the seal of a municipal corporation is wrongfully detained by the clerk of the council a by-law removing him from office may be sealed with another seal *pro hac vice*. *Village of London West* v. *Bartram*, 26 O. R. 161.

Two-Thirds' Vote.]—A by-law to regulate the proceedings of a town council required that every by-law should receive three readings, and that no by-law for raising money, or which had a tendency to increase the burdens of the people, should be finally passed on the day on which it was introduced, except by a two-thirds' vote of the whole council.

A by-law to fix the number of tavern licenses, and which, therefore, required such two-thirds' vote, was read three times on the same day, and was declared passed. It did not, however, receive the required two-thirds' vote. A special meeting of council was then called for the following evening, when the by-law was merely read a third time, receiving the required two-thirds' vote:—

Held, that the by-law was bad, for having been defeated when first introduced by reason of not having received a two-thirds' vote, it was not validated by merely reading it a third time at the subsequent meeting. *Re Wilson and Town of Ingersoll*, 25 O. R. 439.

Validating Act.]—The corporation of the town of Port Arthur passed a by-law entitled "a by-law to raise the sum of $75,000 for street railway purposes and to authorize the issue of debentures therefor" which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, etc., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed but none was submitted ordering the construction of the work. Subsequently an act was passed by the Legislature of Ontario in respect to the said by-law which enacted that the same "is hereby confirmed and declared to be valid, legal and binding on the town . . . and for all purposes, etc., relating to or affecting the said by-law, and any and all amendments of the Municipal Act . . . shall be deemed and taken as having been complied with":—

Held, reversing the decision of the Court of Appeal, 19 A. R. 555, Taschereau, J., dissenting, that the said Act did not dispense with the requirements of sections 504 and 505 of the Municipal Act requiring a by-law providing for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law:—

Held, also, that an erroneous recital in the preamble to the Act that the town council had passed a construction by-law had no effect on the question to be decided. *Dwyer* v. *Town of Port Arthur*, 22 S. C. R. 241.

Voters.]—A local option by-law carried by a vote of seventy-one to fifteen was quashed where it appeared that the returning officer had refused to accept the votes of tenant voters, seventy-four of whom were on the list and had the right to vote, though it was not shewn that more than a very small number of these voters had made any attempt to vote or had expressed any intention of voting, or had heard of the returning officer's refusal.

The election doctrine that irregularities should not be held fatal unless they actually affect the result does not apply where a class is disfranchised in a by-law contest.

In re Croft and Peterborough, 17 A. R. 21, applied. *Woodward* v. *Sarsons*, L. R. 10 C. P. 733, considered.

Judgment of Galt, C.J., reversed, Maclennan, J.A., dissenting. *In re Ponnder and Village of Winchester*, 19 A. R. 684.

CABS.

License —*Omnibus.*]—Sec. 436 of the Municipal Act, R. S. O. ch. 184, empowers the police commissioners of a city to regulate and license the owners of omnibuses, etc. The commissioners of a city passed a by-law enacting that no person or persons should drive or own any omnibus without being licensed to do so:—

Held, that the authority conferred on the commissioners was to license owners, and not drivers; and therefore a conviction of a driver for driving without a license was bad, and must be quashed. *Regina* v. *Butler*, 22 O. R. 462.

Livery Stable Keeper.]—A person licensed to keep a livery stable at a particular locality under a by-law made by the board of police commissioners for a city, pursuant to section 436 of the Municipal Act, but not having a cab license for which under a separate by-law other and larger fees were payable is not at liberty to stand with his cabs and solicit passengers at places, though owned by him, other than that the place mentioned in his license. *Regina* v. *Gurr*, 21 O. R. 499.

Lord's Day Act.]—A cab-driver is not within any of the classes of persons enumerated in section 1 of the Lord's Day Act, R. S. O. ch. 203, and cannot be lawfully convicted thereunder for driving a cab on Sunday. *Regina* v. *Somers*, 24 O. R. 244.

CARRIERS.

I. Goods and Animals.

Animals—*Knowledge of Special Purpose.*]—Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company, including anticipated profits.

Judgment of the County Court of Wentworth reversed. *Kennedy* v. *American Express Co.*, 22 A. R. 278.

Connecting Lines—*Authority of Agent.*]—E., in British Columbia, being about to purchase goods from G., in Ontario, signed, on request of the freight agent of the Northern Pacific Railway Company in British Columbia, a letter to G. asking him to ship goods *via* Grand Trunk Railway and Chicago & N. W. R. W. Co., care Northern Pacific Railway at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Railway Company at Toronto, who sent it to G. and wrote to him "I enclose you card of advice, and if you will kindly fill it up when you make the shipment send it to me, I will trace and hurry them through and advise you of delivery to consignee." G. shipped the goods as suggested in this letter deliverable to his own order in British Columbia :—

Held, affirming the decisions of the Courts below, 21 A. R. 322, 22 O. R. 645, that on arrival of the goods at St. Paul the Northern Pacific Railway Company was bound to accept delivery of them for carriage to British Columbia and to expedite such carriage; that they were in the care of said company from St. Paul to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company was liable to G. for the value of the goods which were delivered to E. at British Columbia without an order from G. and not paid for. *Northern Pacific R. W. Co.* v. *Grant*, 24 S. C. R. 546.

Contract—*Damages.*]—Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line, but on one connecting therewith, it was :—

Held, that this was evidence to be submitted to a jury of a contract to that effect binding the defendants, and that a nonsuit was wrong.

The measure of damages against carriers for non-delivery of trees considered,

Judgment of the County Court of Middlesex reversed, Hagarty, C.J.O., dissenting. *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

Crown's Liability as Carrier.]—*See Lavoie* v. *The Queen*, 3 Ex. C. R. 96, *post* 290.

Reduced Rate — *Release of Company.*]—Where the findings of the jury as to the grounds of negligence in an action against a railway company for damage to goods were based on mere conjecture, the verdict for the plaintiffs was set aside, but as it could not be said that there was no evidence of negligence on other grounds, a new trial was directed.

Per MacMahon, J., dissenting. A presumption of negligence arose from the non-delivery of the goods, and the plaintiffs were not bound to shew any particular acts of negligence.

The plaintiffs' agent shipped a quantity of plate glass by defendants' railway, signing an agreement that in consideration of the defendants receiving the goods at a reduced rate of twenty-three cents per 100 pounds they should not be responsible for any damage arising in the course of the transit, including negligence. The defendants had two rates, namely, the twenty-three cents, a third class rate, and a double first class rate of sixty cents, which they contended were in accordance with the Canadian Joint Freight Classification, adopted by them and approved by the Governor in Council under section 226 of 51 Vict. ch. 29 (D.), "The Railway Act," the said classification stating that the third class rate applied where the goods were "shipped at owners' risk—shipper signing special plate glass release form." The plaintiffs' agent was aware of the two rates, and signed the agreement assenting to the lower rate, under the belief that the defendants could not, under section 246, take advantage of the provision absolving them from liability where the damage was occasioned by negligence. No by-laws approving of the company's tariff under which these rates were charged had been approved of by the Governor in Council, although a by-law fixing a first class rate of sixty-six cents and a third class rate of fifty cents had *inter alia* been so approved :—

Held, per Meredith, C.J., that notwithstanding the payment of the lower rate, and the agreement signed by their agent, the defendants could not, under section 246, relieve themselves from liability when negligence was proved.

Per Rose, J.—The third class rate was the only rate "lawfully payable." If only one rate is fixed the provision in the freight classification as to release was *ultra vires* as contrary to the provisions of section 246.

Per MacMahon, J.—No by-law fixing the rate at sixty cents having been approved of by the Governor in Council, there was no freight "lawfully payable," without which there could be no alternative rate, and the release which would otherwise have been valid, was inoperative. *Coblan* v. *Canadian Pacific R. W. Co.*, 26 O. R. 732. Affirmed in appeal, 23 A. R. 115.

Special Contract—*Limitation of Liability.*] — By section 246 (3) of the Railway Act, 1888, 51 Viet. ch. 29 (D.), "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants":—

Held, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to amount of damages to be recovered for loss or injury to such goods arising from negligence. *Vogel* v. *Grand Trunk R. W. Co.*, 11 S. C. R. 612, and *Bate* v. *Canadian Pacific R. W. Co.*, 15 A. R. 388, distinguished.

The Grand Trunk Railway Co. received from R. a horse to be carried over its line, and the agent of the company and R. signed a contract for such carriage which contained this provision: "The company shall in no case be responsible for any amount exceeding one hundred dollars for each and any horse," etc.:—

Held, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than $100, though the value of the horse largely exceeded that amount. Judgment of the Court of Appeal, 21 A. R. 264, and of the Common Pleas Division, 24 O. R. 75, affirmed. *Robertson* v. *Grand Trunk R. W. Co.*, 24 S. C. R. 611.

Warehousemen.]—When a shipper stores goods from time to time in a railway warehouse, loading a car when a car-load is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire, the shipper has no remedy against the company.

Judgment of the Common Pleas Division, 23 O. R. 454, reversed. *Milloy* v. *Grand Trunk R. W. Co.*, 21 A. R. 464.

II. Passengers and Luggage.

Crown.]—Crown's liability for injuries to passengers on Government railway.—*See Dubé* v. *The Queen*, 3 Ex. C. R. 147, *post* 295.

Patent Defects.]—Held, reversing the judgment of the Superior Court and Court of Queen's Bench for Lower Canada (appeal side), that where the breaking of a rail is shewn to be due to the severity of the climate and the suddenly great variations of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail.

Fournier, J., dissented, and was of opinion that the accident was caused by a latent defect in the rail, and that a railway company is responsible, under the code, for injuries resulting from such a defect. *Canadian Pacific R. W. Co.* v. *Chalifoux*, 22 S. C. R. 721

Production of Ticket.] — The contract between a person buying a railway ticket and the company on whose line it is intended to be used implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for refusing or being unable so to produce and deliver it up, the company is not liable to an action for such ejectment.

Judgment of the Court of Appeal, 20 A. R. 476, and of the Queen's Bench Division, 22 O. R. 967, reversed. *Grand Trunk R. W. Co.* v. *Beaver*, 22 S. C. R. 498.

Special Contract — *Reduced Fare.*] — The plaintiff purchased from an agent of the defendant company at Ottawa what was called a land-seeker's ticket, the only kind of return ticket issued on the route, for a passage to Winnipeg and return, paying some thirty dollars less than the single fare each way. The ticket was not transferable and had printed on it a number of conditions, one of which limited the liability of the company for baggage to wearing apparel not exceeding $100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket explaining that it was for the purpose of identification but did not read nor explain to her any of the conditions, and having sore eyes at the time she was unable to read them herself. On the trip to Winnipeg an accident happened to the train and plaintiff's baggage, valued at over $1,000, caught fire and was destroyed. In an action for damages for such loss the jury found for the plaintiff for the amount of the alleged value of the baggage:—

Held, reversing the judgment of the Court of Appeal, 15 A. R. 388, and of the Divisional Court, 14 O. R. 625, Gwynne, J., dissenting, that there was sufficient evidence that the loss of the baggage was caused by defendants' negligence, and the special conditions printed on the ticket not having been brought to the notice of plaintiff she was not bound by them and could recover her loss from the company. *Bate* v. *Canadian Pacific R. W. Co.*, 18 S. C. R. 697.

Special Contract—*Exemption from Liability.*]—The Commercial Travellers' Association of Ontario, by written agreement with the defendant company, obtained for its members for the season of 1885 special privileges in travelling by the company's boats, one of the terms of the agreement being that the members should receive tickets at a reduced rate "with allowance of 300 lbs. of baggage free, but the baggage must be at the owner's risk against all casualties." This agreement was continued during 1886 by verbal agreement between the manager of the company and the secretary and

traffic manager of the association. D., a commercial traveller, obtained a ticket for a passage on one of the company's boats under this agreement, paying the reduced fare, and took on board three trunks containing the usual outfit of a traveller for a jewellery house, valued at about $15,000. The trunks were checked in the usual way and no intimation was given by D. to any of the officials on the boat as to their contents. On the passage the contents of the trunks were damaged by the negligence of the officers of the company and an action was brought by D. and his employers to recover damages for such injury :—

Held, affirming the decision of the Court of Appeal, 15 A. R. 647, that the agreement between the Association and the company was in force in 1886; that the term "baggage" in the agreement meant not merely personal baggage, such as every passenger is allowed to carry without extra charge, but commercial baggage, and would include the outfit in this case; and that in the expression "must be at owner's risk against all casualties," the words "against all casualties" do not limit, control or destroy, but rather strengthen, the protection which the former words "at owner's risk" afforded the defendants. *Dixon* v. *Richelieu Navigation Co.*, 18 S. C. R. 704.

Street Car—*Expulsion of Passenger—Damages.*]—*See Grinsted* v. *Toronto R. W. Co.*, 24 O. R. 683; 21 A. R. 578; 24 S. C. R. 570, *post* 327.

Ticket — *Condition — Viâ Direct Line.*]—A condition in a railway ticket as to travelling "viâ direct line" was rejected as meaningless, each of three possible routes being circuitous, though one was shorter in point of mileage than the others.

Semble, in this country it is not the law that a passenger rightfully travelling upon his ticket is bound to pay fare wrongfully demanded, or to leave the train on the conductor's order at the peril of not being able to recover damages for an assault committed in expelling him by force. The American cases on the subject considered and not followed. Judgment of the Queen's Bench Division, 20 O. R. 603 varied. *Dancey* v. *Grand Trunk R. W. Co.*, 19 A. R. 664.

See RAILWAYS.

CATTLE.

See DISTRESS—RAILWAYS, VIII.

CAUTION.

See DEVOLUTION OF ESTATES ACT—LAND TITLE ACT.

CERTIORARI.

Notice of Application.]—A preliminary objection, that the magistrate had not six full days' notice of the application for the writ of *certiorari* taken on the return of the motion to make absolute the order *nisi* to quash the conviction, was overruled, on the ground that the magistrate, on the facts appearing in the case, had waived the right to take the objection. *Regina* v. *Whitaker*, 24 O. R. 437.

Recognizance.]—Where the affidavit accompanying a recognizance filed on a motion for a rule *nisi* to quash a conviction did not negative the fact of the sureties being sureties in any other matter, and omitted to state that they were worth $100 over and above any amount for which they might be liable as sureties, it was held insufficient.

The rule in force as to recognizances prior to the passing of the Criminal Code is still in force. *Regina* v. *Robinet*, 16 P. R. 49.

CHALLENGE.

See TRIAL, I.

CHAMPERTY AND MAINTENANCE.

Discovery.]—Discovery was not enforceable in equity in cases of champerty and maintenance, nor should it be under the equivalent remedies given by the Judicature Act; and a plaintiff should not be compelled on examination to answer questions touching an alleged champertous agreement.

Semble, that the rigorous rules which obtained in earlier days in England are not to be imported into her dependencies without some modification.

Ram Coomar v. *Chunder*, 2 App. Cas., at p. 210, specially referred to.

To an action under Lord Campbell's Act the defendants pleaded that it was brought and maintained under a champertous agreement which disentitled the plaintiff to sue :—

Held, that this defence should not be struck out; if proved, it was for the Court to say what effect should follow. *Welbourne* v. *Canadian Pacific R. W. Co.*, 16 P. R. 343.

Right of Entry—*Possession.*]—The plaintiffs were heirs-at-law of M. A. M., a married woman, to whom in 1849, her husband, G. S. M., joining in the deed, one G. conveyed five acres of land, part of a lot of 100 acres conveyed to him in 1841 by the patentee under a Crown grant of the year 1828. G. S. M. was in possession of four acres of the five acres in question for some time before 1835, when he married, and then he and his wife remained in possession of the four acres till 1849, and then of the four acres and the additional one acre [illegible] wife's death in 1864 :—

[illegible] affirming the judgment of the Queen's Bench Division, 21 O. R. 281. Burton, J.A., dissenting, that the deeds from the patentee to G. and from G. to M. A. M. might be upheld, notwithstanding the Statute of Maintenance, 32 H. VIII. ch. 9.

Per Hagarty, C. J. O., and Osler, J. A.—The statute applies only to cases of adverse possession, and there being no evidence one way or the other, the Court was not bound to draw the inference that the possession of G. S. M. was adverse to the patentee. If it did apply and G.

had only a pretenced title, still that pretenced title had been lawfully acquired by M. A. M. to the strengthening of her possessory title, there being nothing in the statute avoiding such a transaction.

Per Maclennan, J. A. The statute did not apply because the possession of G. S. M. having begun (as Maclennan, J.A., upon the evidence held) while the title was in the Crown, was not then adverse, and would not become so without a subsequent ouster by him of which there was no evidence. Burton, J. A., agreed on that point with Maclennan J. A., but held that there was no evidence of this prior possession. *Marsh* v. *Webb*, 19 A. R. 564. *See* the next case.

Statute of Maintenance — *Tortious Possession.*]—In 1828 certain land in Upper Canada was granted by the Crown to King's College. In 1841, while one M. who had entered on the land was in possession, King's College conveyed it to G. In 1849 G. conveyed to the wife of M., and M. signed the conveyance though not a party to it. In an action by the successors in title of M.'s wife to recover possession of the land, the defendants, claiming title through M., set up the statute of limitations, alleging that M. had been in possession twenty years when the land was conveyed to his wife, and that the conveyance to G., in 1841, the grantor not being in possession, was void under the statute of maintenance, and G. had, therefore, nothing to convey in 1849 :—

Held, that it was not proved that the possession of M. began before the grant from the Crown, but assuming that it did, M. could not avail himself of the statute of maintenance, as he would have to establish disseisin of the grantor, and the Crown could not be disseised; nor would the statute avail as against the patentee, as the original entry, not being tortious, the possession would not become adverse without a new entry :—

Held, further, that if the possession began after the grant, the deed to G. in 1841 was not absolutely void under the statute of maintenance, but only void as against the party in possession, and M. being in possession, a conveyance to him would have been good under section 4 of the statute, and the deed to his wife, a person appointed by him, was equally good. Further, M. by his assent to the conveyance to his wife, and subsequent acts, was estopped from denying the title of his wife's grantor. *Webb* v. *Marsh*, 22 S. C. R. 437.

CHATTEL MORTGAGE.

See BILLS OF SALE.

CHEESE FACTORIES.

See BUTTER FACTORIES.

CHEQUE.

See BANKS—BILLS OF EXCHANGE.

CHOSE IN ACTION.

Contract—*Equitable Assignment—Estoppel.*]—The contractor for building a church, being indebted to D. for materials furnished therefor, gave him the following order on the defendants, who were the building trustees, and of which they were duly notified : "Pay to the order of D. the sum of $306 out of certificate of money due me on 1st June for materials furnished to above church." This the defendants refused to accept, and on 31st May paid, out of moneys arising out of the contract, an order for a larger sum, made on that date in favour of another person, under an arrangement made by them with the latter alone :—

Held, that there was a good equitable assignment in favour of D. of money due on the 1st June; and that defendants, by the payment of the other order, were estopped from denying that there were sufficient moneys then due to the contractor to cover his order. *Bank of British North America* v. *Gibson*, 21 O. R. 613.

Contract—*Equitable Assignment—Evidence of Intention.*]—The contractor for the erection of a building for the defendants during its progress gave to various persons orders upon the defendants for sums due them by him, in the following form :—Dungannon, September 12, 1890. To the directors of the Dungannon Driving Park Association. Please pay to D. M. the sum of $—, and oblige (signed) T. F. H., contractor" :—

Held, per Street, J., that these orders were not in themselves good equitable assignments of portions of the fund in the hands of the defendants.

Hall v. *Prittie*, 17 A. R. 306, followed.

The evidence, however, shewed that there was only one fund out of which the directors could be expected to pay the orders; that the nature of that fund and its origin were well known to all the parties; that when the contractor promised the persons with whom he dealt orders upon the directors, he meant to give, and these persons expected to get, orders which were to be paid out of the contract price; and that the directors understood the orders as intended to deal with portions of the contract price, and to be payable only out of that particular fund :—

Held, per Street, J., that the Court should look to the real intention of all the parties to the transaction, and give effect to it, by declaring that the contractor did make an equitable assignment to each of the orderholders of a portion of the fund.

Armour, C. J., agreed in the result. *Lane* v. *Dungannon Agricultural Driving Park Association*, 22 O. R. 294.

Contract — *Right of Contractee to make Deductions.*]—A contract between the defendants and the plaintiff's assignor for the paving of a certain street provided that the former might deduct and pay the price of any materials unpaid for by the latter. The contractor assigned to the plaintiff all moneys to become due under the contract, of which the defendants were duly notified. Subsequently the defendants deducted from the contract moneys the amount of a claim for materials furnished to the contractor, and paid the same :—

Held, that they had a right so to do, the plaintiff's assignment being necessarily subject to the provisions of the original contract. *Farquhar* v. *City of Toronto*, 26 O. R. 356.

Crown.] — Where a chose in action was assigned, *inter alia*, for the general benefit of creditors, all the parties interested being before the Court and the Crown making no objection, the Court gave effect to such assignment.

Quære. In the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown? *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Damages — *Action Quia Timet.*] — Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts and agreements of the firm, no cause of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought against the firm.

Mewburn v. *Mackelcan*, 19 A. R. 729; and *Leith* v. *Freeland*, 24 U.C.R. 132, distinguished.

Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible.

Judgment of Galt, C.J., affirmed. *Sutherland* v. *Webster*, 21 A. R. 228.

Damages—*Solicitor—Negligence.*]—A claim by a client for negligence against a firm of solicitors in directing the distribution of moneys in the sheriff's hands was assigned by him to another, and by the latter to the plaintiff:—

Per Armour, C.J., at the trial.—The claim did not by virtue of R. S. O. ch. 122, sec. 7 (O.), pass to the plaintiff so as to enable him to maintain an action therefor in his own name, but in any event no negligence was proved.

On appeal to the Divisional Court the judgment was affirmed on the ground of the absence of any proof of negligence, but

Per MacMahon, J., if negligence had been proved, the plaintiff could properly have maintained the action in his own name. *Laidlaw* v. *O'Connor*, 23 O. R. 696.

Insurance Moneys.] — C. by instrument under seal assigned to defendant, as security for moneys due, his interest in certain policies of insurance on which he had actions pending. C. afterwards gave to B. & Co. an order on defendant for the balance of the insurance money that would remain after paying his debt to defendant. B. & Co. endorsed the order and delivered it to plaintiff by whom it was presented to the defendant, who wrote his name across its face. B. & Co. afterwards delivered to plaintiff a document signed by them stating that having been informed that the endorsement on order was not negotiable by endorsement to perfect plaintiff's title and enable him to collect the money in defendant's hands, they assigned and transferred their interest therein and appointed plaintiff their attorney, in their name, but for his own use and benefit, to collect the same. The defendant having received the amounts due C. on the insurance policies informed plaintiff, on his demanding an account, that there were prior claims that would absorb it all. Plaintiff then filed a bill in equity for an account and payment of the amount found due him to which defendant demurred for want of parties, alleging that the order, though absolute on its face, was, in fact, only given as security, and that an account between B. & Co. and C. being necessary to protect C.'s rights C. was a necessary party to the suit. The demurrer was overruled and the judgment overruling it not appealed from, and the same defence of want of parties was set up in the answer to the bill:—

Held, affirming the judgment of the Court below, Strong and Patterson, JJ., dissenting, that the question of want of parties was *res judicata* by the judgment on the demurrer and could not be raised again by the answer. Even if it could the judgment was right as C. was not a necessary party. As between plaintiff and defendant the order was an absolute transfer of the fund to be received by defendant, and was treated by all the parties as a negotiable instrument. Defendant had nothing to do with the equities between C. and B. & Co., or between B. & Co. and plaintiff, but was bound to account to plaintiff in accordance with his undertaking as indicated by the acceptance of the order. *McKean* v. *Jones*, 19 S. C. R. 489.

Lands — *Equitable Interest of Purchaser under Contract.*]—The equitable interest of an assignee from the purchaser of a contract for the sale of lands, is exigible under a writ of *fieri facias* against the lands of such assignee, and the purchaser at a sheriff's sale of such interest is entitled to specific performance of the contract.

Re Prittie and Crawford, 9 C. L. T. 45, declared to have been inadvertently decided or reported. *Ward* v. *Archer*, 24 O. R. 650.

Notice of Assignment.] — The Revised Statutes of Nova Scotia, 4 ser. ch. 94, sec. 355, authorizes the assignee of a chose in action in certain cases to sue thereon in the Supreme Court as his assignor might have done, and section 357 provides that before such action is brought a notice in writing, signed by the assignee, his agent or attorney, stating the right of the assignee and specifying his demand thereunder, shall be served on the party to be sued. Pursuant to this section the assignee of a debt served the following notice:—Pictou, Nov. 21st, 1878. Alex. Grant, Esq.: Admin. Estate of Alexander McDonald, deceased. Dear Sir,—You are hereby notified in accordance with ch. 94 of the Revised Statutes, sec. 357, that the debt due by the above estate to Findlay Thompson has been assigned by him to Alexander D. Cameron, who hereby claims payment of twelve hundred dollars, the amount of the said debt so assigned to him. S. H. Holmes, Atty. of Alex. D. Cameron:—

Held, affirming the judgment of the Court below, that the notice was sufficient compliance with the statute. *Grant* v. *Cameron*, 18 S.C.R. 716.

Notice of Transfer — *Condition Precedent to Right of Action.*]—The signification of a transfer or sale of a debt or right of action is a condition precedent to the right of action of the

transferee or purchaser against the debtor, and the necessity of such signification is not removed by proof of knowledge by the debtor of the transfer or sale. The want of such signification is put in issue by a *défense au fonds en fait*. M. and B. entered into a speculation together in the purchase of real estate the title to which was taken in the name of B. and the first instalment of purchase money was acquired from a brother of M., to whom B gave an obligation therefor and transferred to M. a half interest in the property. As each subsequent instalment of purchase money fell due a suit was taken by the vendor against B. and the judgments in such suits as well as the obligation for the first instalment were transferred to M. but without any signification in either case. Subsequently by a formal act of resiliation B. and M. annulled the transfer of the half interest in the property made by B. to M. and formally relieved M. of all further obligation as proprietor *par indivis* for further advances toward the balance due the vendor and threw the burden of providing it entirely upon B. :—

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the act of resiliation and the replacement of the title which it effected into the name of B. was a virtual abandonment on the part of M. of all previous investments made by him in the property or in the claims of others against that property of which he may have taken transfers. *Murphy* v. *Bury*, 24 S. C. R. 668.

Succession—*Acceptation of by Minor Subsequent to Action.*]—The acceptation of a succession subsequent to action and *pendente lite* on behalf of a minor as universal legatee has a retroactive operation. *Martindale* v. *Powers*, 23 S. C. R. 597.

CHURCH.

Diocesan Fund.]—The Diocesan Church Society, of Nova Scotia, holds a fund for distribution among the Church of England clergymen of the Province, and one of the rules governing its distribution is that no clergyman receiving an income of $1,000 and upwards from certain named sources shall be entitled to participate :—

Held, affirming the judgment of the Court below, 21 N. S. Rep. 309, that a rector was not debarred from participating in this fund because the salary paid to his curate, if added to his own salary, would exceed the said sum of $1,000, his individual income being less than that amount. *Diocesan Synod of Nova Scotia* v. *Ritchie*, 18 S. C. R. 705.

Religious Denominations.]—"The Reorganized Church of Jesus Christ of Latter Day Saints" is a religious denomination within the meaning of R. S. O. ch. 131, sec. 1; and a duly ordained priest thereof is a minister authorized to solemnize the ceremony of marriage.

Upon a case reserved, a conviction of such a priest for unlawfully solemnizing a marriage was quashed.

Semble, the words of the statute "church and religious denomination" should not be construed so as to confine them to Christian bodies. *Regina* v. *Dickout*, 24 O. R. 250.

Sale of Church Property.]—In an application under the Vendor and Purchaser Act, R. S. O. ch. 112, in which the surviving trustee of a congregation, which had separated and ceased to exist, was making title to land belonging to the said congregation, but useless for its original purpose :—

Held, following *Attorney-General* v. *Jeffrey*, 10 Gr. 273, that the trust had not come to an end :—

Held, also, that the sanction of the sale and the approval of the deed by the County Judge as provided for by R. S. O. ch. 237, sec. 14, sub-sec. 3, is sufficient in lieu of all that is required by sub-secs. 1 and 2 :—

Held, also, that the statute 9 Geo. IV. ch. 2, sec. 1, gave to the trustees "the corporate attribute of succession," and so created them a corporation, and that under the deed in question they took an estate in fee simple and had power to sell. *Re Wansley and Brown*, 21 O. R. 34.

CLANDESTINE REMOVAL OF GOODS.

See CRIMINAL LAW, IV.

CLOSING OF HIGHWAY.

See WAY, I.

CLUB.

Expulsion of Member—*Evidence- Notice.*]—The directors of a club in exercising disciplinary jurisdiction under a by-law providing that "any member guilty of conduct which, in the opinion of the board, merits such a course, may be expelled," are not bound by legal rules of evidence, and their decision, arrived at after a fair investigation of the facts, will not be interfered with, because they have admitted as part of the evidence in proof of the charge, the informally sworn statement of one of the persons concerned in the transaction.

Where the charge has been made, discussed, and replied to, in the public prints, it is not necessary to give to the accused person who has taken part in such discussion, when calling upon him to shew cause against his proposed expulsion, specific particulars of the accusation; a general statement is sufficient.

Judgment of Armour, C. J., affirmed. *Guinane* v. *Sunnyside Boating Company of Toronto*, 21 A. R. 49.

See INTOXICATING LIQUORS.

COLLATERAL SECURITY.

I. TO BANKS—*See* BANKS, III.

II. LIABILITY OF PLEDGEES OF SHARES—*See* COMPANY, VIII.

III. VALUATION OF—*See* BANKRUPTCY AND INSOLVENCY, I.

Discharge.]—A. and B., partners in business, borrowed money from C., giving him as security their joint and several promissory note, and a mortgage on partnership property. The partnership having been dissolved, A. assumed all the liabilities of the firm, and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note:—

Held, affirming the decision of the Court of Appeal, 20 A. R. 695, that the note having been given for the mortgage debt C. could not recover without being prepared, upon payment, to convey to B. the mortgaged lands which he had incapacitated himself from so doing:—

Held, also, that by the terms of the dissolution of partnership, the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change, his release of the principal, A., discharged B., the surety, from the liability for the debt. *Allison* v. *McDonald*, 23 S. C. R. 635. *See* the next two cases.

Discharge.]—A creditor of a partnership held a note of the firm with a mortgage as collateral security, on property of the firm, amply sufficient to secure his claim. Subsequently, with knowledge of the dissolution of the firm, at the request of one partner who had assumed the liabilities, and without the consent of or notice to the other, he discharged the mortgage, without payment of the note, in such a way as to vest the whole interest in the property, freed from the mortgage, in the continuing partner:—

Held, that he could not afterwards sue the retiring partner on the note.

Walker v. *Jones*, L. R. 1. P. C. 50, applied.

Judgment of the Queen's Bench Division, 23 O. R. 288, reversed, Maclennan, J.A., dissenting. *Allison* v. *McDonald*, 20 A. R. 695. *See* the next case.

Discharge.]—When a partner retires from a firm, although the relationship of principal and surety may have been created thereby between himself and the remaining partners, such arrangement, whether known to a creditor of the firm or not, does not affect his rights against the members of the firm as joint debtors, unless he has accepted the liability of the remaining partners in satisfaction and discharge of the liability of the retiring partner.

R. S. O. ch. 122, secs. 2, 3 and 4, does not cast any duty upon such a creditor, without notice of the relationship of principal and surety having been created, to preserve collateral security taken for the debt, for the benefit of the remaining partners. *Allison* v. *McDonald*, 23 O. R. 288.

Discount of Promissory Notes—*Right to Accessory Securities.*]—A tradesman sold goods to customers, taking promissory notes for the price, and also hire receipts, by which the property remained in him till full payment was made. The notes were discounted through the medium of a third person by the plaintiffs, who were made aware when the line of discount was opened of the course of dealing, and of the securities held. They were not, however, put in actual possession of the securities, and there was no express contract in regard to them.

In an action to recover the securities, or their proceeds, from the assignee for creditors of the tradesman:—

Held, that the securities were accessory to the debt; that in equity the transfer of the notes was a transfer of the securities; that the defendant was in no higher position than his assignor, and could not resist the claim to have the receipts accompany the notes; and that it was not material that the relation of assignor and assignee did not immediately exist between the tradesman and the plaintiffs. *Central Bank* v. *Garland*, 20 O. R. 142. Affirmed in appeal, 18 A. R. 438.

Payments on—*Credit on Principal Debt.*]—The plaintiffs gave the defendants a line of credit "to be secured by collections deposited," in pursuance of which notes of defendants' customers were from time to time deposited by defendants with plaintiffs as collateral to the defendants' own notes. These collaterals at maturity were dealt with by defendants, and when paid the proceeds went to their credit and were at their disposal. The defendants failed and plaintiffs recovered judgment against them on the earlier maturing notes of the defendants. Both before and after such judgments the plaintiffs had collected on the collaterals large sums, considerably less than their own claim, which they carried to a suspense account, and refused to credit any part on their judgments. An issue was directed on the application of defendants to try whether plaintiffs had received any payments which they should have credited on the judgments, and judgment therein was given in the plaintiffs' favour. Subsequently the plaintiffs brought this action for the balance of their claim and refused to credit the collateral suspense account:—

Held, that the decision in the issue although *res judicata* was not conclusive in this action, and that the plaintiffs' course in these proceedings amounted to an election to apply the amount of the suspense account upon that portion of the debt not then due and that they were bound to credit the amount of the suspense account in this action. *Molsons Bank* v. *Cooper*, 26 O. R. 575. Reversed in appeal, 23 A. R. 146.

Pledge—*Transfers "In Trust".*]—The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company not numbered or capable of identification, which were transferred by him to the managers of the loan company "in trust." The managers were also brokers, and were as brokers carrying on stock speculations for the plaintiff, and he transferred to them as security for the payment of "margins" certain other shares in the same company, the transfer being in the same form "in trust." Subsequently the loan company were paid off by the brokers at the plaintiff's request, and the brokers continued to hold the first shares as well as the others as security. Upon all the shares the brokers then obtained advances from a bank, transferring them to the cashier "in trust," and from time to time changed the loan to other banks and financial institutions each transfer being made from and to the manager thereof "in trust." An allotment of new shares was taken up by the then holders of the pledged shares at the request of the brokers.

Subsequently the brokers on the security of the old and new shares obtained a loan from the defendants of a much larger amount than the amount due by the plaintiff to the brokers, the shares being then transferred by the then holders to the defendants :—

Held, reversing the judgment of Street, J., 19 O. R. 272, that the defendants were entitled to hold the stock as security for the full amount advanced by them to the brokers; and that the words "in trust" in the transfer meant that the various transferees were holding the shares "in trust" for their respective institutions. *Duggan* v. *London and Canadian Loan and Agency Co.*, 18 A. R. 305. Reversed by the Supreme Court, 20 S. C. R. 481, but restored by the Judicial Committee, [1893] A. C. 506.

Release without Consent of Surety.]—The plaintiffs, who held a number of promissory notes of a customer, endorsed by various parties, and also a mortgage from the customer on certain lands to secure his general indebtedness, sued the defendant as endorser of one of the notes. Before action brought, they had released certain of the mortgaged lands, without the consent of the defendant :—

Held, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make them account for their dealings with the mortgaged property when that security had answered its purpose, or the debt had been paid by the sureties, or when in any other event the application of the moneys from the security could be properly ascertained.

Decision of Robertson, J., 25 O. R. 503, modified. *Molsons Bank* v. *Heilig*, 26 O. R. 276.

Satisfaction of Principal Debt —*Release of Surety.*]—A creditor may by express reservation preserve his rights against a surety notwithstanding the release of the principal debtor, the transaction in such a case amounting in effect to an agreement not to sue, but if the effect of the transaction between the creditor and the principal debtor is to satisfy and discharge and actually extinguish the debt, there is nothing in respect of which the creditor can reserve any rights against the surety.

Judgment of the Chancery Division, 22 O. R. 235, reversed. *Holliday* v. *Hogan*, 20 A. R. 298. Affirmed by the Supreme Court, *sub nom. Holliday* v. *Jackson*, 22 S. C. R. 479.

Transfer of Shares—*Indebtedness of Transferor.*]—A by-law of a building society (appellants) required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P. a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to the Banque Ville Marie as collateral security for the amount he borrowed from the bank, and it was not till P.'s abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although at the time of his assignment P. was indebted to the appellant society in a sum of $3,744, for which amount under the by-law his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares and of P.'s debt. The shares being worth more than the amount due to the bank the curator to the insolvent estate of P. brought an action claiming the shares as forming part of the insolvent's estate and with the action tendered the amount due by P. to the bank. The society claimed the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws :—

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), and restoring the judgment of the Superior Court, that the shares in question must be held as having always been charged under the by-laws with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society. Fournier and Taschereau, JJ., dissenting. *Société Canadienne-Francaise de Construction de Montreal* v. *Davelny*, 20 S. C. R. 449.

COLLISION.

See SHIP, I.

COMMISSION.

See COMPANY, VIII.

COMMISSION TO TAKE EVIDENCE.

See EVIDENCE, VI.

COMMON EMPLOYMENT.

See CROWN, II.—MASTER AND SERVANT, III..

COMPANY.

I. Corporate Existence.

Nominal Corporation—*Corporators—Partners—Contract—Joint Liability.*]—In the case of a nominal corporation which has no legal status as such, the ostensible corporators are partners; and their liability as partners on the contracts of the company is a joint, and not a joint and several, liability. *Gildersleere* v. *Balfour*, 15 P. R. 293.

II. Directors and Officers.

Bills of Sale—*Affidavit of Bona Fides.*]—Where the affidavit of *bona fides* of a chattel mortgage to an incorporated trading company was made by the secretary-treasurer, who was also a shareholder in the company and had an important share in the management of its affairs, there being, however, a president and vice-president:—

Held, that the affiant was to be regarded not as one of the mortgagees, but as an agent, and, as no written authority to him was registered, as required by R. S. O. ch. 125, sec. 1, the mortgage was invalid as against creditors.

Bank of Toronto v. *McDougall*, 15 C. P. 475, distinguished.

Freehold Loan Co. v. *Bank of Commerce*, 44 U. C. R. 284, followed. *Greene & Sons Co.* v. *Castleman*, 25 O. R. 113.

Director — *Personal Liability for Wages.*]—A person employed as foreman of works, who hires and dismisses men, makes out pay-rolls, receives and pays out money for wages, and does no manual labour, and in addition to receiving pay for his own services at the rate of $5 a day, payable fortnightly, is paid for the use of machinery belonging to him and of horses hired by him, is not a labourer, servant or apprentice within the meaning of section 68 of the Joint Stock Companies Letters Patent Act, R. S. O. ch. 157, and cannot recover against the directors personally.

Judgment of the County Court of Brant affirmed. *Welch* v. *Ellis*, 22 A. R. 255.

Directors—*Purchase by Director of Insolvent Company—Fiduciary Relationship.*]—Upon the appointment of a liquidator for a company being wound up under R. S. C. ch. 129 (The Winding-up Act), if the powers of the directors are not continued as provided by section 34 of the Act their fiduciary relations to the company or its shareholders are at an end, and a sale to them by the liquidator of the company is valid. *Chatham National Bank* v. *McKeen*, 24 S. C. R. 348.

Directors—*Salaried Offices — Right to Remuneration.*]—Where an Act of Incorporation provides that no by-law for the payment of the president or any director, shall be valid or acted on until the same has been confirmed at a general meeting of the shareholders, this applies only to payment for the services of a director *qua* director, and for the services of the president as presiding officer of the board.

Where a company appoints the directors to various salaried offices without a by-law fixing the amount of the salaries as required by the Act of Incorporation, and such appointments are afterwards confirmed by legislation, they are entitled to prove in the winding-up for a *quantum meruit* for services rendered. *Re Ontario Express and Transportation Co., The Directors' Case*, 25 O. R. 587.

Director—*Solicitor—Right to Costs.*]—*See Re Mimico Sewer Pipe and Brick Manufacturing Co., Pearson's Case*, 26 O. R. 289, *post* 149.

Manager—*Payment of Premium.*]—By an application for life insurance, the interim receipt and the policy, it was provided that no policy was to be in force until actual payment of the first premium to an authorized agent and the delivery of the necessary receipt signed by the general manager of the company. The general manager, who was paid by commission, made an agreement with an applicant for a policy that work done by the applicant for him self personally would be taken in payment of the first premium, and gave him a receipt for it without, however, paying the company:—

Held, that the company was not bound. *Tiernan* v. *People's Life Insurance Company*, 26 O. R. 506. Affirmed in appeal, 23 A. R.

Manager of Club—*Keeping Liquor for Sale.*]—Section 50 of the Liquor License Act, R. S. O. ch. 194, which forbids the keeping or having in any house, etc., any liquors for the purpose of selling by any person unless duly licensed thereto under the provisions of the Act, does not justify a conviction of the manager of a club incorporated under the Ontario Joint Stock Companies Letters Patent Act who has the charge or control of the liquor merely in his capacity of manager, the act of keeping, etc., being that of the club and not of the manager.

Regina v. *Charles*, 24 O. R. 432, distinguished. *Regina* v. *Slattery*, 26 O. R. 148.

Medical Examiner—*Authority of Agent.*]—The medical staff of the Equitable Life Assurance Society at Montreal consists of a medical referee, a chief medical examiner and two or more alternate medical examiners. In 1888 L. was appointed an alternate examiner in pursuance of a suggestion to the manager by local agents that it was advisable to have a French Canadian on the staff. By his commission L. was entitled to the privilege of such examinations as should be assigned to him by, or required during the absence, disability or unavailability of, the chief examiner. After L. had served for four years it was found that his methods in holding examinations were not

acceptable to applicants, and he was requested to resign, which he refused to do, and another French Canadian was appointed as an additional alternate examiner, and most of the applicants thereafter went to the latter. L. then brought an action against the company for damages by loss of the business and injury to his professional reputation by refusal to employ him, claiming that on his appointment the general manager had promised him all the examinations of French Canadian applicants for insurance. He also alleged that he had been induced to insure his own life with the company on the understanding that the examination fees would be more than sufficient to pay the premiums, and he asked for repayment of amounts paid by him for such insurance :—

Held, affirming the decision of the Court of Queen's Bench, that by the contract made with L. the company were only to send him such cases as they saw fit, and could dismiss him or appoint other examiners at their pleasure ; that the manager had no authority to contract with L. for any employment other than that specified in his commission ; and that he had no right of action for repayment of his premiums, it being no condition of his employment that he should insure his life, and there being no connection between the contract for insurance and that for employment. *Laberge* v. *Equitable Life Assurance Society*, 24 S. C. R. 595.

President — *Promissory Note—Discount.*]—One S., president and treasurer of a cheese company, kept an account with the defendants, private bankers, or behalf of the company, headed "S., president of B. Cheese Company," upon which he drew from time to time by cheques signed "S., president." The account being overdrawn, the defendants, in good faith, at the request of S., discounted a note in their own favour signed "S., president," with the seal of the company attached (but made without the knowledge or authority of the directors, by whom with the president under the by-laws of the company its affairs were to be managed), and placed the proceeds to the credit of the account, which were afterwards chequed out by S. to pay creditors of the company. At this time S. was a defaulter to the company to a larger amount than the note. In the meanwhile after two renewals the note was charged up by the defendants to the account, with the consent of S. but without the authority of the directors who were unaware that S. was a defaulter, but knew that he kept the bank account in his own name as president, depositing therein the proceeds of sales of cheese and drawing upon it to pay the company's creditors. The company now sued to recover the amount of the note from the defendants, who did not plead fraud, but alleged they had fully accounted :—

Held, that the plaintiffs were bound to affirm or disaffirm the transaction altogether and could not repudiate the liability upon the note and at the same time take the benefit of it.

Decision of Street, J., reversed. *Bridgewater Cheese Factory Co.* v. *Murphy*, 26 O. R. 327. Affirmed in appeal, 23 A. R. 66.

President — *Railway Subsidy — Receipt by President.*]—Where money is granted by the Legislature and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right. The appellant railway company alleged by petition of right that by virtue of 51 and 52 Vict. ch. 91, the Lieutenant-Governor in Council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway ; that by an Order-in-Council dated 6th August, 1888, the land subsidy was converted into a money subsidy, the 9th section of said ch. 91, 51 and 52 Vict., enacting that "it shall be lawful," etc., to convert ; that the company completed the construction of their line of railway, relying upon the said subsidy and Order-in-Council, and built the railway in accordance with the Act 51 and 52 Vict. ch. 91 and the provisions of the Railway Act of Canada, 51 Vict. ch. 29, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded *inter alia*, that the money had been paid by Order-in-Council to the sub-contractors for work necessary for the construction of the road ; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties and signed a receipt for the balance of $6,500 due on account of the first subsidy. The petition of right was dismissed :—

Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right ; Taschereau and Sedgewick, JJ., dissenting ; but assuming it did, the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy. *Hereford R. W. Co.* v. *The Queen*, 24 S. C. R. 1.

III. Liability of Shareholders to Creditors.

Paid-up Stock — *Moneys of Company in Hands of Shareholders — Action by Execution Creditor to recover.*]—Where the defendants agreed to take stock in a company about to be incorporated, and arranged that their interest in certain land acquired from them by the company should be applied in payment of their stock, and although it appeared that the company took the land over at a price considerably beyond that at which it was acquired by the defendants, yet no fraud being shewn, it was :—

Held, that the shares of stock issued to the defendants, pursuant to the arrangement, upon the incorporation of the company, as fully paid-up shares, must be treated as such in an action by an execution creditor of the company seeking to make the defendants liable upon their shares for the amount unpaid thereon.

The law upon that subject is the same in this Province as that of England prior to the Companies' Act, 30 & 31 Vict. ch. 131.

The plaintiff sought also to recover from the defendants moneys shewn to be in their hands which were really the property of the company :—

Held, that the plaintiff was entitled to judgment against the defendants for payment to

him of such moneys; but the company were necessary parties to the action; and their consent to being added as plaintiffs not having been filed as required by Rule 324 *(b)*, they should be added as defendants:—

Held, also, a proper case, under Rules 324 *(c)*, and 326, for dispensing with service upon the company, as the defendants already before the Court were directors and the principal shareholders in the company. *Jones* v. *Millar*, 24 O. R. 268.

Payment on Shares—*Appropriation of Payment by Company.*]—N., a director and shareholder of a railway company, agreed to lend the company $100,000, taking among other securities for the loan 168 shares held by B., which were to be paid up. B. owned 188 shares on which he had paid an amount equal to 40 per cent. of their value, but being unable to pay the balance the directors of the company agreed to treat the sum paid as payment in full for 75 of the 188 shares and B. consented to transfer that number to N. as fully paid up. N. agreed to this and B. signed a transfer which was entered on the books of the company. There was no formal resolution by the board of directors authorizing the appropriation of the money paid by B. A judgment creditor of the railway company, whose writ of execution had been returned *nulla bona*, brought an action against N. for payment of his debt, claiming that only 40 per cent. had been paid on the 75 shares and that the remaining 60 per cent. was still due the company thereon. A judgment in favour of N. was affirmed by the Divisional Court, 20 O. R. 86, but reversed by the Court of Appeal, 18 A. R. 658, on the ground that the appropriation by the directors of the money paid by B. was invalid for want of a formal resolution authorizing it:—

Held, reversing the judgment of the Court of Appeal, 18 A. R. 658, Gwynne, J., dissenting, that the company having got the benefit of the loan by N., were estopped from disputing the application of the money paid by B. in such a way as to constitute N. the holder of the 75 shares, upon the security of which the loan was made, and creditors, not having been prejudiced, are bound in the same way; and the transaction being binding between B. and the company, and not objectionable as regards creditors, N. could accept the 75 shares in lieu of the 168 he was entitled to. *Neelon* v. *Town of Thorold*, 22 S. C. R. 390.

Sci. Fa.]—*Promissory Notes—Ultra Vires.*]—In an action by way of *sci. fa.* against a shareholder in an incorporated company, against which the plaintiff had recovered a fruitless judgment, the defendant alleged as defences that the judgment was recovered upon certain promissory notes which the plaintiff procured the company to make to him, without consideration, when insolvent to his knowledge; that the notes were made in fraud of the creditors and contributories, and were *ultra vires* of the company; and that the company had a good defence to the action on the notes, but allowed the plaintiff to take judgment by default:—

Held, that these defences might have been raised in the original action, and were not available in this; and they were struck out. *Sharer* v. *Cotton*, 16 P. R. 278.

IV. Powers.

Bills of Exchange and Promissory Notes.]—*See Bryant* v. *Banque du Peuple*, *Bryant* v. *Quebec Bank*, [1893] A. C. 170, *ante* 101; *Fairchild* v. *Ferguson*, 21 S. C. R. 484, *ante* 101; and *Bridgewater Cheese Factory Co.* v. *Murphy*, 26 O. R. 327, 23 A. R. 60, *ante* 141.

Conduct of Business.]—The Court will not interfere with the doing of an act by a company which should have been sanctioned by a majority of the shareholders before the act was done, if such sanction can be afterwards obtained. *Purdom* v. *Ontario Loan and Debenture Co.*, 22 O. R. 597.

Contract—*Mining Company—Acquisition of Land—Mortgage to Secure Purchase Money—Execution of Contract.*]—Where a company has power to acquire land for the purposes of its incorporation, it has the power to give a mortgage for and to bind itself by covenant to pay the purchase money.

Where the power to contract exists, a person contracting with the company need not enquire whether the proper formalities of execution by the company have been complied with in a contract under its corporate seal. *Sheppard* v. *Bonanza Nickel Mining Co.*, 25 O. R. 305.

Delegation of—*Agreement with Foreign Company—Lease of Road for Term of Years.*]—The Canada Southern Railway Company, by its charter and amendments thereto, has authority to enter into an agreement with any other railway company with respect to traffic arrangements or the use and working of the railway or any part thereof, and by the Dominion Railway Act of 1879 it is authorized to enter into traffic arrangements and agreements for the management and working of its railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years:—

Held, reversing the decision of the Court of Appeal, *sub nom. Wealleans* v. *Canada Southern R. W. Co.*, 21 A. R. 297, that authority to enter into an arrangement for the "use and working" or "management and working" of its road conferred upon the company a larger right than that of making a forwarding agreement or of conferring running powers; that the company could lawfully lease a portion of its road to a foreign company and transfer to the latter all its rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in its use of the road so leased, to the same extent as the Canada Southern Railway Company is itself protected. *Michigan Central R. W. Co.* v. *Wealleans*, 24 S. C. R. 309.

Seal—*Performance—Adoption.*]—A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. Ritchie, C.J., and Strong, J., dissenting. *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581.

V. Proceedings by.

Libel—*Impugning the Validity of Election of Directors of a Corporation.*]—The defendant published of the directors of the plaintiffs, an incorporated building society, in a newspaper, a notice stating, amongst other matters, that "certain persons representing themselves to be directors of the society had been self-appointed by the most despicable, foul and fraudulent means, and in consequence, all business transacted by them . . . is wholly and entirely contrary to rules and regulations and law":—

Held, that the paragraph was capable of the meaning attributed to it, namely, that the business of the society was being illegally transacted, and as such it was defamatory of the plaintiffs. *Owen Sound Building and Savings Society* v. *Meir*, 24 O. R. 109.

Libel.]—*See Journal Printing Company of Ottawa* v. *McLean*, 25 O. R. 509, *post*, Defamation, VIII.

VI. Proceedings Against.

Annulment of Charter — *Fraud* — *Writ of Scire Facias.*]—Where it appeared that the defendants and others had been incorporated by letters patent, issued under the Great Seal of the Province of Quebec, which letters had been obtained by a fraudulent representation that the defendants and others had petitioned for the same, and a writ of *scire facias* was issued on an information by the Attorney-General against the company, its liquidator, and its judgment creditor, to shew cause why the letters patent should not be declared fraudulent, null and void, "at least in so far as the said defendants were concerned":—

Held, under the C. C. P. 1034 and 1035, that the Code does not authorize a partial annulment of letters patent as had been directed by the Court of Queen's Bench; that they ought to be entirely annulled, and that the terms of the prayer were wide enough to authorize an order to that effect. *Banque d'Hochelaga* v. *Murray*, 15 App. Cas. 414.

Annulment of Charter—*Attorney-General—Information—Scire Facias—Form of Proceedings.*]—The appellant company by its Act of incorporation, 44 Viet. ch. 61 (D.), was authorized to carry on business provided $100,000 of its capital stock were subscribed for, and thirty per cent. paid thereon, within six months after the passing of the Act, and the Attorney-General of Canada having been informed that only $60,500 had been *bonâ fide* subscribed prior to the commencing of the operations of the company, the balance having been subscribed for by *G. in trust*, who subsequently surrendered a portion of it to the company, and that the thirty per cent. had not been truly and in fact paid thereon, sought at the instance of a relator by proceedings in the Superior Court for Lower Canada to have the company's charter set aside and declared forfeited:—

Held, affirming the judgment of the Court below: 1. That this being a Dominion statutory charter proceedings to set it aside were properly taken by the Attorney-General of Canada. 2. That such proceedings taken by the Attorney-General of Canada under Articles 997 *et seq.* C. C. P., if in the form authorized by those articles, are sufficient and valid though erroneously designated in the pleadings as a *scire facias*. 3. That the *bonâ fide* subscription of $100,000 within six months from date of the passing of the Act of incorporation, and the payment of the thirty per cent. thereon, were conditions precedent to the legal organization of the company with power to carry on business, and as these conditions had not been *bonâ fide* and in fact complied with within such six months the Attorney-General of Canada was entitled to have the company's charter declared forfeited. Gwynne, J., dissenting. *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada*, 21 S. C. R. 72.

Information by the Attorney-General.]—*See Cosgrain* v. *Atlantic and North-West R. W. Co.*, [1895] A. C. 282, *ante* 63.

Judgment Against Company—*Examination of officer.*]—*See Charlebois* v. *Great North-West R. W. Co.*, 15 P. R. 10, *post*, Judgment Debtor.

VII. Stock.

Allotment.]—Persons named in the charter of a company as shareholders are liable as such for calls which may be afterwards made upon the stock stated in the charter to be held by them, and no further act of the directors in allotting such stock or giving them notice of allotment is necessary.

In re London Speaker Printing Co., 16 A. R. 508, followed. *In re Haggert Bros. Manufacturing Co. Peaker and Runions' Case*, 19 A. R. 582.

Calls.]—Under ordinary circumstances there is no liability to pay for shares until a call is made, and notice thereof given to the shareholder, and until that time the Statute of Limitations does not begin to run against the company. Therefore persons named in the charter issued in 1880 as shareholders were in 1891 held liable to pay the amount of their shares, no formal call having in the meantime been made.

Judgment of the County Court of Peel affirmed. *In re Haggert Bros. Manufacturing Co. Peaker and Runions' Case*, 19 A. R. 582.

Calls.]—A call upon shares under the Joint Stock Companies' Act, R. S. O. ch. 157, means a call made by the directors in pursuance of the powers given to them by section 44 of that Act. *Ontario Investment Association* v. *Sippi*, 20 O. R. 440.

Pledge.]—*See* Banks, III.—Collateral Security.

Surrender.]—By 54 & 55 Viet. ch. 110, sec. 4 (D.), power was given to any shareholder of the company to surrender his stock by notice in writing within a certain time. A shareholder, desiring to surrender his stock, transferred it within the time by an ordinary assignment to the president "in trust," both intending the transfer to operate as a surrender:—

Held, a valid surrender. *Harte* v. *Ontario Express and Transportation Company. Kirk and Marling's Case*, 24 O. R. 340.

Transfer.]—An otherwise valid transfer of shares allotted to the transferor upon which he has not paid anything, no calls having been made at the time of transfer, is not invalid because the ten per centum upon allotted stock directed by section 45 of the Act to be "called in and made payable within one year from the incorporation of the company" has not been paid.

The last mentioned section is directory merely. *Ontario Investment Association* v. *Sippi*, 20 O. R. 440.

Transfer—*Validity of Assignment not Entered in Books.*]—A *bond fide* assignment or pledge for value of shares in the capital stock of a company incorporated under R. S. O. ch. 157 is valid between the assignor and the assignee, notwithstanding that no entry of the assignment or transfer is made in the books of the company; and, as only the debtor's interest in property seized can be sold under execution, the rights of a *bond fide* assignee cannot be cut out by the seizure and sale of the shares, under execution against the assignor, after the assignment.

R. S. O. ch. 157, sec. 52, considered and construed.

Semble, that nothing passes by such a sale under execution; for the words "goods and chattels" in section 16 of the Execution Act, R. S. O. ch. 64, do not include shares in an incorporated company so as to authorize the sale of the equity of redemption in such shares. *Morton* v. *Cowan*, 25 O. R. 529. *See* now 58 Vict. ch. 13, sec. 32 (O.).

Votes—*Mortgage.*]—Under the 38th section of the Ontario Joint Stock Company's Letters Patent Act, R. S. O. ch. 157, the votes of the "two-thirds in value of the shareholders" who may vote for a by-law authorizing the borrowing of money, etc., on the property of the company are, where there has been no default after a call, to be computed upon the face value of the number of the shares held, and not upon the amount paid upon such shares. *Purdom* v. *Ontario Loan and Debenture Co.*, 22 O. R. 597.

VIII. Winding-up Acts.

1. *Application of Acts and Making of Order.*

Foreign Corporations.]—Section 3 of "The Winding-up Act," Revised Statutes of Canada, ch. 129, which provides that the Act applies to . . . incorporated trading companies doing business in Canada, wheresoever incorporated, is *intra vires* the Parliament of Canada.—2. A winding-up order by a Canadian Court in the matter of a Scotch company, incorporated under the Imperial Acts, doing business in Canada, and having assets and owing debts in Canada, which order was made upon the petition of a Canadian creditor, with the consent of the liquidator previously appointed by the Court in Scotland, as ancillary to the winding-up proceedings there, is a valid order under the said Winding-up Act of the Dominion. *Merchants Bank of Halifax* v. *Gillespie*, 10 S. C. R. 312, distinguished. *Allen* v. *Hanson, In re Scottish Canadian Asbestos Co.*, 18 S. C. R. 667.

Voluntary Assignment—*Wishes of Creditors.*]—Section 9 of the Dominion Winding-up Act gives a wide discretionary power to the Court to grant or refuse a winding-up order; and where, upon an application for such an order, it appeared that the company had previously made a voluntary assignment for the benefit of creditors, and that it was the desire of the great majority in number and value of the creditors that liquidation should be proceeded with under the assignment, the application was refused. *Wakefield Rattan Co.* v. *Hamilton Whip Co.*, 24 O. R. 107.

Voluntary Winding-up—*Compulsory Liquidation*—"*Doing Business in Canada.*"]—There is no clashing between section 3 of the Winding-up Act, R. S. C. ch. 129, and section 3 of the Winding-up Amendment Act, 52 Vict. ch. 32; the latter Act provides for the voluntary winding-up of the companies falling within its provisions, and not for their compulsory liquidation, which is provided for by the former.

A company incorporated under an Act of the Province of Ontario, and carrying on business in Ontario, is "doing business in Canada" within the meaning of section 3 of the original Act. *Re Ontario Forge and Bolt Co.*, 25 O. R. 407.

Winding-up Order—*Proceeding afterwards without Leave.*]—*See Keating* v. *Graham*, 26 O. R. 361; *post*, Judgment, I.

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2. *Carrying on Business.*

Ontario Winding-up Act.]—The paramount object of the Ontario Winding-up Act is the division of the company's assets among its creditors and members with all reasonable speed.

The power to carry on the business after winding-up proceedings have been commenced, and thus to postpone the final winding-up, is one which is not to be exercised unless a strong case of necessity for doing so exists.

That the mortgagees of the company's works, who have foreclosed their mortgage, will be enabled to dispose of the works to greater advantage, and that by affording facilities for procuring repairs to the purchasers of the machinery manufactured by the company, the chances of obtaining payment of outstanding purchase notes will be improved, are not sufficient grounds to justify the carrying on of the business.

Judgment of the County Court of Peel reversed. *In re Haggert Brothers Manufacturing Co.*, 20 A. R. 597.

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3. *Compromise of Claims.*

Dissentient Minority—*Liquidator's Approval.*]—There is no power given by the Winding-up Act, R. S. C. ch. 129, to enforce a compromise upon dissentient minorities of creditors.

Semble, a liquidator cannot be compelled to consent to a compromise, and even when a compromise is recommended by a liquidator it may be frustrated by an opposing minority. *Re Sun Lithographing Co.*, 24 O. R. 200.

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4. *Contributories.*

Director—*Solicitor—Right to Costs—Set-off.*]—Where a director, who was also president, of a company was appointed by the board of directors and acted as solicitor for the company :—

Held, in winding-up proceedings, that he was entitled to profit costs in respect of causes in Court conducted by him as solicitor for the company, but not in respect of business done out of Court, and was entitled to set off the amount of such costs against the amount of his liability as a shareholder.

Decision of the Master in Ordinary reversed. *Cradock* v. *Piper*, 1 Maen. & G. 664, followed. *Re Mimico Sewer Pipe and Brick Manufacturing Co., Pearson's Case*, 26 O. R. 289.

Illegal Increase of Capital — *Validating Act.*]—To attempt to make partially paid-up shares in the capital stock of a company paid-up shares by an allowance of a discount to the holders thereof is *primâ facie* illegal, and a proviso in the Act of Incorporation "that no by-law for the allotment or sale of stock at any greater discount than what has been previously authorized at a general meeting" is not wide enough to impliedly authorize the allowance of such a discount on shares which were originally subscribed for at their full nominal value.

An Act of Parliament reciting that a company had been "duly organized," had ceased its operations, and had been "reorganized"; and declaring that the charter is in force and the company "as now organized" capable of doing business, does not give legislative sanction to an illegal increase of the capital stock so as to make holders of shares of the illegally issued stock liable as contributories in winding-up proceedings.

Judgment of Boyd, C., 24 O. R. 216, on these points, reversed. *In re Ontario Express and Transportation Co.*, 21 A. R. 646.

An appeal from this decision was quashed by the Supreme Court, 24 S. C. R. 716. *See* the next case.

Increase of Capital Stock—*Surrender of Shares.*]—The charter of the company provided that the capital stock might be increased, if and when the original stock had been paid in full. When twenty per cent. had been paid on the latter, a by-law allowing a discount of eighty per cent. was passed, and then another by-law increasing the capital stock. By subsequent Act, 54 & 55 Vict. ch. 110 (D.), the "reorganization" of the company was recited, and the company, "as now organized," was declared capable of doing business :—

Held, in winding-up proceedings, that though the issue of the increased stock was irregular and illegal, yet the Act last referred to had validated it, and the holders of the new stock were liable as contributories.

Section 4 of the said Act provided that any shareholder might surrender his shares within a time limited, and that the said shares should be forfeited, and his liability in respect thereof should cease :—

Held, in winding-up proceedings, that those who had thus surrendered their shares were not liable as contributories even to the extent of the ten per cent. which they ought to have paid at the time of subscription, but had not. *In re Ontario Express and Transportation Co.*, 24 O. R. 216.

Issue of Shares at a Discount.]—A joint stock limited liability company being indebted in a small amount, which was afterwards paid off, and having at the time assets worth more than double the amount of its issued stock and all other liabilities, allotted a number of shares to its shareholders, at a discount. Subsequently the company was freshly incorporated with the shares so issued treated as fully paid up, and afterwards falling into difficulties, was put into liquidation under R. S. C. ch. 129 :—

Held, that these shareholders were not liable as contributories. *In re Owen Sound Dry Dock Shipbuilding and Navigation Co.*, 21 O. R. 349.

Petition for Incorporation — *Estoppel.*]—Where in winding-up proceedings it appeared that an alleged contributory joined in the petition for incorporation, wherein it was untruly stated that he had taken 250 shares of the capital stock, whereas the shares he held had, after incorporation, been voted to him by a resolution of the directors as paid-up stock, for services in connection with the formation of the company :—

Held that in view of the provisions of the Ontario Joint Stock Companies' Letters Patent Act, he was liable to be held a contributory in respect of, at the least, the number of shares voted to him.

Semble. He was liable for the full number of shares mentioned in the petition. *Re Collingwood Dry Dock Ship Building and Foundry Co. Weddell's Case*, 20 O. R. 107.

Pledgee—*Transfers.*]—After a winding-up order has been made it is too late for holders of shares, entered as such in the books of the bank, to escape liability by shewing irregularities in transfers to more or less remote predecessors in title.

A loan company which advances money on the security of shares which are transferred to it, and accepted by it in the ordinary absolute form, cannot escape liability on the ground that it is merely a trustee for the borrower. Judgment of Robertson, J., affirmed. *In re Central Bank of Canada, Home Savings and Loan Company's Case*, 18 A. R. 489.

Promoter Selling Property to Company—*Fiduciary Relation.*]—Shares in a joint stock company may be paid for in money or money's worth and if paid for by a transfer of property they must be treated as fully paid up; in proceedings under the Winding-up Act the Master has no authority to inquire into the adequacy of the consideration with a view to placing the holder on the list of contributories.

There is a distinction between a trust for a company of property acquired by promoters and afterwards sold to the company and the fiduciary

relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed.

A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a relation to the latter and if he sells to them fiduciary must not violate any of the duties devolving upon him in respect to such relationship. If he sells, for instance, through the medium of a board of directors who are not independent of him the contract may be rescinded, provided the property remains in such a position that the parties may be restored to their original status.

There may be cases in which the property may be regarded as being bound by a trust either *ab initio* or in consequence of *ex post facto* events; if a promoter purchases property from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of the property such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promoter may be made a contributory. *In re Hess Manufacturing Co. Edgar v. Sloan*, 23 S C. R. 644. *See* the next two cases.

Promoter—*Trust.*]—To make an alleged promoter of a company liable for the amount of paid-up shares allotted to him in consideration of the transfer by him to the company of property standing in his name, it must be shewn that at the time of its acquisition by him he stood in such a relation to the intended company that he could not claim to have bought the property for himself, and, therefore, that there was no consideration for the allotment; and the Court [Hagarty, C.J.O., dissenting], having, on the evidence, come to the conclusion that this was not shewn, reversed the judgment of Meredith, J., 23 O. R. 182. *In re Hess Manufacturing Co. Sloan's Case*, 21 A. R. 66. *See* the next case.

Promoter—*Sale to Company—Paid-up Stock.*]—The appellant, intending to promote a joint stock company for manufacturing furniture, procured the conveyance to himself of certain lands, free of charge, in consideration of the factory being erected upon them, which was done, he contributing $7,300 for that purpose. $7,000 of this he repaid himself by mortgaging the land.

The company was incorporated under R. S. O. ch. 157, the appellant being one of the directors and appearing as a subscriber for 150 shares. At a shareholders' meeting, after he had ceased to be a director, but at which he was present by agent, it was agreed that the company should purchase the land and factory from him for $25,000, payable by the assumption of the $7,000 mortgage, and the issue to him of $18,000 of paid-up shares, which were accordingly allotted to him. Subsequently he transferred 234 of the 360 shares so allotted. A winding-up order having been made under R. S. C. ch. 129:—

Held, affirming the decision of the Master in Ordinary, that the appellant, as a promoter of the company, held a fiduciary position towards the company which precluded him from making a profit on his dealings with the company, and that he was liable as a contributory in respect to the 126 shares still held by him, but not in respect of the shares transferred, the same having been taken by him as trustee for those to whom he afterwards transferred them. *In re Hess Manufacturing Co. Sloan's Case*, 23 O. R. 182.

Purchase by Company of its Own Shares—*Transfer to "Manager in Trust"—Liability of Manager as Contributory.*]—The manager of an insurance company, authorized by the directors, with the moneys of the company, purchased from the holder thereof, who was ignorant of the object intended, a number of partly paid-up shares of the company on which calls were in arrear, for the purpose of cancellation, taking the transfer to himself as "manager in trust." The company had no power to deal in its own stock. The shares were never cancelled, the dividends thereon being credited to the company:—

Held, in liquidation proceedings, that in the absence of knowledge by the transferor that the purchase was for an illegal purpose, the manager was properly placed on the list of contributories. *Re Union Fire Ins. Co. McCord's Case*, 21 O. R. 264.

Repudiation of Shares.]—After the issue of letters patent in 1880 incorporating the company and naming certain persons as shareholders, these persons stated to certain of the directors of the company that they would not accept their stock, and would have nothing more to do with the company, but no proceedings were taken by them to relieve themselves from liability; and no proceedings were taken against them until the company was wound up in 1891:—

Held, distinguishing *Nicol's Case*, 29 Ch. D. 421, that as these persons had not a mere inchoate right to receive shares, but were actually shareholders and members of the company by virtue of the charter, mere statements of this kind, and the lapse of time, and the failure of the directors to enforce payment of the shares, did not relieve them from their liability as shareholders.

In re Huggert Bros. Manufacturing Co. Peaker and Runions' Case, 19 A. R. 582.

Subscription — *Non-payment at Time of Allotment.*]—*See In re Central Bank, Nasmith's Case*, 16 O. R. 293. Affirmed in appeal, 18 A. R. 209.

Transfer of Shares for a Particular Purpose—*Neglect to Re-transfer.*]—The defendant, at the request of the president of the plaintiff association, accepted from him a transfer of shares, partly paid-up, in the association, for the purpose of attending a meeting of shareholders and forming a quorum, and gave the president a power of attorney to re-transfer the shares after the meeting. No re-transfer was made, and the defendant remained in ignorance that the shares stood in his name until the association became financially embarrassed:—

Held, that he was liable as a contributory.

Decision of MacMahon, J., at the trial reversed. *Ontario Investment Association* v. *Leys*, 23 O. R. 496.

Transfer of Shares.]—The shareholders of a company sold and transferred part of their property, and also contracted that they would, within a year, transfer their charter by assigning all their stock to the purchaser's nominee. Part of the purchase money was paid at once, but the purchaser did not nominate a person to whom the shares should be transferred. After an order for the winding-up of the company had been made, the liquidators brought this action for the balance of the purchase money :—

Held, that they were entitled to recover.

Decision of MacMahon, J., affirmed. *Redfern* v. *Polson*, 25 O. R. 321.

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5. *Distribution of Assets.*

Joint and Several Debtors.] — Held, per Ritchie, C.J., and Taschereau, J., affirming the judgment of the Court below, Strong and Fournier, JJ., contra, that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor.—Per Gwynne and Patterson, JJ., that a person who has realized a portion of his debt upon the insolvent estate of his co-debtors cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtors jointly and severally liable without first deducting the amount he has previously received from the estate of his other co-debtor. R. S. C. ch. 129, sec. 62, The Winding-up Act. *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152.

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6. *Liquidators.*

Insolvent Bank—*Right to Appoint Another Bank.*]—The Winding-up Act provides that the shareholders and creditors of a company in liquidation shall severally meet and nominate persons who are to be appointed liquidators and the Judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool the Judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank :—

Held, affirming the judgment of the Court below, 22 N. S. Rep. 97, that there is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators; that a bank may be appointed liquidator; and that if any appeal lies from the decision of the Judge in exercising his judgment as to the appointment such discretion was wisely exercised in this case. *Forsythe* v. *Bank of Nova Scotia. In re Bank of Liverpool*, 18 S. C. R. 707.

Liquidator—*Examination before Statement of Claim.*]—An official liquidator cannot as an officer of the Court be called upon to make discovery unless he is representatively in the position of an adverse litigant to the party requiring the discovery.

Where certain shareholders of an insolvent bank were suing the directors for negligence and misfeasance, and had made the bank defendants for conformity without asking any relief against them, an application by the plaintiffs under Rule 556 for leave to examine one of the liquidators for discovery before statement of claim was refused. *Henderson* v. *Blain*, 14 P. R. 308.

Liquidators' Commission — *Allowance of Commission on Set-off.*]—In fixing the liquidators' commission or compensation in the winding-up proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set-off, but not actually received by the liquidators; and in this case a commission of two and a-quarter per cent. having been allowed on the gross amount of moneys actually collected, a further commission of one and a-quarter per cent. on a sum of $231,000, consisting of amounts adjusted or set-off, was allowed.

So far as possible, the amount allowed as compensation to liquidators in such winding-up proceedings should be evenly spread over the whole period of the liquidation, so as to ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators, when more than one. *In re Central Bank, Lye's Claim*, 22 O. R. 247.

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7. *Practice.*

(a) *Appeals.*

Divisional Court.]—The Divisional Courts are not constituted appellate Courts for the purposes of Dominion Judicature under the Winding-up Act and an appeal does not lie to a Divisional Court from an order of a Judge in Chambers in a proceeding under that Act.

The Master in Chambers, or other subordinate judicial officer, has no jurisdiction, unless by delegation, to make an order in a proceeding under that Act.

Where a notice of appeal to the Court of Appeal from an order of a Judge in such a proceeding has been given, but leave to appeal has not been obtained, it is not necessary to have the notice set aside.

Donovan v. *Haldane*, 14 P. R. 106, distinguished. *Re Sarnia Oil Co.*, 15 P. R. 182.

Final Order.]—An order of the County Court under the Ontario Winding-up Act approving of the sale of the assets is a "final order," as nothing further remains to be done under it and therefore is the subject of appeal. *In re D. A. Jones Co.*, 19 A. R. 63.

Leave to Appeal—*Successive Applications.*]—Where an application for leave to appeal to the Court of Appeal from a decision in a matter under the Winding-up Act, R. S. C. ch. 129, has been made under section 74, and refused by a Judge, a fresh application will not be entertained by another Judge.

The cases in which successive applications to successive Judges have been favoured, are not

pertinent to a case where the right to appeal, upon leave, is sought under a special statute. *Re Sarnia Oil Co.*, 15 P. R. 347.

Leave to Appeal—*Time Extended after Argument.*]—After a case under the Winding-up Act was argued the appellant, with the consent of the respondent, obtained from a Judge of the Court below an order to extend the time for bringing the appeal, and subsequently before the time expired he got an order from the Registrar of the Supreme Court, sitting as a Judge in Chambers, giving him leave to appeal in accordance with section 76 of the Winding-up Act, and the order declared that all proceedings had upon the appeal should be considered as taken subsequent to the order granting leave to appeal. *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152.

(b) *Costs.*

Security for Costs—*Intervening Shareholder out of the Jurisdiction.*]—An order was made by the Court delegating the powers exercisable by the Court for the purpose of winding-up a company, to a referee, pursuant to R. S. C. ch. 129, sec. 77, as amended by 52 Vict. ch. 32, sec. 20 (D.):—

Held, that power was delegated to the referee to order security for costs and to stay proceedings till security should be given by a shareholder resident out of the jurisdiction, who intervened:—

Held, also, that the liquidator and others opposing the applications made by the intervening shareholder were not barred of their right to security by not applying till after the original applications of the shareholder had been dismissed, and appeals taken; but that the security should be limited to the costs of the appeals. *Re Sarnia Oil Co.*, 14 P. R. 335.

(c) *Powers of Judges and Masters.*

County Court.]—The liquidator of a company which was being voluntarily wound up under the Ontario Winding-up Act, sold the assets thereof en bloc, without the sanction of the contributories, to a private individual, and then obtained from the County Court an order approving of the sale, and making certain provisions for the disposition of the purchase moneys.

On appeal, it was held that the order was made without authority, and that it was a nullity. *In re D. A. Jones Co.*, 19 A. R. 63.

County Court—*Personal Order against Liquidator for Costs.*]—An order was made by a County Court, under R. S. O. ch. 183, for the winding up of the companies, and a liquidator was appointed, who brought in a list of contributories. The contributories shewed cause to their names being settled upon the list, and the Court made an order in the case of each of them, reciting that it appeared there was no jurisdiction to make the winding-up order, and that all proceedings were irregular or null, and ordering that each contributory should have his costs of shewing cause, to be paid by the companies and the liquidator:—

Held, that if there was jurisdiction to make the winding-up order, the contributories could not defend themselves by shewing that it was irregular or erroneous; and if there was no jurisdiction all the proceedings were *coram non judice*, and there was no jurisdiction, the Court being an inferior one, to order the liquidator or the companies to pay the costs.

And even if there was jurisdiction, in the circumstances of this case, it should not have been exercised against the liquidator.

Rule 1256 does not apply to proceedings under the Winding-up Act, either by virtue of section 34 of the Act or otherwise. *Re Cosmopolitan Life Association—Re Cosmopolitan Casualty Association*, 15 P. R. 185.

Foreclosure or Sale by Petition.]—On a petition by a mortgagee in the winding-up proceedings of a company, under R. S. C. ch. 129, asking for the conveyance to him by the liquidator of the company's equity of redemption, the Court has jurisdiction to make the usual order for foreclosure or sale.

It is a matter of discretion with the Court whether an action will be directed or summary proceedings sanctioned. *Re Essex Land and Timber Co., Trout's Case*, 21 O. R. 367.

Illegal Transaction—*Summary Application to Set Aside.*]—Sub-section 17 of section 23 of R. S. O. ch. 183, which provides for summary proceedings in the course of winding-up a company against directors and other officers in respect of alleged misfeasance or breach of trust, is not wide enough to authorize the setting aside as a breach of trust, on the summary application of the liquidator, of a sale of lands by the company to a director, especially where the lands have, at the director's request, been conveyed by the company to the director's wife.

The scope of the sub-section considered. *In re Essex Centre Manufacturing Co.*, 19 A. R. 125.

Injunction to Restrain Proceedings in Quebec Court.]—Injunctions granted to restrain proceedings in a Montreal Court against a bank in process of being wound up in Ontario, under the Dominion Winding-up Act, and also such proceedings against the liquidators appointed in the winding-up for things done in their official capacity, and from attacking the validity of their appointment. *Re Central Bank, Baxter* v. *Central Bank*, 20 O. R. 214.

Master in Ordinary—*Fraudulent Preference.*]—In the course of a reference made to the Master in Ordinary in winding-up proceedings under R. S. C. ch. 129, sec. 77, sub-sec. 2, as amended by 52 Vict. ch. 32, sec. 20 (D.), a claim was made for rent, and the liquidator contended that the conveyance under which the claimant assumed to be owner of the demised premises was a fraudulent preference, and further that the alleged lease was never executed:—

Held, that the Master had no jurisdiction to adjudicate upon this contention; and the liquidator should be left to proceed under R. S. C. ch. 129, sec. 31, by way of action. *In re Sun Lithographing Co., Farquhar's Claim*, 22 O. R. 57.

Master in Ordinary—*Fraudulent Transfer.*]—The Master in Ordinary, or other officer of

the Court, to whom its powers may be delegated, is not a competent tribunal to decide questions of fraudulent transfer arising in the course of a reference in winding-up proceedings, under the Dominion Winding-up Act and amending Acts. *Harte* v. *Ontario Express and Transportation Co., Molsons Bank Claim*, 25 O. R. 247.

Master—*Insurance Act of Ontario.*]—A Master of the High Court has no authority, under the provisions of the Insurance Corporations Act, 1892, to direct security to be given by an officer of a company being wound up, in place of an insufficient security already given by such officer. Section 54, sub-sections 5 and 7, merely provide for the giving of security as interim receiver, which may be made a condition of retention in that office, but default in giving which cannot be punished by imprisonment for contempt. *Re Dominion Provident, Benevolent, and Endowment Association*, 24 O. R. 416.

Master—*Insurance Act of Ontario.*]—The Master has power under that Act to settle schedules of creditors, which implies power to adjudicate upon the claims of officials of a company for services to ascertain whether they shall appear as creditors in the schedules, but he cannot adjudicate upon the question whether they have been guilty of such conduct as deprives them of their right to claim as creditors.

He has also power to settle schedules of contributories, but cannot adjudicate upon the question whether officials of the company have been guilty of such a breach of duty as to make them liable for any loss by reason thereof. Such matters can only be determined by action. *Re Dominion Provident, Benevolent, and Endowment Association*, 25 O. R. 619.

Minority—*Liquidator's Appraval.*]—There is no power given by the Winding-up Act, R. S. C. ch. 129, to enforce a compromise upon dissentient minorities of creditors.

Semble, a liquidator cannot be compelled to consent to a compromise, and even when a compromise is recommended by a liquidator, it may be frustrated by an opposing minority. *Re Sun Lithographing Co.*, 24 O. R. 200.

Quebec Law.]—There is nothing in section 56 of the Dominion Winding-up Act which alters or interferes with the *lex loci contractus* in the case of a claim.

Where a lease of property situate in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the lessor, on the insolvency of the lessee, and by the law of that Province, Civil Code, Article 1092, on such insolvency the rent not yet exigible, by the terms of the lease, becomes so, a claim for the whole rent, taxes, etc., to the end of the term was, on the insolvency of the lessee company, allowed to the lessors in liquidation proceedings under the Dominion Act. *In re Harte and the Ontario Express and Transportation Co.*, 22 O. R. 510.

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8. *Sale of Assets.*

Sale by the Court.]—The words "peremptory" or "peremptorily" do not always mean "absolutely final," there being a discretion in the Court under special and urgent circumstances whether they shall have that meaning or not.

A sale by tender (not saying that the property will be sold to the highest bidder) is a mere attempt to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt.

In winding-up proceedings of a joint stock company, tenders were advertised for the purchase of the company's property, to be received by a certain time when the sale was to be "peremptorily closed." At the time fixed one tender only had been received, and the referee enlarged the time for the arrival of a train which was late. Two more tenders were received by that train; one on behalf of the largest beneficiary under the mortgage to enforce which the sale was being held, and the other by a stranger, which was a little higher than that of the beneficiary. The latter then by his agent handed in a much higher tender, whereupon the referee instructed notice of the last tender to be given to the other tenderers, and on a subsequent day accepted the last which was the highest tender:—

Held, that he was justified in so doing. *Re Alger and Sarnia Oil Co.*, 21 O. R. 440. Affirmed in appeal, 19 A. R. 446.

Sale by Liquidator—*Purchase by Director of Insolvent Company.*]—Upon the appointment of a liquidator for a company being wound up under R. S. C. ch. 129, The Winding-up Act, if the powers of the directors are not continued as provided by section 34 of the Act their fiduciary relations to the company or its shareholders are at an end and a sale to them by the liquidator of the company is valid. *Chatham National Bank* v. *McKeen*, 24 S. C. R. 348.

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9. *Solicitor.*

Creditors' Solicitor.]—Upon a reference for the winding-up of a company, the referee appointed a firm of solicitors to represent the general body of creditors, and ordered that they should be notified to attend whenever he so directed, and that their costs, as between solicitor and client, should be paid out of the assets:—

Held, that this class of order and liability was not favoured by the Courts, and should be invoked and attendance thereunder had only when there was any special question on which the appearance of some one to represent the creditors was desirable; that attendances and services should not be paid for out of the assets except where contemporaneously approved of by the referee; and it was not proper practice to extend this at the close of the proceedings by obtaining a certificate from him that, had he been applied to from time to time, he might have provided for other attendances and services.

Order of Meredith, C.J., varied. *Re Drury Nickel Co.*, 16 P. R. 525.

Liquidator's Solicitor.]—In a proceeding for the winding-up of a company, a solicitor who is acting for claimants whose claims must be contested by the liquidators, cannot obtain the

sanction of the Court to his acting also as solicitor for the liquidators. Nor will the Court sanction the appointment of a special solicitor to act for the liquidators in the matter of the contested claim. The winding-up must be prosecuted by one disinterested solicitor, whose services will not be divided by the assertion of antagonistic claims. *Re Charles Stark Co.*, 15 P. R. 471.

COMPENSATION.

See RAILWAYS, X.—TRUSTS AND TRUSTEES, IV.

COMPOSITION AGREEMENT.

See BANKRUPTCY AND INSOLVENCY, II.

CONDITIONAL FEE.

See ESTATE.

CONDITIONAL SALE.

See SALE OF GOODS.

CONDITIONS.

See DEED—INSURANCE.

CONFESSION OF JUDGMENT.

See BANKRUPTCY AND INSOLVENCY, I.

CONSIDERATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES I.—BILLS OF SALE—CONTRACT.

CONSOLIDATION OF ACTIONS.

See PRACTICE, II.

CONSOLIDATION OF MORTGAGES.

See MORTGAGE, XVIII.

CONSPIRACY.

See CRIMINAL LAW, IV.

CONSTABLE.

Notice of Action.]—*See Scott* v. *Reburn*, 25 O. R. 450; and *Kelly* v. *Archibald, Kelly* v. *Barton*, 26 O. R. 608, 22 A. R. 522, *ante* 8.

Tenure of Office.]—Under R. S. O. ch. 184, sec. 445, the chief constable for the municipality can only hold office during the pleasure of the council, and this although he may have been appointed for one year by a by-law passed by the council. *Vernon* v. *Town of Smith's Falls*, 21 O. R. 331.

CONSTITUTIONAL LAW.

I. GENERALLY.

Case Stated Under 52 Vict. ch. 15, sec. 5 (O.).]—A case can be stated by a Justice of the Peace under 52 Vict. ch. 15, sec. 5 (O.), for the judgment of the Court of Appeal, only when the constitutional validity of the statute under which he has acted is called in question, and not when the constitutional validity of some other statute, such as a statute regulating procedure or evidence, is collaterally attacked. *Regina* v. *Edwards*, *Regina* v. *Lynch*, 19 A. R. 706.

Case Stated by Governor-in-Council.]—*See In re County Courts of British Columbia*, 21 S. C. R. 446, *post* 163.

Governor-in-Council—*Statutory Power of Approval by Governor-in-Council—Position of a Minister of the Crown with Respect to the Exer-*

cise of such Power.]—By the sixth section of the Liquor License Act, 1883, the Boards of License Commissioners for the various license districts in the Dominion, were empowered to fix the salaries of license inspectors, subject to the approval of the Governor-in-Council:—

Held, that such approval could not be given by a Minister of the Crown. *Burroughs* v. *The Queen*, 2 Ex. C. R. 293. Affirmed by the Supreme Court, 20 S. C. R. 420.

Lieutenant-Governor—*Representative of the Queen—Provincial Government.*]—The Lieutenant-Governor of a Province is as much the representative of Her Majesty the Queen for all purposes of provincial Government as the Governor-General himself is for all purposes of the Dominion Government. *Attorney-General of Canada* v. *Attorney-General of Ontario*, 23 S. C. R. 458.

See, also, the cases under British North America Act, 1867, *post* 161.

Territorial Rights—*Great Seal—Exchequer Court.*]—The Crown, in right of the Dominion, has a right to take proceedings to restrain an individual from making use of a provincial grant in a way to embarrass the Dominion in the exercise of its territorial rights. The rights of the Crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or Province (as the case may be), in which is vested the beneficial interest therein. The Parliament of Canada has the right to enact that all actions and suits of a civil nature, at common law or equity, in which the Crown, in right of the Dominion, is plaintiff or petitioner, may be brought in the Exchequer Court. Taschereau, J., *dubitante*. *Farwell* v. *The Queen*, 22 S. C. R. 553.

II. British North America Act, 1867.

1. *Generally.*

Powers of Province.]—The British North America Act, 1867, has not severed the connection between the Crown and the Provinces. The relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers, executive and legislative, public property and revenues, as are vested in them respectively. In particular, all property and revenues reserved to the Provinces by sections 109 and 126 are vested in Her Majesty as sovereign head of each Province. *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437. *See* the next case.

Powers of Province.]—The Government of each Province of Canada represents the Queen in the exercise of her prerogative as to all matters affecting the rights of the Province. *The Queen* v. *Bank of Nova Scotia*, 11 S. C. R. 1, followed. *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, 20 S. C. R. 695.

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2. *Adulteration of Food.*

Act to Prevent Frauds against Cheese Factories.]—The Act 52 Vict. ch. 43 (D.), an Act to provide against frauds in the supplying of milk to cheese factories, etc., is *intra vires* the Dominion Parliament. *Regina* v. *Stone*, 23 O. R. 46.

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3. *Assessment and Taxes.*

Taxation—*Penalty for Not Paying Taxes.*]—The Municipal Act of Manitoba provides that persons paying taxes before December 1st in cities and December 31st in rural municipalities shall be allowed ten per cent. discount; that from that date until March 1st the taxes shall be payable at par; and after March 1st ten per cent. on the original amount of the tax shall be added:—

Held, reversing the judgment of the Court below, Gwynne, J., dissenting, that the ten per cent. added on March 1st is only an additional rate or tax imposed as a penalty for non-payment which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of section 91 of the B. N. A. Act. *Ross* v. *Torrance*, 2 Legal News 186, overruled. *Lynch* v. *Canada N. W. Land Co.*, *South Dufferin* v. *Mordon*, *Gibbins* v. *Barber*, 19 S. C. R. 204.

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4. *Banking.*

Warehouse Receipts.]—The Bank Act is *intra vires* of the Dominion Parliament. Section 19, sub-section 15, of the British North America Act, 1867, gives to that Parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the Province, and confers upon a bank privileges as a lender which the provincial law does not recognize. The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in section 91, is of paramount authority, even though its trenches upon the matters assigned to the provincial legislature by section 92. *Cushing* v. *Dupuy*, 5 App. Cas. 409, followed. *Tennant* v. *Union Bank of Canada*, [1894] A. C. 31, affirming *S. C.*, 19 A. R. 1.

See Quirt v. *The Queen*, 19 S. C. R. 510, *post* 163.

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5. *Bankruptcy and Winding-up Acts.*

Bankruptcy and Insolvency—*Assignments and Preferences Act, R. S. O. ch. 124.*]—Held, that the provisions of section 9 of the Act respecting Assignments and Preferences, R. S. O. ch. 124, which relate to assignments purely voluntary, and postpone thereto judgments and executions not completely executed by payment, are merely ancillary to bankruptcy law, and as such are within the competence of the provincial legislature so long as they do not conflict with any existing bankruptcy legislation of the Dominion Parliament. *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*, [1894] A. C. 189, reversing *S. C.* 20 A. R. 489.

sub nom. In re Assignments and Preferences Act, and overruling *Union Bank* v. *Neville*, 21 O. R. 152.

Right of Legislation—*Banking and Incorporation of Banks—Bankruptcy and Insolvency.*]—In 1866 the Bank of Upper Canada became insolvent and assigned all its property and assets to trustees. By 31 Vict. ch. 17, the Dominion Parliament incorporated said trustees giving them authority to carry on the business of the bank so far as was necessary for winding-up the same. By 33 Vict. ch. 40, all the property of the bank vested in the trustees was transferred to the Dominion Government who became seized of all the powers of the trustees :—

Held, affirming the judgment of the Court of Appeal, 17 A. R. 421, *sub nom. Regina* v. *County of Wellington*, that these Acts were *intra vires* the Dominion Parliament.

Per Ritchie, C.J.—That the legislative authority of Parliament over "banking and the incorporation of banks" and over "bankruptcy and insolvency" empowered it to pass the said Acts.

Per Strong, Taschereau and Patterson, JJ.—The authority to pass the said Acts cannot be referred to the legislative jurisdiction of Parliament "over banking and the incorporation of banks" but to that over "bankruptcy and insolvency" only. *Quirt* v. *The Queen*, 19 S. C. R. 510.

Winding-up Act—*Foreign Corporations.*]—Section 3 of "The Winding-up Act" R. S. C. ch. 129, which provides that the Act applies to . . . incorporated trading companies doing business in Canada wheresoever incorporated is *intra vires* the Parliament of Canada. *Allen* v. *Hanson*. *In re Scottish Canadian Asbestos Co.*, 18 S. C. R. 667.

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6. *Courts and Judges.*

Administration of Justice—*Speedy Trials Act.*]—The power given to the provincial Governments by the B. N. A. Act, sec. 92, sub-sec. 14, to legislate regarding the constitution, maintenance and organization of provincial Courts includes the power to define the jurisdiction of such Courts territorially as well as in other respects, and also to define the jurisdiction of the Judges who constitute such Courts.

The Acts of the legislature of British Columbia, C. S. B. C. ch. 25, sec. 14, authorizing any County Court Judge to act as such in certain cases in a district other than that for which he is appointed, and 53 Vict. ch. 8, sec. 9, which provides that until a County Court Judge of Kootenay is appointed the Judge of the County Court of Yale shall act as and perform the duties of the County Court Judge of Kootenay, are *intra vires* of the said legislature under the above section of the B. N. A. Act.

The Speedy Trials Act, 51 Vict. ch. 47 (D.), is not a statute conferring jurisdiction but is an exercise of the power of Parliament to regulate criminal procedure.

By this Act jurisdiction is given to "any Judge of a County Court," to try certain criminal offences :—

Held, that the expression "any Judge of a County Court," in such Act, means any Judge having, by force of the provincial law regulating the constitution and organization of County Courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a County Court Judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the provincial legislature so to do :—

Held, per Taschereau, J.—It is doubtful if Parliament had power to pass those sections of the Act 54 & 55 Vict. ch. 25, which empower the Governor-General in Council to refer certain matters to this Court for an opinion. *In re County Courts of British Columbia*, 21 S. C. R. 446.

Insurance Act of Ontario—*Powers of Master.*]—The Ontario Legislature has power to confer upon the Master the powers given by "The Insurance Corporations Act of 1892." *Re Dominion Provident, Benevolent, and Endowment Association*, 25 O. R. 619.

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7. *Criminal Law and Procedure.*

Assault and Battery—*Bar of Civil Remedy.*]—Sections 865 and 866 of the Criminal Code, 1892, whereby it is enacted that a person who has obtained a certificate of the justice who tried the case, that a charge against him of assault and battery has been dismissed, or who has paid the penalty or suffered the imprisonment awarded shall be released from all further proceedings, civil or criminal, for the same cause, are *intra vires* the Dominion Parliament. *Flick* v. *Brisbin*, 26 O. R. 423.

Bigamy—*Offence Committed in Foreign Country.*]—Conviction for bigamy quashed where the second marriage took place in a foreign country, and there was evidence that the defendant, who was a British subject, resident in Canada, left there with the intent to commit the offence.

The provisions of section 275 of the Criminal Code making such a marriage an offence are *ultra vires* the Parliament of Canada.

Macleod v. *Attorney-General for New South Wales*, [1891] A. C. 455, followed. *Regina* v. *Plowman*, 25 O. R. 656.

Evidence.]—Notwithstanding the reservation of criminal procedure to the Dominion Parliament in sub-section 27 of section 91 of the "British North America Act," a provincial legislature has power to regulate and provide for the course of trial and adjudication of offences against its lawful enactments, in this case a breach of "The Liquor License Act," even though such offences may be termed crimes; and therefore to regulate the giving of evidence by defendants in such cases, which they have done by R. S. O. ch. 61, sec. 9, providing that where the proceeding is a crime under the provincial law, the defendant is neither a competent nor compellable witness. *Regina* v. *Bittle*, 21 O. R. 605.

Forgery.]—Procedure in criminal matters, which by the B. N. A. Act, sec. 91, sub-sec. 27, is assigned exclusively to the Parliament of

Canada, includes the trial and punishment of the offender; and therefore section 2 of 53 Vict. ch. 18 (O.), which authorizes police magistrates to try and convict persons charged with forgery is *ultra vires* the provincial legislature. *Regina* v. *Toland*, 22 O. R. 505.

Forgery.]—The power granted by the British North America Act, sec. 92, sub-sec. 14, to the provincial legislatures to constitute Courts of civil and of criminal jurisdiction, necessarily includes the power of giving jurisdiction to those Courts, and impliedly includes the power of enlarging, altering, amending, and diminishing the jurisdiction of such Courts.

The Act 53 Vict. ch. 18, sec. 2 (O.), so far as it provides that the Courts of General Sessions of the Peace shall have jurisdiction to try any person for any offence under any of the provisions of sections 28 to 31 of R. S. C. ch. 165, an Act respecting forgery, is within the powers of the Legislature of Ontario, as being in relation to the constitution of a provincial Court of criminal jurisdiction, and does not in any way trench upon the exclusive authority given to the Parliament of Canada by section 91, sub-section 27, to make laws in relation to criminal law and criminal procedure. *Regina* v. *Levinger*, 22 O. R. 690.

Provincial Penal Legislation.]—The local legislatures have the right and power to impose punishments by fine and imprisonment as sanction for laws which they have power to enact. B. N. A. Act, sec. 92, sub-sec. 15. *Attorney-General of Canada* v. *Attorney-General of Ontario*, 23 S. C. R. 458.

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8. *Elections.*

Electoral Franchise Act.]—There is no jurisdiction in the High Court of Justice to issue a writ of prohibition to a revising officer to compel him to abstain from "performing any duty under the Electoral Franchise Act."

The legislation in regard to such matters does not trench upon, nor is the question one of "property and civil rights in the Province."

Re Simmons and Dolton, 12 O. R. 595, not followed. *Re North Perth*, *Hessin* v. *Lloyd*, 21 O. R. 538.

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9. *Interest.*

Taxation—*Penalty for not Paying Taxes.*]—The Municipal Act of Manitoba provides that persons paying taxes before December 1st in cities, and December 31st in rural municipalities, shall be allowed 10 per cent. discount; that from that date until March 1st the taxes shall be payable at par; and after March 1st 10 per cent. on the original amount of the tax shall be added:—

Held, reversing the judgment of the Court below, Gwynne, J., dissenting, that the 10 per cent. added on March 1st was only an additional rate or tax imposed as a penalty for non-payment which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of section 91 of the B. N. A. Act. *Ross* v. *Torrance*, 2 Legal News 186, overruled. *Lynch* v. *Canada N. W. Land Co.*, *South Dufferin* v. *Morden*, *Gibbins* v. *Barber*, 19 S. C. R. 204.

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10. *Intoxicating Liquors.*

Liquor License Act—*Local Option.*]—Section 18 of 53 Vict. ch. 56 (O.), allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires* the Ontario Legislature, as is also section 1 of 54 Vict. ch. 46, which explains it, but the prohibition can only extend to sale by retail. *In re Local Option Act*, 18 A. R. 572.

Liquor License Act.]—Section 51 (2) of the Liquor License Act, R. S. O. ch 194, which requires brewers licensed by the Government of Canada to take out licenses under that Act, is *intra vires* provincial legislation.

Severn v. *The Queen*, 2 S. C. R. 70, has been in effect overruled by more recent decisions of the Judicial Committee.

Judgment of the County Judge of Wellington reversed. *Regina* v. *Halliday*, 21 A. R. 42.

Local Option Act.]—The statute 53 Vict. ch. 56, sec. 18 (O.), allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires* the Ontario Legislature, as is also section 1 of 54 Vict. ch. 46 (O.), which explains it, but the prohibition can only extend to sale by retail. *In re Local Option Act*, 18 A. R. 572, approved. Gwynne and Sedgewick, JJ., dissenting. *Huson* v. *Township of South Norwich*, 24 S. C. R. 145. *See* the next case.

Prohibition—*Local Option.*]—1. A provincial legislature has not jurisdiction to prohibit the sale, either by wholesale or retail, within the Province, of spirituous, fermented, or other intoxicating liquors.

Per the Chief Justice and Fournier, J., dissenting: A provincial legislature has jurisdiction to prohibit the sale within the Province of such liquors by retail, but not by wholesale; and if any statutory definition of the terms wholesale and retail be required, legislation for such purpose is vested in the Dominion as pertaining to the regulation of trade and commerce.

2. A provincial legislature has not jurisdiction to prohibit the manufacture of such liquors within, or their importation into, the Province.

3. The Ontario Legislature had not jurisdiction to enact the 18th section of the Act 53 Vict. ch. 56 (O.), as explained by 54 Vict. ch. 46 (O.). The Chief Justice and Fournier, J., dissenting. *In re Provincial Jurisdiction to Pass Prohibitory Liquor Laws*, 24 S. C. R. 170.

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11. *Lands.*

Foreshore of Harbour—*Grant from Local Government.*]—After the British North America Act came into force the Government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C.B. S. conveyed this

lot, through the C. B. Coal Co., to the S. & L. Coal Co. S. having died, his widow brought an action for dower in said lot to which the company pleaded that the grant to S. was void, the property being vested in the Dominion Government :—

Held, affirming the judgment of the Court below, Strong and Gwynne, JJ., dissenting, that the company having obtained title to the property from S., they were estopped from saying that the title of S. was defective.

Per Strong and Gwynne, JJ., dissenting. The conveyance by S. to the C. B. Coal Co. was an innocent conveyance by which S. himself would not have been estopped, and as estoppel must be mutual his grantees would not. There were no recitals in the deed that would estop them, and estoppel could not be created by the covenants.

After the conveyance to the defendant company an Act was passed by the Legislature of Nova Scotia ratifying and confirming the title of the defendant company to all property of the C. B. Coal Co. :—

Held, that if the legislature could by statute affect the title to this property which was vested in the Dominion Government, it had not done so by this Act in which the Crown is not expressly named. Moreover the statute should have been pleaded by the defendants. *Sydney and Louisburg Coal and R. W. Co.* v. *Sword*, 21 S. C. R. 152.

Lands in Railway Belt in British Columbia.]—On 10th September, 1883, D. *et al.* obtained a certificate of pre-emption under the British Columbia Land Act, 1875, and Land Amendment Act, 1879, of 640 acres of unsurveyed lands within the 20-mile belt south of the C. P. R., reserved on the 29th November, 1883, under an agreement between the two Governments of the Dominion and of the Province of British Columbia, and which was ratified by 47 Vict. ch. 14 (B.C.). On 29th August, 1885, this certificate was cancelled, and on the same day a like certificate was issued to respondents, and on the 31st July, 1889, letters patent under the Great Seal of British Columbia were issued to respondents. By the agreement ratified by 47 Vict. ch. 6 (D.), it was also agreed that three and a half million additional acres in Peace River District should be conveyed to the Dominion Government in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right or by Crown grant. On an information by the Attorney-General for Canada to recover possession of the 640 acres :—

Held, affirming the judgment of the Exchequer Court (3 Ex. C. R. 293), that the land in question was exempt from the statutory conveyance to the Dominion Government, and that upon the pre-emption right granted to D. *et al.* being subsequently abandoned or cancelled, the land became the property of the Crown in right of the Province, and not in right of the Dominion. *The Queen* v. *Demers*, 22 S. C. R. 482.

Ownership of Land.]—So far as abstract competence is concerned the Ontario Legislature has power to change the ownership of land within the Province with or without compensation.

Land which had been dedicated by its owner for a public burying ground was used for many years for such purpose. The municipality in which the ground was situate procured an Act of the Ontario Legislature authorizing the closing of the burial ground, and the removal of the dead, thereafter vesting the land in the corporation ; the Act providing for compensation for all parties likely to be affected by the carrying out of its provisions, and for payment of the value of the lot to the dedicator or those claiming under him to be fixed by arbitration :—

Held, that the Act was within the competence of the legislature. *Re McDowell and Town of Palmerston*, 22 O. R. 563.

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12. *Municipal Elections.*

Master in Chambers.]—Held, by the Divisional Court, following the principle of the decision in *Re Wilson* v. *McGuire*, 2 O. R. 118, that the provincial legislature had power to invest the Master with authority to try controverted municipal election cases. *Regina* v. *Birkett*, 21 O. R. 162.

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13. *Navigable Waters and Harbours.*

Foreshore of Harbour.]—The Dominion statute, 44 Vict. ch. 1, sec. 18, gave the Canadian Pacific Railway Company the right to take and use the land below high water mark in any stream, lake, etc., so far as required for the purposes of the railway :—

Held, that the right of the public to have access to a harbour, the foreshore of which had been taken by the company under this Act, was subordinate to the rights given to the company thereby, and the latter could prevent by injunction an interference with the use of the foreshore so taken. *City of Vancouver* v. *Canadian Pacific R. W. Co.*, 23 S. C. R. 1.

Interference with Navigation.—An information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbour is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50-51 Vict. ch. 16, sec. 17 (*d*). (2.) A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament. (3.) The provincial legislatures since the union of the Provinces cannot authorize such an interference. (4.) Wherever by an Act of a provincial legislature passed before the union authority is given to the Crown to permit an interference with the public right of navigation, such authority is exercisable by the Governor-General and not by the Lieutenant-Governor of the Province. *The Queen* v. *Fisher*, 2 Ex. C. R. 365.

Water Lots Granted by Crown Prior to Confederation.]—Claimants' title to a water-lot

at Lévis, in the harbour of Quebec, was based on a grant from the Lieutenant-Governor of Quebec prior to Confederation. The grant contained, *inter alia*, a provision that, upon giving the grantee twelve months' notice, and paying him a reasonable sum as indemnity for improvements, the Crown might resume possession of the said water-lot for the purpose of public improvement:—

Held, the property being situated in a public harbour, this power of resuming possession for the purpose of public improvement would be exercisable by the Crown as represented by the Government of Canada. *Holman* v. *Green*, 6 S. C. R. 707, referred to. (2.) Inasmuch as the Crown had not exercised this power, but had proceeded under the expropriation clauses of The Government Railways Act, the [illegible]nts were entitled to recover the fair val[illegible]e lot at the date of expropriation. That value, however, should be determined with reference to the nature of the title. *Samson* v. *The Queen*, 2 Ex. C. R. 30.

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14. *Pardoning Power.*

Pardoning Power of Lieutenant-Governor—*Provincial Penal Legislation.*]—The local legislatures have the right and power to impose punishments by fine and imprisonment as sanction for laws which they have power to enact. B. N. A. Act, sec. 92, sub-sec. 15. The Lieutenant-Governor of a Province is as much the representative of Her Majesty the Queen for all purposes of provincial government as the Governor-General himself is for all purposes of the Dominion Government. Inasmuch as the Act 51 Vict. ch. 5 (O.), declares that in matters *within the jurisdiction* of the legislature of the Province all powers, etc., which were vested in or exercisable by the Governors or Lieutenant-Governors of the several Provinces before Confederation shall be vested in and exercisable by the Lieutenant-Governor of that Province, if there is no proceeding in dispute which has been attempted to be justified under 51 Vict. ch. 5 (O.), it is impossible to say that the powers *to be* exercised by the said Act by the Lieutenant-Governor are unconstitutional. *Quære:* Is the power of conferring by legislation upon the representative of the Crown, such as Colonial Governor, the prerogative of pardoning in the Imperial Parliament only or, if not, in what legislature does it reside?

Gwynne, J., dissenting, was of opinion that 51 Vict. ch. 5 (O.), is *ultra vires* the provincial legislature. *Attorney-General of Canada* v. *Attorney-General of Ontario*, 23 S. C. R. 458, affirming *S. C.* 19 A. R. 31; and 20 O. R. 222. *See* the next two cases.

Powers of Lieutenant-Governor.]—The Act 51 Vict. ch. 5 (O.), which declares that in matters within the jurisdiction of the legislature of the Province all powers, etc., which were vested in or exercisable by the Governors or Lieutenant-Governors of the several Provinces before Confederation shall be vested in and exercisable by the Lieutenant-Governor of this Province, is valid and within the power of the provincial legislature to enact.

The power of commuting and remitting sentences for offences against the laws of this Province, or offences over which the legislative authority of the Province extends, which by the terms of the Act, is included in the powers above mentioned, does not affect offences against criminal laws which are the subject of Dominion legislation, but refers only to offences within the jurisdiction of the provincial legislature, and in that sense this enactment is *intra vires* the provincial legislature.

Judgment of the Chancery Division, 20 O. R. 222, affirmed. *Attorney-General for Canada* v. *Attorney-General for Ontario*, 19 A. R. 31. *See* the next case.

Lieutenant-Governor — *Provincial Penal Legislation.*]—Held, that the Ontario Statute 51 Vict. ch. 5, entitled "An Act respecting the executive administration of the Laws of this Province," whereby the pardoning powers in certain cases, and other executive functions, are vested in the Lieutenant-Governor, is *intra vires* the provincial legislature.

An enactment couched in general language, is not to be held invalid by reason of any ambiguity, as to what is covered, arising therefrom. Language, large or loose, is to be shaped by presuming an intention to act with candour and within the bounds of constitutional competence.

The intention of section 92, sub-section 1, of the B. N. A. Act, is to keep intact the headship of the provincial government, forming as it does the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office.

Though there may exist no direct or immediately representative coordination of Queen and people in the Provincial Assembly, yet sovereign power is a unity, and though distributed in different channels and under different names, it must be politically and organically identical throughout the Empire.

The Act in question may be classified as one made in relation to the imposition of punishment; or from another point of approach, it may be covered by the provisions for the "administration of justice in the Province":—

Held, also, that section 2 of the Act in question properly construed, refers to offences under existing laws enacted by the Province, or to laws operating therein passed by the old Province of Canada or Great Britain, in regard to matters which fall within those assigned to provincial legislation by the B. N. A. Act. *Attorney-General of Canada* v. *Attorney-General of Ontario*, 20 O. R. 222.

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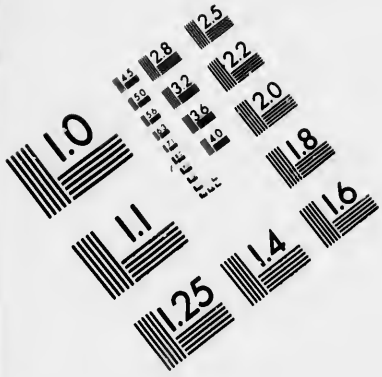
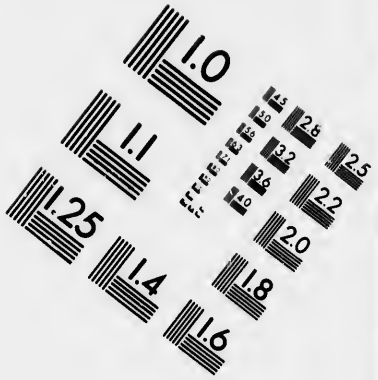
15. *Provincial Subsidies.*

Interest.]—By section 111 of the British North America Act Canada is made liable for the debt of each Province existing at the union. By section 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the Province of Canada at the time of the union over $62,500,000 and chargeable with five per cent. interest thereon. Sections 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding eight and seven millions respectively, and by section 116, if the debts of those Provinces should be less than said





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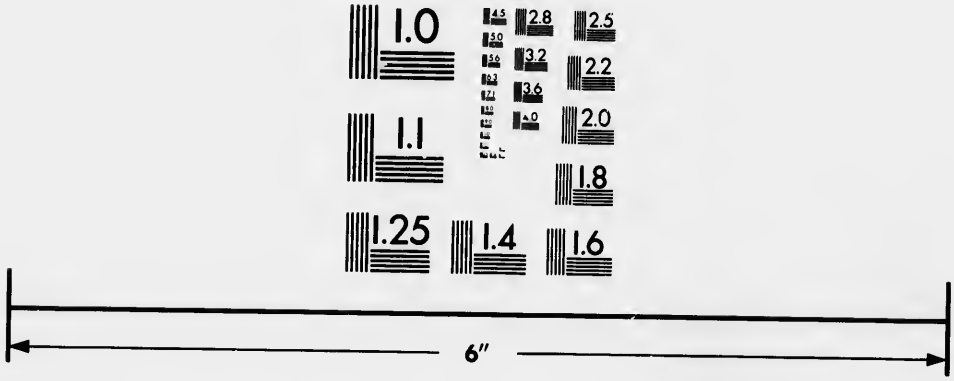

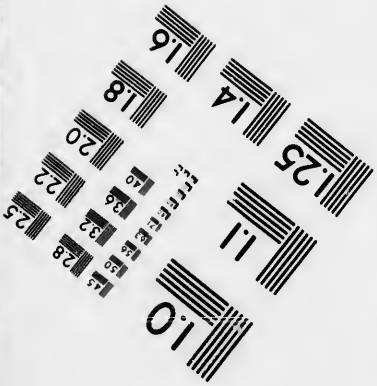

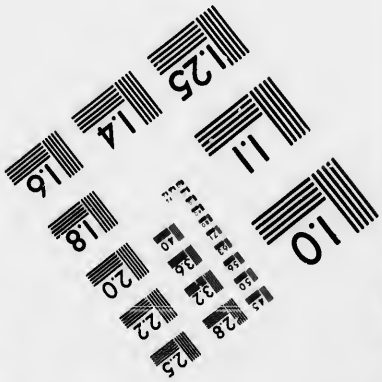

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amounts they are entitled to receive, by half-yearly payments in advance, interest at the rate of five per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several Provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada and shall be paid half-yearly in advance to each Province, but the Government of Canada shall deduct from such grants, as against any Province all sums chargeable as interest on the public debt of that Province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the union exceeded the sum mentioned in section 112, and on appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec:—

Held, affirming said award, that the subsidy of the Provinces under section 118 was payable from the 1st of July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance on the excess of debt under section 118.

By 36 Vict. ch. 30 (D.), passed in 1873, it was declared that the debt of the Province of Canada at the union was then ascertained to be $73,006,688.84, and that the subsidies should thereafter be paid according to such amount. By 47 Vict. ch. 4, in 1884, it was provided that the accounts between the Dominion and the Provinces should be calculated as if the last mentioned Acts had directed that such increase should be allowed from the coming in force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from July 1st, 1867, to January 1st, 1873, with interest at five per cent. from the day on which it would have been so paid to July 1st, 1884, should be deemed capital owing to the respective Provinces bearing interest at five per cent. and payable after July 1st, 1884, as part of the yearly subsidies:—

Held, affirming the said award, Gwynne, J., dissenting, that the last mentioned Acts did not authorize the Dominion to deduct interest in advance from the subsidies payable to the Provinces half-yearly but leaves such deduction as it was under the British North America Act. *Dominion of Canada* v. *Provinces of Ontario and Quebec*, 24 S. C. R. 498.

III. Manitoba Act, 1870—Manitoba Schools Act, 1890.

Denominational Schools.]—The exclusive right to make laws with respect to education in the Province of Manitoba is assigned to the provincial legislature by the constitution of the Provinces as a part of the Dominion, 33 Vict. ch. 3, with the restriction that nothing in any such law "shall prejudicially affect the rights or privileges with respect to denominational schools, which any class of persons had by law *or practice* in the Province at the union." The words "or practice" are an addition to, and the only deviation from, the terms of section 92 sub-section 1, of the B. N. A. Act, under which the New Brunswick Public School Act was upheld. Prior to the union the Roman Catholics of Manitoba had no schools established by law, but there were schools under the control of the Church for the education of Catholic children. In 1890 the legislature of Manitoba passed an Act relating to schools, 53 Vict. ch. 38, by which the control of all matters relating to education and schools was vested in a department of education consisting of a committee of the Executive Council and advisory boards, established as provided by the Act; the schools of the Province were to be free and non-sectarian, and no religious exercises were to be had except as prescribed by the advisory boards; and the ratepayers of each municipality were to be indiscriminately taxed for their support. A Catholic ratepayer moved to quash a by-law of the city of Winnipeg for collecting these school rates, shewing by affidavit the position of Catholic schools before the union, the practice of the Church to control and regulate the education of Catholics, and to have the doctrines of their Church taught in the schools, and that Catholic children would not be allowed to attend the Public schools:—

Held, reversing the judgment of the Court below, that this Act, 53 Vict. ch. 38, by depriving Catholics of the right to have their children taught according to the rules of their Church, and by compelling them to contribute to the support of schools to which they could not conscientiously send their children, prejudicially affected rights and privileges with respect to their schools which they had *by practice* in the Province at the union, and was *ultra vires* of the legislature of the Province. *Ex parte Renaud*, 1 Pugs. (N.B.) 273, distinguished. *Barrett* v. *City of Winnipeg*, 19 S. C. R. 374. *See* the next case.

Denominational Schools.]—According to the true construction of the Constitutional Act of Manitoba, 33 Vict. ch. 3 (D.), having regard to the state of things which existed in Manitoba at the date thereof, the legislature of the Province did not exceed its powers in passing the Public School Act, 1890.

Section 22 of the Act of 1870 authorizes the provincial legislature, exclusively, to make laws in relation to education so as not to "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice, in the Province, at the union":—

Held, that the Act of 1890, which abolished the denominational system of public education established by law since the union, but which did not compel the attendance of any child at a public school, or confer any advantage in respect of attendance other than that of free education, and at the same time left each denomination free to establish, maintain, and conduct its own schools, did not contravene the above proviso; and that, accordingly, certain by-laws of a municipal corporation which authorized assessments under the Act were valid. *City of Winnipeg* v. *Barrett*, *City of Winnipeg* v. *Logan*, [1892] A. C. 445.

Appeal to Governor-General in Council.]—Section 22 of the Manitoba Act, 33 Vict. ch. 3

(D.), enacts: In and for the Province, the said legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union. (2) An appeal shall lie to the Governor-General in Council from any act or decision of the legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education. Sub-section 3 of section 93 of the British North America Act, 1867, enacts: (3) Where in any Province a system of separate or dissentient schools exists by law at the union, or it is thereafter established by the legislature of the Province, an appeal shall lie to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education. By certain statutes of the Province of Manitoba relating to education, passed in 1871 and subsequent years, the Catholic minority of Manitoba enjoyed up to 1890 immunity from taxation for other schools than their own, etc., etc., but by the Public Schools Act, 53 Vict. ch. 38 (1890), these acts were repealed, and the Roman Catholics were made liable by assessment for the public schools which are non-denominational, but were left free to send their children to the Public schools. On a petition and memorials sent to the Governor-General in Council by the Catholic minority, alleging that rights and privileges in the matter of education secured to them since the union had been affected, and praying for relief under sub-sections 2 and 3 of section 22 of the Manitoba Act, 1871, a special case was submitted to the Supreme Court of Canada, and it was held: 1. That the said rights and privileges in the matter of education, being rights and privileges which the legislature of Manitoba had itself created, and there being no clear express and unequivocal words in section 22 of the Manitoba Act, 1871, restricting the constitutional right of the legislature of the Province to repeal the laws it might itself enact in relation to education, no right of appeal lies to the Governor-General in Council as claimed either under sub-section 2 of section 22 of the Manitoba Act, or sub-section 3 of section 93 of the British North America Act, 1867. Fournier and King JJ., contra. 2. That the right of appeal given by sub-section 2 of section 22 of the Manitoba Act is only from an act or decision of the legislature, which might affect any rights or privileges existing at the time of the union, as mentioned in sub-section 1, or of any provincial, executive or administrative authorities affecting any right or privilege existing at the time of the union. Fournier and King JJ., dissenting.

Per Taschereau and Gwynne, JJ., that the decision in *City of Winnipeg* v. *Barrett*, [1892] A. C. 445, disposes of and concludes the present application.

Quære, Per Taschereau, J.—Is section 4 of 54 and 55 Vict. ch. 25, which purports to authorize such a reference for hearing "or" consideration, *intra vires* of the Parliament of Canada? *In re Certain Statutes of the Province of Manitoba relating to Education*, 22 S. C. R. 577. *See* the next case.

Appeal to the Governor-General in Council.]—Where the Roman Catholic minority of Manitoba appealed to the Governor-General in Council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby:—

Held, reversing the judgment of the Supreme Court, 22 S. C. R. 577, on a case submitted to it:

(*a*). That such appeal lay under section 22, sub-section 2, of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the Province after the date thereof;

(*b*). That the Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the Province, to select books for their use, and to determine the character of the religious teaching therein, were affected as regards that right by the Acts of 1890, under which State aid was withdrawn from their schools, while they themselves remain liable to local assessment in support of non-sectarian schools, to which they conscientiously object;

(*c*) That the Governor-General in Council has power to make remedial orders in the premises within the scope of sub-section 3 of section 22, *e.g.*, by supplemental rather than repealing legislation. *Brophy* v. *Attorney-General of Manitoba*, [1895] A. C. 202.

CONSTRUCTIVE NOTICE.

See TRUSTS AND TRUSTEES, IX.

CONTEMPT OF COURT.

Appeal.]—Contempt of Court is a criminal proceeding and unless it comes within section 68 of the Supreme Court Act an appeal does not lie to that Court from a judgment in proceedings therefor. *O'Shea* v. *O'Shea*, 15 P. D. 59, followed; *In re O'Brien*, 16 S. C. R. 197, referred to. In proceedings for contempt of Court by attachment until sentence is pronounced there is no "final judgment" from which an appeal could be brought. *Ellis* v. *The Queen*, 22 S. C. R. 7.

County Court—"*Process.*"]—An order made by the Judge of a County Court in Chambers for the commitment to close custody of a party to an action in that Court, for default of attendance to be re-examined as a judgment debtor, pursuant to a former order, is "process" in an action within the meaning of the exception in section 1 of the *Habeas Corpus* Act, R. S. O. ch. 70; and where such a party was confined under such an order, a writ of *habeas corpus* granted upon his complaint was quashed as having been improvidently issued. *Re Anderson* v. *Panstone*, 16 P. R. 243.

Committal—*Discharge—Consent.*]—Where a judgment debtor was imprisoned under an

order directing his committal for three months for a contumacious refusal to answer questions put to him upon his examination as such judgment debtor:—

Held, that an application to the indulgence and discretion of the Court for his discharge from custody before the expiry of the term of imprisonment could not be granted, even upon the consent of the judgment creditor upon whose motion the order for committal had been made. *Jones* v. *Macdonald*, 15 P. R. 345.

Committal—*Discharge—Conditions—Inability to Obey Judgment — Penalty — Terms.*]—The defendant was arrested and imprisoned by a sheriff in obedience to a writ of attachment, issued pursuant to an order of the Court made at the instance of the plaintiff, on notice to and in the presence of the defendant, which adjudged him guilty of contempt, and ordered that the sheriff should take him into custody and commit him to the common gaol for such contempt, there to be detained and imprisoned until he should have purged his contempt, and that for this purpose a writ of attachment should issue. The writ commanded the sheriff to attach the defendant so as to have him before the Chancery Division of the High Court of Justice, there to answer touching his contempt, etc., and further to perform and abide such order as the Court should make.

The contempt consisted in disobedience of a judgment, made upon consent, ordering the defendant to cause a certain mortgage to be discharged save as to the plaintiff's life estate.

Upon motion for the defendant's discharge, upon the return of a *habeas corpus*:—

Held, that the arrest and imprisonment of the defendant under the order and writ were regular and in accordance with the proper practice; it was not necessary that the conditions of the release of the defendant from custody should be expressed in the writ.

Owing to the character of the judgment, the plaintiff was entitled to the order and writ, and they could no more be denied to her than could a remedy by way of *fi. fa.* be denied to a judgment creditor, and the matter of the defendant's continuing in confinement was not a matter resting in the discretion of any Court or Judge.

Much time having elapsed since the consent judgment, and much having been done under it, it could not be vacated without consent, even if a petition to vacate it had not already been presented and dismissed.

Upon a petition by the defendant for leave to withdraw his consent and to vacate the judgment entered thereon, the petitioner alleged that there was a mistake in the consent; that it was intended that the mortgage should be ordered to be discharged as to any interest which the plaintiff might have over and above a life estate; and he contended that the plaintiff had no such interest:—

Held, that the petition could be dealt with on no other grounds than any other matter of practice, although the petitioner was in custody; and that the matters alleged were not sufficient to induce the Court to vacate the judgment and allow the case to be tried out, after the withdrawal of charges of fraud against the petitioner, the death of the original plaintiff, the lapse of more than four years since the judgment, and the prior refusal of two similar applications. *Elsas* v. *Williams*, 54 L. J. Ch. 336, and *Peel* v. *Cussen*, 4 Dr. & War. 199, followed.

A subsequent application by the defendant for a fiat or order that he be brought before the Court for the purpose of moving in person for his discharge from custody was refused.

Ford v. *Nassau*, 9 M. & W. 793, and *Ford* v. *Graham*, 10 C. B. 369, followed.

Semble, a *habeas corpus* for the purpose would be refused, and *a fortiori* a fiat or order; for the sheriff would not be bound to obey it, and if the party were removed from prison under it, he would not in the meantime be in proper and legal custody.

The defendant, after he had been for more than three months in gaol, applied again for an order for his release, upon the ground that, being destitute of money, and having no means of procuring or earning it, he was unable to do what was required, and had already been sufficiently punished for his offence:—

Held, that the imprisonment suffered by the defendant was not a penalty, but the remedy to which the plaintiff was entitled for execution of her judgment, and no case had been made out entitling the defendant to be discharged.

After the enactment of sec. 29 of 58 Vict. ch. 13 (O.), which was assented to on the 16th April, 1895, and after the defendant had been nearly five months in gaol, an order was made for his release upon the terms of his consenting to a judgment against him for the sum required to pay off the mortgage and all costs for which he was liable to the plaintiff, and upon his undertaking not to bring any action against any one on account of his arrest and imprisonment; such order to be without prejudice to any proceeding or the rights of the plaintiff against any other person. *Roberts* v. *Donovan*, 16 P. R. 456.

Evidence — *Pending Motion — Default.*]—Under Rule 578 a party may require the attendance of the opposite party for examination as a witness on a pending motion; and the consequence of default on the part of the party to be examined is to put him in contempt.

And where, upon a motion by the plaintiff to set aside or vary an order staying proceedings until he should give security for costs, he required the attendance of the defendant for examination as a witness, and the defendant attended but refused to be examined, an order suspending the former order until he should submit to be examined, was affirmed. *Clark* v. *Campbell*, 15 P. R. 338.

Examination—*Refusal to be Sworn.*]—Where a judgment debtor attends for examination, but refuses to be sworn, he will be ordered to attend and take the oath and submit to be examined at his own expense; if he makes a default, process of contempt may issue on further proof. *Uhrig* v. *Uhrig*, 15 P. R. 53.

Justice of the Peace—*Power to Commit for Contempt.*]—A barrister and solicitor while acting as counsel for certain persons charged with a misdemeanour before a justice of the peace, holding court under the Summary Convictions Act, was arrested by a constable by the order of the justice, without any formal adjudication or warrant, excluded from the court room, and imprisoned for an alleged contempt and for disorderly conduct in court.

In an action by the counsel against the justice and the constable for assault and false arrest and imprisonment :—

Held, that the justice had no power summarily to punish for contempt *in facie curiæ*, at any rate without a formal adjudication and a warrant setting out the contempt.

Armour v. *Boswell*, 6 O. S. 153, 352, 450 followed.

2. That he had the power to remove persons who, by disorderly conduct, obstructed or interfered with the business of the court ; but, upon the evidence, that the plaintiff was not guilty of such conduct, and had not exceeded his privilege as counsel for the accused ; and the proper exercise of such privilege could not constitute an interruption of the proceedings so as to warrant his extrusion.

If the justice had issued his warrant for the commitment of the plaintiff and had stated in it sufficient grounds for his commitment, the Court could not have reviewed the facts alleged therein ; but, there being no warrant, the justice was bound to establish such facts upon the trial, as would justify his course.

Judgment of Rose, J., at the trial, reversed. *Young* v. *Saylor*, 23 O. R. 513. Affirmed in appeal, 20 A. R. 645.

Payment of Money.]—Section 6 of R. S. O. ch. 67, which abolishes process of contempt for non-payment of any sum of money payable by a judgment or order, refers to payment of money as between debtor and creditor ; and defendants who are, by judgment, directed to procure the discharge of an encumbrance wrongfully placed by them on the plaintiff's lands may be attached for failure to comply with the judgment, although payment of money may become necessary to effect what is required.

Male v. *Bouchier*, 1 Ch. Ch. 359 ; 2 Ch. Ch. 254, overruled.

But where the judgment directs the act to be done within a limited time the defendants cannot be attached unless the judgment, with the proper notice of the penalty for default, has been served upon them in time to give them a reasonable opportunity of complying with its terms before the expiration of the prescribed period ; Meredith, J., dissenting on this point.

Judgment of Boyd, C., reported *sub nom. Roberts* v. *Donovan*, 21 O. R. 535, affirmed on other grounds. *Berry* v. *Donovan*, 21 A. R. 14.

Practice—*Motion for Attachment—Court or Chambers.*]—An application to attach a person for contempt of Court in publishing in a newspaper while an action is pending, comments upon the matter in question therein, is to be dealt with as a criminal matter, not affected by the practice or procedure under the Consolidated Rules ; and should be made to the Court, not to a Judge in Chambers. *Southwick* v. *Hare*, 15 P. R. 239. Affirmed by the Divisional Court, 15 P. R. 331.

Practice—*Motion to Quash Appeal.*]—The fact that a party to an action is in contempt is no bar to his proceeding with the action in the ordinary way ; the contempt is only a bar to his asking the Court for an indulgence.

And where the defendants received certain moneys in disobedience to an interim injunction, which was made perpetual by the judgment at the trial, a motion by the plaintiff to quash the defendants' appeal from the judgment was refused. *Ferguson* v. *County of Elgin*, 15 P. R. 399.

Practice—*Security for Costs.*]—Where the plaintiff, after the commencement of the action, left the Province to escape arrest under orders of committal for contempt of Court in other actions, he was ordered to give security for costs. *Codd* v. *Delap*, 15 P. R. 374.

Subpœna—*Substituted Service.*]—A witness is not liable to attachment for disobedience to a subpœna served substitutionally pursuant to an order authorizing such service.

Mills v. *Mercer*, 15 P. R. 281, applied and followed. *Barber* v. *Adams*, 16 P. R. 156.

Winding-up Proceedings—*Failure of Receiver to give Security.*]—*See Re Dominion Provident, Benevolent, and Endowment Association*, 24 O. R. 416, *ante* 157.

CONTRACT.

I. Breach of Contract.

Service Out of Jurisdiction—*Breach of Contract within Jurisdiction—Letter.*]—The defendants, resident in the Province of Quebec, there wrote and posted to the plaintiff in Ontario a letter putting an end to a contract of hiring entered into in Quebec between the parties :—

Held, in an action for wrongful dismissal, that the breach of the contract occurred in Quebec, the receipt of the letter by the plaintiff not being the breach, but only evidence of it ; and service of the writ of summons on the defendants in Quebec could not be allowed under Rule 271 (*e*).

Cherry v. *Thomson*, L. R. 7 Q. B. 573, followed. *Offord* v. *Bresse*, 16 P. R. 332.

Service out of Jurisdiction—*Breach of Contract within Jurisdiction—Letter.*]—Where a contract of hiring is made within the Province of Ontario, and the work thereunder is to be done there, the commission therefor will be payable there.

Hoerler v. *Hanover, etc., Works*, 10 Times L. R. 22, and *Robey* v. *Snaefell Mining Co.*, 20 Q. B. D. 152, referred to.

If the contract is ended by letter sent from another Province, *quere* whether this indicates that the breach complained of was out of the Province.

And where, upon a motion to set aside service of a writ of summons on defendants resident out of the jurisdiction in an action for breach of such contract of hiring, there was conflicting evidence as to whether the discharge of the plaintiff from the defendants' service was by letter or by the act of an agent of the defendants within the Province, the plaintiff was allowed to proceed to trial upon his undertaking to prove at the trial a cause of action within Rule 271 (*e*). *Bell* v. *Villeneuve*, 16 P. R. 413.

See DAMAGES.

II. CONSIDERATION.

Illegal or Immoral Consideration.]—A contract for transfer of property with intent by the transferor, and for the purpose, that it shall be applied by the transferee to the accomplishment of an illegal or immoral purpose is void and cannot be enforced; but mere knowledge of the transferor of the intention of the transferee so to apply it will not void the contract unless, from the particular nature of the property, and the character and occupation of the transferee, a just inference can be drawn that the transferor must also have so intended. Judgment of the Court of Appeal, 20 A. R. 198, *sub nom. Hager* v. *O'Neil*, affirming that of Street, J., 21 O. R. 27, affirmed. Taschereau, J., dissenting. *Clark* v. *Hagar*, 22 S.C.R. 510.

Sale of Liquors for Use in County where Canada Temperance Act in Force—*Repeal of Act.*]—In an action for the price of liquors supplied with the knowledge that they were for use in a county in which the Canada Temperance Act was in force, part of which were sold prior to a vote for the repeal of the Act, and the remainder subsequent to a successful vote for its repeal, but before the order in council bringing the Act into force had been revoked:—

Held, that the price of the liquors sold before were not, but that of those sold after the successful vote were recoverable.

Pearce v. *Brooks*, L. R. 1 Ex. 217, followed. *Smith* v. *Benton*, 20 O. R. 344.

Stifling Prosecution.]—In an action on a bond executed by J., to secure an indebtedness of L. to plaintiff bank the evidence shewed that L., who had married an adopted daughter of J., was agent of the bank, and having embezzled the bank funds the bond was given in consideration of an agreement not to prosecute:—

Held, affirming the judgment of the Court below, that the consideration for said bond was illegal and J. was not liable thereon. *People's Bank of Halifax* v. *Johnson*, 20 S. C. R. 541.

III. CONSTRUCTION.

1. *Conditions.*

Certificate of Engineer.]—In 1879 the respondent filed a petition of right for the sum of $608,000 for extra work and damages arising out of his contract for the construction of section 18 of the Intercolonial Railway without having obtained a final certificate from F., who held at the time the position of Chief Engineer. In 1880, F. having resigned, F. S. was appointed Chief Engineer of the Intercolonial Railway, and investigated, amongst others, the respondent's claim, and reported a balance in his favour of $120,371. Thereupon the respondent amended his petition and made a special claim for the $120,371, alleging that F. S.'s report or certificate was a final closing certificate within the meaning of the contract, which question was submitted for the opinion of the Court by special case. This report was never approved of by the Intercolonial Railway Commissioners or by the Minister of Railways and Canals under 31 Vict. ch. 13, sec. 18. The Exchequer Court, Fournier, J., presiding, held that the suppliant was entitled to recover on the certificate of F. S. On appeal to the Supreme Court of Canada:—

Held, reversing the judgment of the Exchequer Court, 1 Ex. C. R. 321.

(1.) Per Ritchie, C.J., and Gwynne, J., that the report of F.S., assuming him to have been the Chief Engineer, to give the final certificate under the contract, cannot be construed to be a certificate of the Chief Engineer which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon.

(2.) Per Ritchie, C.J., that the contractor was not entitled to be paid anything until the final certificate of the Chief Engineer was approved of by the Commissioners or Minister of Railways and Canals: 31 Vict. ch. 13, sec. 18, and 37 Vict. ch. 15; *Jones* v. *The Queen*, 7 Can. S. C. R. 570.

(3.) Per Patterson, J., that although F. S. was duly appointed Chief Engineer of the Intercolonial Railway, and his report may be held to be the final and closing certificate to which the suppliant was entitled under the eleventh clause of the contract, yet as it is provided by the fourth clause of the contract that any allowance for increased work is to be decided by the Commissioners and not by the Engineer, the suppliant is not entitled to recover on F. S.'s certificate.

Per Strong and Taschereau, JJ., dissenting, that F. S. was the Chief Engineer and as such had power under the eleventh clause of the contract to deal with the suppliant's claim and that his report was "a final closing certificate" entitling the respondent to the amount found by the Exchequer Court on the case submitted.

Per Strong, Taschereau and Patterson, JJ., that the office of Commissioners having been abolished by 37 Vict. ch. 15, and their duties

and powers transferred generally to the Minister of Railways and Canals, the approval of the certificate was not a condition precedent to entitle the suppliant to claim the amount awarded to him by the final certificate of the Chief Engineer. *The Queen* v. *McGreevy*, 18 S. C. R. 371.

Certificate of Engineer.]—A sub-contract for the construction of a part of the North Shore Railway provided *inter alia*, that, "the said works shall, in all particulars, be made to conform to the plans, specifications and directions of the party of the second part, and of his engineer, by whose classifications, measurements and calculations, the quantities and amounts of the several kinds of work performed under this contract shall be determined, and who shall have full power to reject and condemn all work or materials which, in his opinion, do not conform to the spirit of this agreement, and who shall decide every question which may or can arise between the parties relative to the execution thereof, and his decision shall be conclusive and binding upon both parties hereto. The aforesaid party of the second part hereby agrees, and binds himself, that upon the certificates of his engineer that the work contemplated to be done under this contract has been fully completed by the party of the first part, he will pay said party of the first part for the performance of the same in full, for materials and workmanship. It is further agreed, by the party of the second part, that estimates shall be made during the progress of the work on or about the first of each month, and that payments shall be made by second party upon the estimate and certificate of his engineer, to the party of the first part, on or before the 20th day of each month, for the amount and value of work done, and materials furnished during the previous month, ten per cent. being deducted and retained by the party of the second part until the final completion of the work embraced in this contract, when all sums due the party of the first part shall be fully paid, and this contract considered cancelled." Upon completion of the contract the engineer made a final estimate fixing the value of the work done by the sub-contractor at $79,142.65, and after deducting the money paid to and received by the sub-contractor, and a clerical error appearing on the face of the certificate, a sum of $4,187.32 remained due to the sub-contractor. Upon an action brought by the sub-contractor to recover the sum of $36,312.12, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, granted the plaintiff the amount of $4,187.32 with interest and costs. On appeal to the Supreme Court :—

Held, affirming the judgment of the Court below, that the estimate as given by the engineer was substantially such a certificate as the contract contemplated, but if not the plaintiff must fail as a final certificate of the engineer was a condition precedent to his right to recover. *Guilbault* v. *McGreevy*, 18 S. C. R. 609.

Certificate of Engineer—*Bulk Sum Contract —Interest.*]—In a bulk sum contract for various works and materials, executed, performed and furnished on the Quebec harbour works, the contractors were allowed by the final certificate of the engineers a balance of $52,011. The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882, but the certificate was only granted on the 4th February, 1886. In an action brought by the contractors (appellants) for $181,241 for alleged balance of contract price and extra work :—

Held (1.) That the certificate of the engineers was binding on the parties and could not be set aside as regards any matter coming within the jurisdiction of the engineers, but that the engineers had no right to deduct any sum from the bulk sum contract price on account of an alleged error in the calculation of the quantities of dredging to be done stated in the specifications and the quantities actually done, and, therefore, the certificate in this case should be corrected in that respect.

(2.) That interest could not be computed from an earlier date than from the date of the final certificate fixing the amount due to the contractors under the contract, viz., 4th February, 1886.

Strong and Gwynne, JJ., were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs. *Peters* v. *Quebec Harbour Commissioners*, 19 S. C. R. 685.

Certificate of Engineer—*Extras.*]—A contract entered into between Her Majesty the Queen, in right of the Province of Quebec, and S. X. Cimon for the construction of three of the departmental buildings at Quebec, contained the usual clauses that the balance of the contract price was not payable until a final certificate by the engineer in charge was delivered, shewing the total amount of work done, and materials furnished, and the cost of extras and the reduction in the contract price upon any alterations. There was a clause providing for the final decision by the Commissioner of Public Works in matters in dispute upon the taking over or settling for the works. The Commissioner of Public Works, after hearing the parties, gave his decision that nothing was due to the contractors, and the engineer in charge, by his final certificate, declared that a balance of $31.36 was due upon the contract price and $42.84 on extras. The suppliants by their petition of right claimed *inter alia* $70,000 due on extras. The Crown pleaded general denial and payment. The Superior Court granted the suppliants $74.20, the amount declared to be due under the final certificate of the engineer. On appeal the Court of Queen's Bench for Lower Canada (appeal side) increased the amount to $13,198.77, with interest and costs :—

Held, reversing the judgment of the Court below, and restoring the judgment of the Superior Court, that the suppliants were bound by the final certificate given by the engineer under the terms of the contract.

Per Fournier and Taschereau, JJ., dissenting, that as the final certificate had not been set up in the pleadings as a bar to the action, and there was an admission of record by the Crown that the contractor was entitled to 20 per cent. commission on extras ordered and received, the evidence fully justified the finding of the Court of Queen's Bench that the commission of 20 per cent. was still due and unpaid on $65,837.09 of

said extra work. *The Queen* v. *Cimon*, 23 S. C. R. 62.

Change in Plans and Specifications.]—The appellants entered into a contract with the Dominion Government to construct a bridge for a specified sum. After the materials necessary for its construction according to the original plans and specifications had been procured, the Government altered the plans so much that an entirely new and more expensive structure became involved. The appellants were then given new plans and specifications by the Chief Engineer of Public Works, the proper officer of the Government in that behalf, and were directed by him to build the bridge upon the altered plans, being at the same time informed that the prices for the work would be subsequently ascertained. They thereupon proceeded with the construction of the bridge. Under the provisions of the written contract, the Chief Engineer was required to make out and certify the final estimate of the contractors in respect of the work done upon the bridge; and upon the completion of the bridge, a final estimate was so made and certified, whereby the appellants were declared to be entitled to a certain amount. The appellants, however, claimed to be entitled to a much larger amount, and their claim was ultimately referred by the Government to the official arbitrators, who awarded them a sum slightly in excess of that certified to be due in the final estimate. On appeal from this award:—

Held (1.) That section 7 of 31 Vict. ch. 12, which provides "that no deeds, contracts, documents or writings shall be deemed to be binding upon the Department [of Public Works], or shall be held to be acts of the Minister [of Public Works] unless signed and sealed by him or his deputy, and countersigned by the secretary," only refers to executory contracts, and does not effect the right of a party to recover for goods sold and delivered, or for work done and materials provided to and for another party and accepted by him.

(2.) That the Crown, having referred the claim to arbitration, having raised no legal objection to the investigation of the claim before the arbitrators, and not having cross-appealed from their award, must be assumed to have waived all right to object to the validity of the second contract put forward by the claimants. *Starrs* v. *The Queen*, 1 Ex. C. R. 301.

Conditional Promise.]—After negotiations had taken place for the sale of a farm at $9,500, the following contract was signed by the purchasers:—"We agree to take your farm and pay you $9,000, and if we get along fairly well we will give you the other $500 as soon as we are able":—

Held, that the provision as to the $500 was a conditional promise which might be enforced on proof that the purchasers were of ability to pay, which the evidence in this case failed to shew. *Sylvester* v. *Murray*, 26 O. R. 599. Affirmed by the Divisional Court, 26 O. R. 765.

Extras.]—The contract provided that no extras were to be allowed unless expressly ordered, and payments for the same expressly agreed for in writing by the proprietors or architects:-

Held, that extras could not be allowed unless a writing was proved. *Wood* v. *Stringer*, 20 O. R. 148.

Moneys Entrusted for Investment—*Transfer—Prête-nom.*]—H. having funds belonging to one T. J. C. for investment, agreed to invest them with M., of Winnipeg, in a certain land speculation, and, after correspondence, accepted and paid M.'s draft for $2,375, mentioning in the letter notifying M. the acceptance of the draft the understanding H. had as to the share he was to get, and adding: "I also assume that the lands are properly conveyed and the full conditions of the prospectus carried out, and if not, that money will be at once refunded." The lands were never properly conveyed and the conditions of the prospectus never carried out. T. J. C. transferred *sous seing privé* this claim to the plaintiff, who brought an action against M. for the amount of the draft:—

Held, affirming the judgment of the Courts below, (1) That the action being for the recovery of a sum of money entrusted to the defendant for a special purpose, the prescription of two years did not apply: Article 2262 C. C. (2) That the conditions upon which the money had been advanced were conditions precedent, and not having been fulfilled M. was bound to refund the money. (3) That the transfer *sous seing privé* of the claim to plaintiff had been admitted by M., and the plaintiff, even if considered as a *prête-nom*, had a sufficient legal interest to bring the present action. *Moodie* v. *Jones*, 19 S. C. R. 266.

Reference to Experts.]—The Royal Electric Company having sued the city of Three Rivers for the contract price of the installation of a complete electric plant, which, under the terms of the contract was to be put in operation for at least six weeks before payment of the price could be claimed, the Court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed. The Superior Court adopted the finding of fact of the experts and dismissed the action. The Court of Queen's Bench for Lower Canada (appeal side) on an appeal affirmed the judgment of the Superior Court and on an appeal to the Supreme Court of Canada:—

Held, affirming the judgments of the Courts below, that it being found that the appellants had not fulfilled their contract within the delay specified, they could not recover:—

Held, also, that when a contract provides that no payment shall be due until the work has been satisfactorily completed a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract.

Quære: Whether a right of action exists although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration. *Quebec Street R. W. Co.* v. *City of Quebec*, 10 Q. L. R. 205, referred to. *Royal Electric Co.* v. *City of Three Rivers*, 23 S. C. R. 289.

Reference to Engineer of Municipal Corporation.]—Under a contract with a municipality for the laying of block pavements on certain streets with a provision that "the decision of

the city engineer on all points coming within this contract and specifications shall be final and conclusive whether as to the interpretation of the various clauses, the measurements, extra work, quantity, quality, and all other matters and things which may be in dispute, and from his decision there shall be no appeal," the city engineer is not disqualified, in the absence of fraud or of bad faith, from deciding whether certain work is or is not extra work and does or does not fall within the plans and specifications. The possible bias of the engineer in favour of the plans and specifications drawn by him is not sufficient to disqualify him. Judgment of Rose, J., affirmed on other grounds. *Farquhar* v. *City of Hamilton*, 20 A. R. 86.

Reference to Superintendent of Works.]—By a contract between plaintiff and a city municipality for additions and improvements to its system of waterworks, it was provided that all differences, etc., should be referred to the award, order, arbitrament, and final determination of H., the superintendent in charge of the said work:—

Held, that the fact of H. being such superintendent did not disqualify him from acting as arbitrator; and on the evidence that no cause existed to restrain him from proceeding with the reference. *McNamee* v. *City of Toronto*, 24 O. R. 313.

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2. *Implying Terms.*

Contract for Carrying Rails—*Employment of Persons other than Contractor to do Work Covered by Contract.*]—On the 9th August, 1875, the suppliant entered into a written contract with the Dominion Government to remove and carry in barges all the steel rails that were then actually landed, or that might thereafter be landed, from sea-going vessels upon the wharves in the harbour of Montreal during the season of navigation in that year, and to deliver them at a place called the Rock Cut on the Lachine Canal. Suppliant duly entered upon the execution of his contract, and no complaint was made on behalf of the Government that his performance of the work was not entirely satisfactory. Some time in the month of September, and when the suppliant had only carried a small quantity of rails, the Government without previous notice to the suppliant, cancelled the contract and employed other persons to do the work that he had agreed to perform. Thereupon the suppliant filed a petition of right claiming damages against the Government for breach of contract. It was alleged by suppliant that M., who had acted on behalf of the Government in making the contract with the suppliant, had represented to him that a very large quantity of rails, amounting to some 25,000 or 35,000 tons, would have to be carried by the suppliant as such contractor; and that it was upon this representation that he entered into the said contract and made a large outlay with a view to efficiently removing and carrying the rails and delivering them safely at their place of destination:—

Held, (1.) The fact that no stipulation embodying such representation appeared in the written instrument was evidence that it formed no part of the contract. (2.) That although the suppliant could not import into the formal contract any representations made by M. prior to it being reduced to writing, yet under the terms of the written contract he was entitled to remove all the rails landed from ships in the port of Montreal during the year 1875 for the purpose mentioned in the contract, and should have damages for the loss of the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. *Kenney* v. *The Queen*, 1 Ex. C. R. 68.

Contract for Construction of a Public Work.]—It was a term in suppliant's contract with the Crown for the construction of a public work that certain timber required in such construction should be treated in a special manner, to the satisfaction of the proper officer in that behalf of the Department of Railways and Canals. By another term of the contract it was declared that the express covenants and agreements contained therein should be the only ones upon which any rights against the Crown should be founded by the suppliant. The suppliant, immediately after entering upon the execution of his contract, notified A., the proper officer of the department in that behalf, that he intended to procure the timber at a certain place and have it treated there in the manner specified, before shipment. A. approved of the suppliant's proposal, and promised to appoint a suitable person to inspect the timber at such place. The inspector was not appointed until a considerable time afterwards, and by reason of such delay the suppliant had to pay a higher rate of freight on the timber than he otherwise would have had to pay, and was compelled to carry on his work in more unfavourable weather and at greater cost, for which he claimed damages:—

Held, on demurrer to the petition, that the Crown was not bound under the contract to have the inspection made at any particular place; and that in view of the 98th section of The Government Railways Act, 1881, and the express terms of the contract, A. had no power to vary or add to its terms, or to bind the Crown by any new promise.

The suppliant's contract contained the following clause:—"The contractor shall not have or make any claim or demand, or bring any action, or suit, or petition against Her Majesty for any damage which he may sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; and it is agreed that, in the event of any such delay, the contractor shall have such further time for the completion of the work as may be fixed in that behalf by the Minister";—

Held, that this clause covered delay by the Government's engineer in causing an inspection to be made of certain material whereby the suppliant suffered loss. *Mayes* v. *The Queen*, 2 Ex. C. R. 403. Affirmed by the Supreme Court, 23 S. C. R. 454.

Contract to Carry Mails.]—The suppliant had a contract to carry Her Majesty's mails along a certain route. In the construction of a Government railway the Crown obstructed a highway used by the suppliant in the carriage of such mails, and rendered it more difficult

and expensive for him to execute his contract. After the contract had been fully performed by both parties, the suppliant sought to maintain an action by petition of right for breach thereof on the ground that there was an implied undertaking on the part of the Crown in making such contract that the Minister of Railways would not so exercise the powers vested in him by statute as to render the execution of the contract by the suppliant more onerous than it would otherwise have been :—

Held, that such an undertaking could not be read into the contract by implication. *Archibald* v. *The Queen*, 2 Ex. C. R. 374.

Contract to Supply Printing Paper.]—On the 1st December, 1879, B., to whose rights the suppliants had succeeded, entered into a contract with the Crown to supply, for a given time, "such quantities of paper, and of such varieties, as may be required or desired from time to time for the printing and publishing of the *Canada Gazette*, of the statutes of Canada, and of such official and departmental and other reports, forms, documents and other papers as may at any time be required to be printed and published, or as may be ordered from time to time by the proper authority therefor, according to the requirements of Her Majesty in that behalf." Attached to the contract, and made part thereof, was a schedule and specification shewing the paper to be supplied and the price to be paid therefor, but in which no mention was made of double demy,—the paper ordinarily, though not exclusively, used for departmental printing :—

Held, that notwithstanding this omission, the contractor had agreed to supply the Crown, and the Crown by implication had agreed to purchase of the contractor, among other paper, that required for departmental printing. *Clarke* v. *The Queen*, 2 Ex. C. R. 141.

Sales on Commission—*Absence of Express Contract to Manufacture.*]—In a written contract of agency the principal agreed to pay to the agent a fixed commission on all sales of goods manufactured by the former effected by or through the latter. The contract was made terminable at the end of a year on a month's notice by either party; but it contained no express agreement by the principal to employ for any period or to manufacture any goods :—

Held, that these terms could not be imported into the contract by implication. *Morris* v. *Dinnick*, 25 O. R. 291.

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3. *Miscellaneous Cases.*

Agreement to Discontinue Business.]—B., a manufacturer of glassware, entered into a contract with two companies in the same trade by which, in consideration of certain quarterly payments, he agreed to discontinue his business for five years. The contract provided that if at any time during the five years any furnace should be started by other parties for the manufacture of glassware, either of the said companies could, if it wished, by written notice to B., terminate the agreement "as on the first day on which glass has been made by the said furnace" and the payments to B. should then cease unless he could shew "that said furnace or furnaces at the time said notice was given could not have a production of more than $100 per day :—

Held, affirming the decision of the Court of Review, that under this agreement B. was only required to shew that any furnace so started did not have an actual output worth more than $100 per day on an average for a reasonable period and that the words "could not have a production of more than $100 per day" did not mean mere capacity to produce that quantity whether it was actually produced or not. *North American Glass Co.* v. *Barsalou*, 24 S. C. R. 490.

Building Contract—*Dismissal of Contractor—Right to Remove Material and Plant.*]—By a contract for the erection of certain buildings, the contractor was to supply all labour, material, apparatus, scaffolding, utensils and cartage of every description needful for the performance of the work ; and was to deliver up to the owner the work in proper repair, etc., when complete, and was not to sub-let any part of the works without the architect's consent ; and all work and material as delivered on the premises were to form part of the works and be considered the property of the owner, and not to be removed without his consent, the contractor to have the right to remove all surplus material after he had completed the works. Without the architect's consent the contractor entered into a sub-contract with plaintiff for the excavation, brick, and masonry work, and the plaintiff commenced work under his sub-contract and continued to work for some time when he was ordered to discontinue by the architect :—

Held, that the plaintiff was entitled to remove from the premises (premises meaning what the parties treated as such) material placed thereafter he was directed to discontinue, and also material delivered off the premises, as well as plant constituting the fixtures and the apparatus, etc., necessary for carrying on his business, or to recover from the owner the value of any material used by him in the buildings ; but that plaintiff was not entitled to remove any material placed there before he was ordered to discontinue ; and that no demand was necessary, it appearing that the owner was using the same, and thus committing an act of conversion. *Ashfield* v. *Edgell*, 21 O. R. 195.

Charter of Tug—*Demise or Hiring.*]—The defendant hired a tug from the plaintiff by a contract signed by both parties in these words, "I agree to charter tug . . . to tow two barges from . . . for which I agree to pay . . . owner to supply engineer and captain . . ." The tug on the voyage was run on a rock through the negligence of the captain :—

Held, not a demise of the tug, but a contract of hiring, and that the defendant was not liable for the damage.

Decision of Falconbridge, J., at the trial reversed. *Thompson* v. *Fowler*, 23 O. R. 644.

Cutting Ice.]—An agreement by which M. undertook to cut and store ice, provided :—That said ice houses and all implements were to be the property of P., who, after completion of the contract, was to convey same to M., and that M., was to deliver said ice to vessels to be sent

by P., who was to be obliged to accept only good merchantable ice so delivered and stored :—

Held, affirming the judgment of the Court below, that the property in the ice was in M. ; that it was the buildings and implements only which were to be the property of P. under the agreement, and not the ice which was at M.'s risk and shipped by him. *North British and Mercantile Insurance Co.* v. *McLellan*, 21 S. C. R. 288.

Employer's Liability Policy—*Defence of Actions.*]—In an action upon an employer's liability policy, whereby the defendants agreed to pay the plaintiff all sums up to a certain limit and full costs of suit, if any, in respect of which the plaintiff should become liable to his employees for injuries received whilst in his service, subject to the condition, amongst others, that "if any proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefor" :—

Held, that the plaintiff was not entitled, in the face of such a stipulation, to claim from the defendants the amount of a judgment obtained against him by an employee in an action defended by the plaintiff through his own solicitor and counsel, leaving the defendants to shew as a defence or by way of a counterclaim that they could have done better by defending it themselves ; nor was an offer by the plaintiff, at a time when the action was at issue and on the peremptory list for trial the following day, to hand over the defence to the defendant's solicitors, a sufficient compliance with the condition. *Wythe* v. *Manufacturers' Accident Insurance Co.*, 26 O. R. 153.

Newspaper — *Engagement of Editor—Dismissal.*]—A. B. and C. B. who had published a newspaper as partners or joint owners entered into a new agreement by which A. B. assumed payment of all the debts of the business and became from that time sole proprietor of the paper, binding himself to continue its publication, and, in case he wished to sell out, to give C. B. the preference. The agreement provided that : 3. Le dit Charles Bélanger devient, à partir de ce jour, directeur et rédacteur du dit journal, son nom devant paraitre comme directeur en tête du dit journal, et pour ses serviees et son influence comme tel, le dit Arthur Bélanger lui alloue quatre cents piastres par année, tant par impressions, annonces, etc., qu'en argent jusqu'au montant de cette somme, et le dit Arthur Bélanger ne pourra mettre fin à cet engagement sans le consentement du dit Charles Bélanger. The paper was published for some time under this agreement as a supporter of the Liberal party, when C. B., without instructions from or permission of A. B., wrote editorials violently opposing the candidate of that party at an election and was dismissed from his position on the paper. He then brought an action against A. B. to have it declared that he was "*rédacteur et directeur*" of the newspaper and claiming damages :—

Held, reversing the decision of the Court of Queen's Bench, that C. B. by the agreement had become the employee of A. B. the owner of the paper ; that he had no right to change the political colour of the paper without the owner's consent and that he was rightly dismissed for so doing. *Bélanger* v. *Bélanger*, 24 S. C. R. 678.

Oral Alteration of Terms—*Quantum Meruit.*] *See Barry* v. *Ross*, 19 S. C. R. 360.

"Plant" — *Meaning of.*] — By one of the clauses of a railway contract for excavation, "all machinery and other plant, materials and things whatsoever," provided by the contractor were until the completion of the work to be the property of the company, when such as had not been used and converted into the works and remained undisposed of were to be delivered over to the contractor, but in other clauses the words "teams and horses" were respectively used as well as the word "plant" :—

Held, under the contract, that horses were not included in the word "plant :" and that expert evidence was not admissible to explain its meaning. *Middleton* v. *Flanagan*, 25 O. R. 417.

Railway Tickets and Contracts for Carriage of Goods.]—*See* CARRIERS.

Sale — *Contre Lettre.*] — A sale of property was controlled by a writing in the nature of a *contre lettre*, by which it was agreed as follows : "The vendor in consideration of the sum of $2,940 makes and executes this day a clear and valid deed in favour of the purchaser of certain property (therein described), and the purchaser for the term of three years is to let the vendor have control of the said deeded property, to manage as well, safely and properly as he would if the said property was his own, and bargain and sell the said property for the best price that can be had for the same, and pay the rent, interest and purchase money when sold, and all the avails of the said property to the purchaser to the amount of $2,940, and interest at the rate of eight per cent. per annum from the date of these presents, and then the said purchaser shall re-deed to the vendor any part of the said property that may remain unsold after receiving the aforesaid amount and interest." The vendor was at the time indebted to the purchaser in the sum of $2,941. The vendor had other properties and gave the purchaser a power of attorney to convey all his real estate in the same locality. The term of three years mentioned in the *contre lettre* was continued by mutual consent. The vendor subsequently paid amounts on account of his general indebtedness to the purchaser. It was only after the purchaser's death that the vendor claimed from the heirs of the purchaser the balance, above mentioned, of $1,470 as owing to him for the management of his properties :—

Held, reversing the judgment of the Court of Queen's Bench, and restoring the judgment of the Superior Court, that the proper construction of the contract was to be gathered from both documents and dealings of the parties, and that the property having been deeded merely as security it was not an absolute sale and that plaintiff was not M. S.'s agent in respect of this property :—

Held also, that the only action plaintiff had was the *actio mandata contraria* with a tender of his *reddition de compte*. *Hunt* v. *Taplin*, 24 S. C. R. 36.

Sale—*Particular Chattel.*]—McD. bought at auction, through an agent, a billiard table described in the auctioneer's advertisement as "a full size 6-pocket English billiard table, made by Thurston," etc., and wrote to M. & Co., makers of billiard tables, in Toronto, describing his table, and asking terms of exchanging it for a new one of another style. On receiving the information asked, McD. wrote that he could not accept the terms offered. M. & Co. afterwards wrote the following letter:—"Toronto, Oct. 2nd, 1886. D. C. McDougall, Esq., Agent Halifax Banking Co., Antigonish. Dear Sir,—Your laconic reply to our letter of 24th instant to hand. We would drop the matter if it was not for an inquiry which we have just received from a private party in the far North-West who would like to purchase a good secondhand English table. We would therefore kindly ask you to make us your offer for the proposed exchange, and if we can possibly do it we will accept it. Give us as near a description as you can of your table, maker's name is essential, but as you have nothing with it but the billiard outfit (no life and pyramid balls and boards), you should not make your price too high, or a deal will be impossible. Awaiting your kind reply, we remain, yours truly, Samuel May & Co." To which McD. answered:—"I may just say I never saw our table yet, but am informed it is a very nice one, made by 'Thurston,' and very little the worse of wear, being in the private family of Sir Edward Kenny, in his country residence near Halifax. The gentleman who purchased the table for us writes thus: 'I got the three billiard balls and marker and nineteen cues, which is all that is needed for billiards. I am told the table is a great bargain, cost £200 in England, and is not much the worse for wear.' The table is 6 x 12, and for particulars we would refer you to Jerry E. Kenny, Esq., or F. D. Clark, auctioneer, Halifax. Yours truly, D. C. McDougall." M. & Co. then wrote accepting the offer, and adding, "We trust that the English table is fully as represented; and if you are satisfied, you may ship it at once, with billiard balls, markers, nineteen cues, cloth, and what else there may be. In the meantime we will get up a 4½ x 9 Eclipse Combination table, in best style, and with outfits for pool, carom and pin pool games. Awaiting your early reply, we remain, dear sir, yours truly, Samuel May & Co." The table shipped by McD. on reaching Toronto was found to be an American made table, with English cushions, and worth only from $15 to $25. M. & Co. brought an action for the original price of the new table:—

Held, affirming the judgment of the Court below, that McD. agreed to deliver to M. & Co. an English built table, made by Thurston, as described in his letter, and having failed to deliver such a table he was liable to pay the full price of the one obtained from M. & C. *May* v. *McDougall*, 18 S. C. R. 700.

Sale of Goods—*Quantity — Description — "Car-load."*]—The defendants agreed to buy from the plaintiff a car-load of hogs at a rate per pound, live weight. The plaintiff shipped a "double-decked" car-load, and the defendants refused to accept this, contending that a "single-decked" car-load should have been shipped. There was conflicting evidence as to the meaning given in the trade to the term "car-load of hogs," and it was shewn that hogs were shipped sometimes in the one way and sometimes in the other:—

Held, Hagarty, C.J.O., dissenting, that the plaintiff had the option of loading the car in any way in which a car might be ordinarily or usually loaded, and that he having elected to ship a double-decked car-load, the defendants were bound to accept.

Judgment of the County Court of Middlesex reversed. *Hanley* v. *Canadian Packing Co.*, 21 A. R. 119.

Sale of Timber—*Time for Payment.*]—By agreement in writing I. agreed to sell and the V. H. L. Co. to purchase timber to be delivered "free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour so that the timber may be counted. . . . Settlement to be finally made inside of thirty days in cash less 2 per cent. for the dimension timber which is at John's Island:—

Held, affirming the decision of the Court of Appeal, that the last clause did not give the purchaser thirty days after delivery for payment; that it provided for delivery by vendor and payment by purchasers within thirty days from the date of the contract; and that if purchasers accepted the timber after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance. *Victoria Harbour Lumber Co.* v. *Irwin*, 24 S. C. R. 607.

Service—*Arbitrary Right of Dismissal.*]—By an agreement under seal between M., the inventor of a certain machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements on said machine and assign the same to McR., who in consideration thereof agreed to employ M. for two years to place the patents on the market, paying him a certain sum for salary and expenses, and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation. By one clause of the agreement the employer was to be the absolute judge of the manner in which the employed performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal but to have no claim whatever against his employer. M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders:—

Held, reversing the judgment of the Court of Appeal, 17 A. R. 139, and of the Divisional Court, 16 O. R. 495, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty without notice, and without specifying any particular act calling for such dismissal:—

Held, per Ritchie, C.J., Fournier, Taschereau and Patterson, JJ., that such dismissal did not deprive M. of his claim for a share of the profits of the business.

Per Strong, and Gwynne, JJ., that the share of M. in the profits was only a part of his

remuneration for his services which he lost by being dismissed equally as he did his fixed salary. *McRae* v. *Marshall*, 19 S. C. R. 10.

Sewer—*Extension of Time—Power to Employ Labour to Hasten Work.*]—A contract for the construction of a sewer made between the corporation of a town and the plaintiff, payment for which was to be made by items according to schedule prices, provided for its completion within a limited time, which was extended by resolution of the council and again informally extended for a further period. The contract provided that if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corporation might employ and place on the work such force of men and teams, and procure such materials, as might be deemed necessary to complete the work by the day named for completion, and charge the cost thereof to the plaintiff; and by the specifications, which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corporation, before the expiration of the second extension of time, exercised the powers above conferred :—

Held, that under the contract the power conferred could only be exercised during the time fixed for the completion of the work or the extension thereof, but under the specifications thereafter; and therefore, even if the corporation could not under the contract avail themselves of the second extension as granted informally, the powers were properly exercised under the specifications. *Mangan* v. *Town of Windsor*, 24 O. R. 675.

Street Railway—*Permanent Pavements.*]—The Toronto Street Railway Company was incorporated in 1861, and its franchise was to last thirty years, at the expiration of which period the city corporation could assume the ownership of the railway and property of the company on payment of the value thereof to be determined by arbitration. The company was to keep the roadway between the rails and for eighteen inches outside each rail paved and macadamized and in good repair, using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the corporation the company was not bound to construct a like pavement between the rails, etc., but was only to pay the cost price of the same, not to exceed a specified sum per yard. The city corporation laid upon certain streets traversed by the company's railway permanent pavements of cedar blocks, and issued debentures for the whole cost of such works. A by-law was then passed, charging the company with its portion of such costs in the manner and for the period that adjacent owners were assessed under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1886, but refused to pay for subsequent years on the ground that the cedar block pavement had proved to be by no means permanent, but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the city for these rates, it was held that the company was only liable to pay for permanent roadways and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with, but an agreement was entered into by which all matters in dispute to the end of the year 1888 were settled, and thereafter the company was to pay a specific sum annually per mile in lieu of all claims on account of debentures maturing after that date, and "in lieu of the company's liability for construction, renewal, maintenance and repair in respect of all the portions of streets occupied by the company's track so long as the franchise of the company to use the said streets *now* extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had if the city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends." This agreement was ratified by an Act of the Legislature passed in 1890, which also provided for the holding of the said arbitration, which having been entered upon the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators having refused to allow this claim, an action was brought by the city to recover the said amount :—

Held, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed; that the said agreement discharged the company from all liability in respect to construction, renewal, maintenance and repair of the said streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration, etc., must be considered to have been inserted *ex majori cautela* and could not do away with the express contract to relieve the company from liability :—

Held, further, that by an Act passed in 1877, and a by-law made in pursuance thereof, the company was only assessable as for local improvements which, by the Municipal Act, constitute a lien upon the property assessed but not a personal liability upon the owners or occupiers after they have ceased to be such; therefore, after the termination of the franchise the company would not be liable for these rates. *City of Toronto* v. *Toronto Street R. W. Co.*, 23 S. C. R. 198.

Telephone Service—*Transmission of Message.*]—The Bell Telephone Co. carried on the business of executing orders by telephone for messenger boys, cabs, etc., which it sold to the Elec. Desp. Co., agreeing among other things not to transmit or give, in any manner, directly or indirectly, any orders for messengers, cabs, etc., to any person or persons, company or corporation, except to the Elec. Desp. Co. The G. N. W. Tel. Co. afterwards established a messenger service for the purposes of which the wires of the Telephone Co. were used. In an action for breach of the agreement with the Elec. Desp. Co. and for an injunction to restrain the Telephone Co. from allowing their wires to be used for giving orders for messengers, etc.:—

Held, Ritchie, C.J., doubting, that the Telephone Co., being ignorant of the nature of communications sent over their wires by subscribers,

did not "transmit" such orders within the meaning of the agreement; that the use of the wires by subscribers could not be restricted; and that the Telephone Co. was under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all communications with a view to preventing such orders being given. *Electric Despatch Co.* v. *Bell Telephone Co.*, 20 S. C. R. 83.

Timber—*Removal of.*]—The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land under an agreement which provided, among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land, "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed would have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber :—

Held, affirming the judgment of the Court below, 19 A. R. 176, that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendant's right, under the general grant of the trees, to remove the trees across the cleared land. Gwynne, J., dissenting. *Stephens* v. *Gordon*, 22 S. C. R. 61.

Time.]—Where under a building contract work was to be completed by "November 31st" under penalty of damages :—

Held, that this must be construed to mean November 30th. *McBean* v. *Kinnear*, 23 O. R. 313.

IV. Making the Contract.

Corporation — *Seal* — *Performance* — *Adoption.*]—A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations.

Ritchie, C.J. and Strong, J., dissenting.

In section 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. Ritchie, C.J., and Strong, J., dissenting. *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581.

Letters.]—To a written offer to sell some flour on certain terms the following telegram was sent :—"Letter received; offer accepted; writing." No letter was written :—

Held, affirming the judgment of the Queen's Bench Division, that there was a completed contract. Burton, J.A., doubting. *Dalrymple* v. *Scott*, 19 A. R. 477.

Mining Company—*Acquisition of Land*—*Mortgage to Secure Purchase Money.*]—Where a company has power to acquire land for the purposes of its incorporation, it has the power to give a mortgage for and to bind itself by covenant to pay the purchase money.

Where the power to contract exists, a person contracting with the company need not enquire whether the proper formalities of execution by the company have been complied with in a contract under its corporate seal. *Sheppard* v. *Bonanza Nickel Mining Co.*, 25 O. R. 305.

See Sale of Goods—Sale of Land.

V. Performance.

1. *Excuse for Non-performance.*

Breach by Other Party.]—Where before the time for the completion of a contract for the sale of goods one party notifies the other that he does not intend to complete, that notification may be treated as a breach and at once acted on; but if, as he may, the other party waits till the time for completion and then brings his action, he must shew that at this time he had himself fulfilled all conditions precedent on his part.

Judgment of the Queen's Bench Division reversed, Maclennan, J.A., dissenting. *Dalrymple* v. *Scott*, 19 A. R. 477.

Expropriation for Government Railway—*Performance of Contract Rendered Impossible by Expropriation.*]—The claimants sought to recover from the Crown the amount of damages they alleged they were obliged to pay to a contractor who was prevented by the expropriation from completing the construction of a wharf he had undertaken to build for them :—

Held, that as the contractor had been prevented from completing the construction of the wharf by the exercise of powers conferred by Act of Parliament, the claimants were excused from any liability to him in respect of the breach of contract, and could not maintain any claim against the Crown in that behalf. *Samson* v. *The Queen*, 2 Ex. C. R. 30.

Illegality of Contract.]—The information alleged an agreement with Her Majesty whereby in consideration of the conveyance by the Intercolonial Railway of certain passengers between certain stations, the defendants agreed to pay Her Majesty, through the proper officers of that railway, the fares or passage money of such passengers at the rate therein mentioned as agreed to between the defendants and such officers. The defendants admitting the agreement as alleged, sought to avoid it by setting up as a defence that such passengers were carried on *bons* in blank signed by one of the defendants only :—

Held (on demurrer to the plea), to be no answer to the breach of contract alleged. *The Queen* v. *Pouliot*, 2 Ex. C. R. 49.

Merger of Contract in Conveyance]—The defendant, an assignee for creditors, agreed with the plaintiff to exchange five houses, then in course of erection, for certain lands of the plaintiff. By the contract, which was dated March 24th, the houses were to be completed by May 30th, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within sixty days, i.e., by May 24th, but as a matter of fact they were executed and exchanged about May 9th. The plaintiff subsequently in the present action claimed damages for non-completion and defects in the finishing of the houses.

The deed from the defendants contained no covenants covering the matters complained of:—

Held, nevertheless, that the plaintiff was entitled to recover on the original contract.

A contract to perform work or to do things for the other contracting party on a sale of lands at a period after the time fixed by the same contract for the execut[illegible] and final delivery of the formal conveyanc[illegible] does not become merged in the conveyance:—

Held, also, that the loss of rents which might have been obtained for the houses if completed at the proper time was a proper measure of damages, the contracting parties having known that the houses were intended to be rented. *Smith* v. *Tennant*, 20 O. R. 180.

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2. *Place for Performance.*

Performance within Ontario—*Sale of Goods —Inspection of Bulk.*]—The defendants in British Columbia by letter offered to sell the plaintiff in Ontario a car-load of lumber, according to a sample previously furnished, at a certain price, free on board cars at Toronto. The plaintiff accepted the offer by letter, and it was agreed between the parties that the lumber was to be shipped at Vancouver and delivered at Toronto, upon which being done the price was to be paid by means of a draft. When the lumber arrived at Toronto the plaintiff inspected it and refused to accept it or the draft on the ground that it was not up to sample. He then brought this action for damages for breach of the contract:—

Held, that the plaintiff had the right to make inspection of the bulk at Toronto before accepting or paying; and the contract was one which, according to its terms, ought to be performed within Ontario; and therefore service out of the jurisdiction of the writ of summons ought to be allowed under Rule 271 (e). *Fisher* v. *Cassady*, 14 P. R. 577.

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3. *Time for Performance.*

Acceleration Clause.]—Where, by virtue of an acceleration clause in a mortgage deed, the whole of the mortgage money has become due by default of payment of interest, and judgment has been recovered for the whole by the mortgagee against the mortgagor, in an action solely upon the covenant for payment contained in the mortgage deed, the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside.

The acceleration is not in the nature of a penalty, but is to be regarded as the contract of the parties.

Rules 359, 360, and 361, and the long form of the acceleration clause, R. S. O. ch. 107, schedule B., sec. 16, considered. *Wilson* v. *Campbell*, 15 P. R. 254.

Extension of Time—*Necessity of Application for.*]—Under a building contract, in writing, the contractor agreed that, subject to any extension of time by the architect, the building should be finished by a named day, and that in default he would pay $50 a week as liquidated damages. It was also provided that all extras, etc., should form part of the contract if authorized by the architect, who was first to fix the price, and grant such extension of time therefor as he thought necessary, and power was also given him to extend the time for completion in case of a strike.

The building was not completed for over four months after the time fixed, and this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract.

Although some extras were done, and there was evidence as to delay by strikes, the architect was not asked for and he did not grant any extension of time:—

Held, that the contract must govern, and that the defendants were entitled to recover, by way of counterclaim, the sum provided by the contract as liquidated damages. *McNamara* v. *Skain*, 23 O. R. 103.

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4. *Who may Enforce.*

Action en Garantie — *Connexité.*] — The appellants, who had a contract with the City of Three Rivers to supply and set up a complete electric plant, sublet to the respondents the part of their engagement which related to the steam engine and boilers. The original contract with the city of Three Rivers embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the works, having sued the city of Three Rivers for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondents:—

Held, affirming the judgments of the Courts below that there was no legal connection, *connexité*, existing between the contract of the defendant and that of the plaintiffs with the city of Three Rivers, upon which the principal demand was based, and therefore the action *en garantie simple* was properly dismissed. *Royal Electric Co.* v. *Leonard*, 23 S. C. R. 298.

Assignee of Contract.] — *See* CHOSE IN ACTION.

Stranger to Contract.]—*See* COVENANT.

VI. Statute of Frauds.

Ante-Nuptial Contract.]—An ante-nuptial contract not signed by the parties but by notaries in their own names, they having full authority to do so, was held sufficiently signed within the Statute of Frauds. *Taillifer* v. *Taillifer*, 21 O. R. 337.

Contract not to be Performed Within a Year.] -The Statute of Frauds does not apply to a contract which has been entirely executed on one side within the year from the making so as to prevent an action being brought for the non-performance on the other side.

And, therefore, where the plaintiff delivered sheep to the defendant within a year from the making of a verbal contract with the defendant under which the latter was to deliver double the number to the plaintiff at the expiration of three years :—

Held, that the contract was not within the statute. *Trimble* v. *Lanktree*, 25 O. R. 109.

Guaranty.]—As a written memorandum of an oral guaranty is required only for the purpose of evidence, a letter or other writing subsequently given by the guarantor sufficiently shewing the terms of his undertaking will suffice.

A letter shewing the terms, written by the guarantor partly on his own behalf and partly on behalf of a firm of debtors and signed by him in the firm name and in his own name for them *per proc.*, is sufficient to bind him.

Judgment of the County Court of Essex varied. *Thomson* v. *Eede*, 22 A. R. 105.

Memorandum in Writing.]—An acceptance in writing by the owner of land of a written offer therefor addressed to him but unsigned by any purchaser and without any purchaser being named or in any way described therein, is not a sufficient memorandum to satisfy the statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer.

Per Osler, J. A., dissenting, such an instrument is a proposal to sell to any one who accepts the offer. *McIntosh* v. *Moynihan*, 18 A. R. 237.

Memorandum in Writing—*Denial of Agent's Authority.*]—A letter referring to the terms of a contract made by an agent, but denying the authority of the agent to make it, is a sufficient memorandum within the Statute of Frauds.

Judgment of the Common Pleas Division affirmed, Burton, J. A., dissenting. *Haubner* v. *Martin*, 22 A. R. 468. Affirmed by the Supreme Court.

Mine—*Agreement to Transfer Portion of Proceeds of Sale.*]—An agreement by the owner of an interest in a gold mine to transfer to another, in consideration of services performed in working the mine, a portion of such owner's share in the proceeds when it was sold is not a contract for sale of an interest in land within the Statute of Frauds. *Stuart* v. *Mott*, 23 S. C. R. 384.

Printing Debentures—*Work, Labour and Materials.*]—A contract to print debentures in a special form on paper supplied by the printers is a contract for the sale of goods and chattels, and not a contract for work, labour and materials, and is within the Statute of Frauds, Osler, J. A., *dubitante*.

Judgment of Armour, C. J., affirmed. *Canada Bank Note Co.* v. *Toronto R. W. Co.*, 22 A. R. 462.

Sale of Goods—*Sale by Weight—Acceptance of.*]—Held, per Ritchie, C. J., Strong and Fournier, JJ., affirming the judgment of the Court below, that where goods and merchandise are sold by weight the contract of sale is not perfect and the property in the goods remains in the vendor and they are at his risk until they are weighed, or until the buyer is in default to have them weighed ; and this is so, even where the buyer has made an examination of the goods and rejected such as were not to his satisfaction :—

Held, also, per Ritchie, C.J., Fournier and Taschereau, JJ., that where goods are sold by weight and the property remains in the possession of the vendor the vendor becomes in law a depositary, and if the goods while in his possession are damaged through his fault and negligence he cannot bring action for their value.

Per Patterson, J., *dubitante*, whether there was sufficient evidence of acceptance in this case to dispense with the writing necessary under Article 1,235 C. C. to effect a perfect contract of sale. *Ross* v. *Hannon*, 19 S. C. R. 227.

Sale by Sheriff Acting as Assignee for the Benefit of Creditors.]—*See McIntyre* v. *Faubert*, 26 O. R. 427, *ante* 82.

Timber—*License to Cut.*]—As a general rule a contract for the sale of standing timber which is not to be severed immediately is a sale of an interest in land.

Upon a parol sale of timber for valuable consideration, with a parol license to enter upon the land during such time as should be necessary for the purpose of cutting and removing the timber, the defendant during the period allowed by the contract continued to cut and remove, notwithstanding he was notified not to do so :—

Held, in an action of trespass and for damages for timber cut after the notice, that he was at liberty to shew the existence of the parol agreement in justification of what he had done, and under which no right of revocation existed, and to shew the part performance as an answer to the objection founded on the Statute of Frauds. *Handy* v. *Carruthers*, 25 O. R. 279.

Trust.]—L. signed a document by which he agreed to sell certain property to W. for $42,500, and W. signed an agreement to purchase the same. The document signed by W. stated that the property was to be purchased "subject to the incumbrances thereon." With this exception the papers were, in substance, the same, and each contained at the end this clause "terms and deeds, etc., to be arranged by the 1st of May next." On the day that these papers were signed L., on request of W.'s solicitor to have the terms of sale put in writing, added to the one signed by him the following : "Terms, $500 cash this day, $500 on delivery of the deed of the Parker property, $800 with interest every three months until the

six thousand five hundred dollars are paid, when the deed of the entire property will be executed." The property mentioned in these documents was, with other property of L., mortgaged for $36,000. W. paid two sums of $500 and demanded a deed of the Parker property which was refused. In an action against L., for specific performance of the above agreement the defendant set up a verbal agreement that before a deed was given the other property of L. was to be released from the mortgage, and also pleaded the Statute of Frauds :—

Held, affirming the judgment of the Court below, Patterson, J., doubting, that there was no completed agreement in writing to satisfy the Statute of Frauds.

Per Ritchie, C.J.—The agreement only provides for payment of $6,500 leaving the greater part of the purchase money unprovided for. If W. was to assume the mortgage it was necessary to provide for the release of L.'s other property and for matters in relation to the leasehold property.

Per Strong, J.—The agreement was for sale of an equity of redemption only, and as questions would arise in future as to release of L.'s other property from the mortgage and his indemnity from personal liability to the mortgagee, which should have formed part of the preliminary agreement, specific performance could not be decreed. *Williston* v. *Lawson*, 19 S. C. R. 673.

Trust—*Deed in Name of Third Party.*]—M. agreed by written contract to give to B. an absolute deed of property as security for a loan the same to be held by B. in trust for the time the loan was to run. By B.'s directions the deed was made out in his daughter's name. The daughter having claimed that she purchased the property absolutely, and for her own benefit, an action was brought by M. against her and B. for specific performance of the contract with B. and for a declaration that the daughter was a trustee only subject to repayment of the loan. The defendants denied the allegation of collusion and conspiracy charged in the statement of claim and pleaded the Statute of Frauds :—

Held, Strong, J., dissenting, that the evidence shewed that the daughter was aware of the agreement made with B. and the Statute of Frauds did not prevent parol evidence being given of such agreement. *Barton* v. *McMillan*, 20 S. C. R. 404.

VII. Miscellaneous Cases.

Agreement for Service—*Remuneration.*]—S., a girl of fourteen, lived with her grandfather, who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was twenty-five, when she married. The grandfather died shortly after, leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for his daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses :—

Held, that the alleged agreement to provide for S. by will was not one of which the Court could decree specific performance, but :—

Held, further, that S. was entitled to remuneration for her services, and $1,000 was not too much to allow her. *McGugan* v. *Smith*, 21 S. C. R. 263. *See* the next case.

Agreement to Remunerate by Legacy.]—Where services are rendered, not on a contract of hiring, nor gratuitously, but upon the faith of a promise to leave property by will, which the testator fails to perform, an action may be maintained against his representatives to recover compensation for the services in the shape of damages for breach of the previous promise.

The plaintiff brought the action against the executors of her grandfather's estate, alleging that for several years she had worked for her grandfather in consideration of his agreement to leave her by his will as much as any of his daughters. He left her by his will $400, while to his daughters he left $1,000 each, and she claimed specific performance, or, in the alternative, wages :—

Held, per Hagarty, C.J.O., and Burton, J.A. —That the plaintiff could not recover wages, but that the agreement being proved, she was entitled to recover damages for its breach, which would be, if the assets were sufficient, $600.

Per Osler, J.A.—That no more specific agreement was proved, than that the plaintiff was to be remembered by the testator in his will, and therefore she was entitled to nothing beyond the sum left her by the will.

Per Maclennan, J.A.—That the agreement was proved, and that the plaintiff was entitled to recover as damages for its breach a sum equal to the amount given to the least favoured daughter, to be ascertained in due course of administration.

In the result the judgment of Falconbridge, J., in the plaintiff's favour, was affirmed with a variation. *Smith* v. *McGugan*, 21 A. R. 542.

Agreement for Services—*Relationship of Parties.*]—M., on his father's death, at the age of three years, went to live with his grandfather, W., who sent him to school until he was sixteen years old and then took him into his store where he continued as the sole clerk for eight or nine years when W. died and M. died a few days later. Both having died intestate the administratrix of M.'s estate brought an action against the representatives of W. for the value of such services rendered by M. and on the trial there was evidence of statements made by W. during the time of such service to the effect that if he (W.) died without having made a will, M. would have good wages, and if he made a will he would leave the business and some other property to M. :—

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that there was sufficient evidence of an agreement between M. and W. that the services of the latter were not to be gratuitous but were to

be remunerated by payment of wages or a gift by will to overcome the presumption to the contrary arising from the fact that W. stood *in loco parentis* towards M. There having been no gift by will, the estate of W. was therefore liable for the value of the services as estimated by the jury. *McGugan* v. *Smith*, 21 S. C. R. 263, followed. *Murdoch* v. *West*, 24 S. C. R. 305.

Crown's Liabilities on Contracts.]—*See* CROWN, II.

Married Woman's Contract.]—*See* HUSBAND AND WIFE.

Remuneration for Services—*Collateral Contract—Novation.*]—Where services have been performed by one person for the benefit and at the request of another, and which have been charged to the latter, the fact that a third person has subsequently agreed to pay for such services, and has had judgment recovered against him therefor, by the person rendering them, will not prevent the latter recovering in an action against the person liable in the first instance, unless the subsequent agreement amounts to a novation. *Herod* v. *Ferguson*, 25 O. R. 565.

Restraint of Trade.]—*See* COVENANT.

Substitution of New Agreement.]—*See Penman Manufacturing Co.* v. *Broadhead*, 21 S. C. R. 713.

Suretyship—*Endorsement of Note—Right to Commission for Endorsing.*]—M., by agreement in writing, agreed to become surety for McD. & S. by endorsing their promissory note, and McD. & S. on their part agreed to transfer certain property to M. as security, to do everything necessary to be done to realize such securities, to protect M. against any loss or expense in regard thereto, or in connection with the note, to pay him a commission for endorsing, and to retire said note within six months from the date of the agreement. The note was made and endorsed and the securities transferred, but McD. & S. were unable to discount it at the bank where it was made payable, and having afterwards quarrelled with each other the note was never used. In an action by M. for his commission :—

Held, affirming the decision of the Court of Appeal, Taschereau and Gwynne, JJ., dissenting, that M. having done everything on his part to be done to earn his commission, and having had no control over the note after he endorsed it, and being in no way responsible for the failure to discount it, was entitled to the commission. *McDonald* v. *Manning*, 19 S. C. R. 112.

Timber—*Boomage Dues.*]—*See Ball* v. *McCaffrey*, 20 S. C. R. 319, *post*, ESTOPPEL, II.

CONTRIBUTION.

Discharge of Co-Surety—*Payment—Contribution.*]—Where one of several sureties has been released by the creditor giving time to the principal debtor, with the consent of the other sureties, the latter cannot, upon payment of the debt, recover contribution from the co-surety.

Three out of four sureties on a note obtained from the holder an extension of time by a renewal during the absence and without the consent or approval of the fourth surety, the holder retaining the original note.

After payment of the renewal by the three who had obtained the extension, they brought an action against the fourth for contribution :—

Held, that they could not recover. *Worthington v. Peck*, 24 O. R. 535.

Liability of Married Woman as Co-Contractor.]—A married woman having separate estate may enter into a contract along with others.

Semble, if she having no separate estate is not liable under such a contract the other contractors are liable without her. *Dingman* v. *Harris*, 26 O. R. 84.

CONTRIBUTORY.

See COMPANY, VIII.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, III.

CONTROVERTED ELECTIONS.

See MUNICIPAL CORPORATIONS — PARLIAMENTARY ELECTIONS.

CONVERSION.

Building Contract—*Right of Contractor to Remove Material and Plant.*]—*See Ashfield* v. *Edgell*, 21 O. R. 195, *ante* 188.

Joint Owners.]—A sale by one joint owner of property does not amount, as against his co-owner, to a conversion unless the property is destroyed by such sale or the co-owner is deprived of all beneficial interest. *Rourke* v. *Union Insurance Co.*, 23 S. C. R. 344.

Jus Tertii.]—In an action for wrongful distress for rent before it was due, there was no allegation in the statement of claim that the action was brought upon 2 W. & M., sess. 1, ch. 5, sec. 5, nor that the goods distrained were "sold," but merely an allegation that the defendant "sold and carried away the same and converted and disposed thereof to his own use ;" nor was a claim made for double the value of the goods distrained and sold, within the terms of the statute :—

Held, reversing the decision of Ferguson, J., that the action was the ordinary action for conversion, and that the value, and not the double value, of the goods distrained was recoverable :—

Held, also, reversing the decision of Ferguson, J., that a wrong-doer taking goods out of the

possession of another, cannot set up the *jus tertii*, but the person out of whose possession the goods are taken, may shew it, and in such case the wrong-doer may take advantage of it; and the plaintiff, having shewn a chattel mortgage subsisting upon a portion of the goods distrained, could not be allowed to recover the value of such portion without protecting the defendant against another action at the suit of the mortgagee:—

Held, also, per Ferguson, J., that the plaintiff was not entitled to recover from the defendant the amount received by him from the sale of the plaintiff's goods in addition to the value thereof; nor was the defendant obliged to deduct the amount so received by him from the rent which afterwards fell due. *Hoare* v. *Lee*, 5 C. B. 754, followed. *Williams* v. *Thomas*, 25 O. R. 536.

Jus Tertii—*Bailment.*]—*See Ross* v. *Edwards*, 11 R. (Dec.) 9, *ante* 65.

Policy of Insurance]—*See Buck* v. *Knowlton*, 21 S. C. R. 371, *ante* 5.

CONVICTIONS.

See CRIMINAL LAW — INTOXICATING LIQUORS —JUSTICE OF THE PEACE.

COPYRIGHT.

Circulars—*Forms.*]—The purely commercial or business character of a composition or a compilation does not oust the right to protection of copyright, if time, labour and experience have been devoted to its production.

The, plaintiff, the proprietor of a school for the cure of stammering, had obtained copyright for publications consisting of: (1) "Applicant's Blank," a series of questions to be answered by entrants to the school; (2) "Information for Stammerers," an advertisement circular; (3) "Entrance Memorandum," an agreement to be signed by entrants, and (4) "Entrance Agreement," similar to No. 3, but more formal:—

Held, that the plaintiff had copyright in the publications, and was entitled to an injunction restraining infringement thereof.

Griffin v. *Kingston and Pembroke R. W. Co.*, 17 O. R., at p. 665, dissented from. *Church* v. *Linton*, 25 O. R. 131.

Printing Canadian Copyright Work Abroad—*Publication in Canada.*]—Section 33 of the Copyright Act, R. S. C. ch. 62, does not impose the penalty mentioned therein upon the owner of a Canadian copyright in respect to a musical composition who has the work printed abroad, and inserts notification of the existence of such copyright on copies published in Canada. *Lancefield* v. *Anglo-Canadian Music Publishing Association (Limited)*, 26 O. R. 457.

See TRADE MARK.

CORONER'S INQUEST.

See CRIMINAL LAW, II.

CORPORATIONS.

See COMPANY—MUNICIPAL CORPORATIONS.

CORROBORATION.

See EVIDENCE, II.

CORRUPT PRACTICES.

See PARLIAMENTARY ELECTIONS, I.

COSTS.

I. APPEALS AS TO COSTS.

By-law in Question in Action Repealed.]—After the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada:—

Held, that the only matter in dispute between the parties being a mere question of costs, the Court would not entertain the appeal. Supreme and Exchequer Courts Act, sec 24. *Moir* v. *Village of Huntingdon*, 19 S. C. R. 363.

Defendant Ordered to Pay all Costs.]—Where a defendant is ordered to pay the costs of the action, but no further relief is given by the

judgment, an appeal from the judgment is not an appeal for costs within the meaning of section 65 O. J. Act.

A judgment ordering the defendant to pay the whole costs of the action cannot be supported unless the plaintiff is entitled to bring the action.

Dick v. *Yates*, 18 Ch. D. 76, followed.

Judgment of Street, J., 20 O. R. 547, affirmed. *Fleming* v. *City of Toronto*, 19 A. R. 318.

Erroneous Principle.]—An appeal lies to a Divisional Court from the order of a trial Judge who was awarded costs on a wrong principle. *McCausland* v. *Quebec Fire Ins. Co.*, 25 O. R. 330.

Lapse of Time Curing Defect Complained of.]—Held, that as the valuation roll sought to be set aside in this case had been duly homologated and not appealed against within the delay provided in Article 1061 (M. C.), the only matter in dispute between the parties was a mere question of costs, and therefore the Court would not entertain the appeal. *Moir* v. *Village of Huntingdon*, 19 S. C. R. 363, followed. *McKay* v. *Township of Hinchinbrook*, 24 S. C. R. 55.

Successful Litigant in Effect Paying Costs.]—*See Lamb* v. *Cleveland*, 19 S. C. R. 78, *post* 207.

II. Giving and Withholding Costs.

1. *Generally.*

Costs Out of Estate—*Successful Litigant in Effect Paying Costs.*]—The Supreme Court of New Brunswick, while deciding against the next of kin on his claim as against the husband to the residue of the estate of a *feme coverte*, directed that his costs should be paid out of the estate. The next of kin's appeal to the Supreme Court of Canada was dismissed with costs, and the direction as to costs in the Court below was struck out of the decree, as that direction had the effect of making the successful party pay the costs. *Lamb* v. *Cleveland*, 19 S. C. R. 78.

Discretion.]—By their statement of claim the plaintiffs alleged themselves to be creditors for wages of two of the defendants, and they sought relief against the third defendant only as having obtained certain assets from the other two, either fraudulently or upon a trust to pay the plaintiff's claims. In their reply they set up that they were creditors of the third defendant himself, upon the ground that he was really the person who hired them. There was no subsequent pleading:—

Held, that the reply was a direct violation of Rule 419; and that the trial Judge was within his right in refusing, in his discretion, to try the action until the issues were properly presented upon the pleadings, and in directing that the costs of the postponement should be borne by the plaintiffs.

No opinion expressed as to whether a Divisional Court had power to review such a ruling. *Hurd* v. *Bostwick*, 16 P. R. 121.

Ex parte Motion.]—Costs should not be awarded against another person upon an *ex parte* motion. *McLean* v. *Allen*, 14 P. R. 84.

Special Disposition of Costs.]—*See McCullough* v. *Clemow*, 26 O. R. 467; *Dolen* v. *Metropolitan Life Ins. Co.*, 26 O. R. 67.

Test Case.]—Costs of both parties of an appeal to the Judicial Committee were directed to be paid by the successful appellant, special leave having been given to him under special circumstances notwithstanding the small amount at stake. *Forget* v. *Ostigny*, [1895] A. C. 318.

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2. *Conduct of Parties.*

Delay in Making Objection to Title.]—Under the circumstances of this case, it was held that the vendee had not, by his conduct and delay, waived his right to object to the title, but as he had not raised the objection in the proper manner at the proper time, he was allowed no costs of his action. *Nason* v. *Armstrong*, 22 O. R. 542.

Delay in Taking Objection.]—An appeal was allowed without costs where an objection to jurisdiction was not taken *in limine*. *Jacobs* v. *Robinson*, 16 P. R. 1.

Extravagant Claim.]—Where the tender was not unreasonable and the claim very extravagant, the claimant was not given costs although the amount of the award exceeded somewhat the amount tendered. *McLeod* v. *The Queen*, 2 Ex. C. R. 106.

Failure to Make Proper Admissions.]—In an administration action commenced by writ the plaintiff was allowed upon taxation only such costs as would have been taxed had he begun his proceedings by a summary application under Rule 965. The defendant claimed to have taxed to him and set off his additional costs incurred by reason of the less expensive procedure not having been adopted. He had not in the action admitted the right of the plaintiff to an account, but had pleaded a release, and had not objected to the procedure adopted:—

Held, that the defendant's additional costs had not been incurred by reason of the plaintiff's improper or unnecessary proceedings, but by his own conduct in not admitting the right to an account and in not objecting to the plaintiff's manner of proceeding at the earliest possible stage; and the case therefore did not come within Rule 1195.

Semble, it would have been proper to raise the question at the hearing; but the taxing officer had jurisdiction under Rule 1195, without an order, to "look into" it. *Moon* v. *Caldwell*, 15 P. R. 159.

False Affidavit of Increase.]—Upon the taxation of the plaintiff's costs of the action, he made the usual affidavit of increase, and was thereupon allowed for disbursements of sums of money as witness and counsel fees. The taxation was closed, and the certificate issued without objection. The defendant afterwards discovered that the fees had not been paid as stated in the affidavit, and made a motion to set aside the certificate and have the items in question disallowed:—

Held, that neither the Master in Chambers nor a Judge in Chambers had jurisdiction to entertain the motion.

Upon a motion to a Judge in Court:—

Held, that the items should be disallowed.

Hornick v. *Romney*, 11 C. L. T. 329, followed. *Harding* v. *Knust*, 15 P. R. 80.

Fraud not Proved.]—Costs withheld from the defendant because he had misled the plaintiff as to his power to make an exchange, and declined to perform his contract on grounds some of which were untenable, and also alleged fraud which he failed to prove. *Tenute* v. *Walsh*, 24 O. R. 309.

Misrepresentation Before Action.]—Costs were refused to successful claimants where there had been a misrepresentation innocently made by their agent, to whom they had not communicated facts within their knowledge. *Smith* v. *The Queen*, 2 Ex. C. R. 417.

Mortgage—*Unsuccessful Claim to Consolidate.*]—The defendants before action tendered, with the amount due on the first mortgage, an assignment thereof, which the plaintiffs, being mortgagees in possession, were not bound and declined to give, under R. S. O. ch. 102, sec. 2, and subsequently but without tender the defendant offered to take a reconveyance:—

Held, that the plaintiffs' claim to consolidate was not misconduct so as to deprive them of their costs of the action.

Decision of Street, J., varied upon the question of costs. *Stark* v. *Reid*, 26 O. R. 257.

New Grounds of Attack.]—The applicants for an order quashing a by-law before moving had appeared on a notice, given by them, to name an arbitrator before a Judge, who raised an objection to the by-law, whereupon the applicants gave notice of abandonment and moved to quash:—

Held, that the applicants were not estopped, but that they should have no costs. *Re Davis and City of Toronto*, 21 O. R. 243.

New Grounds of Defence.]—Costs withheld from the successful respondent where the objection as to laches was substantiated by affidavits filed for the first time in the Court of Appeal. *McVicar* v. *McLaughlin*, 16 P. R. 450.

Suppression of Facts.]—It is within the power of the Court or a Judge, upon an application to discharge a defendant from custody, to impose upon him the term that he shall bring no action against the plaintiff; but it should only be imposed where the plaintiff is shewn to have been entirely frank and open in his application for the order for arrest, and to have had reasonable grounds for the statements he has laid before the Judge. The circumstances of this case did not warrant such a term being imposed; for the plaintiff was aware of the circumstances and the publicity of the defendant's departure in 1891, and conveyed a false impression when he swore that the defendant then "absconded from this Province."

For the same reason the defendant was entitled to the costs of his application to be discharged from custody. *Scane* v. *Coffey*, 15 P. R. 112.

Technical Objection.]—Appeal quashed with costs where, upon the merits, there appeared to be no reason to differ from the Court below. *Teskey* v. *Neil*, 15 P. R. 244.

Venue—*Party not in Fault.*]—Costs were not given against the plaintiffs where they obtained a change of venue to expedite the trial because of the illness of a witness, they not being in fault. *Mercer Co.* v. *Massey-Harris Co.*, 16 P. R. 171.

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3. *Good Cause.*

Order of Judge under Rule 1172.]—The words of Rule 1172 "the Judge or Court makes no order respecting the costs" do not confer any wholly discretionary powers on the Judge, but must be read with Rule 1170, as referring to an order made "for good cause."

And where, in an action in a County Court for damages for bodily injuries sustained by the plaintiff through the alleged negligence of the defendant, the jury found for the plaintiff and assessed the damages at $30, and added that the defendant should pay "the Court expenses," and the Judge made an order that the defendant should have full County Court costs, and that the defendant should not have the set-off provided by Rule 1172, because, in his opinion, the injury done to the plaintiff was attended by circumstances of great aggravation, and the jury ought to have given larger damages:—

Held, Osler, J.A., dissenting, that these were not circumstances which constituted "good cause" within the meaning of Rule 1170; for the very matters relied upon by the Judge as "good cause" had been passed upon adversely by the jury; and therefore the costs should follow the event under Rule 1172.

Beckett v. *Stiles*, 5 Times L. R. 88, followed. *McNair* v. *Boyd*, 14 P. R. 132.

Order of Trial Judge under Rules 1170, 1172.]—In an action for damages for assault and negligence brought in the High Court and tried with a jury, a verdict for $110 damages was rendered. The trial Judge directed judgment to be entered for that sum, with County Court costs, and ordered that the defendant should have no right to the excess of his costs in the High Court over County Court costs, in the manner provided for by Rule 1172. The trial Judge's reasons for making the order preventing the set-off were: (1) because the defendant had induced the plaintiff to go with him to his own physician after the assault complained of, promising to pay the bill, and had afterwards refused to perform his promise; and (2) because the plaintiff might reasonably have expected the damages to have been allowed at more than $200, and so was entitled to bring his action in the High Court:—

Held, that neither of these reasons could be treated as "good cause" within the meaning of Rule 1170; and therefore the costs should follow the event under Rule 1172.

McNair v. *Boyd*, 14 P. R. 132, followed. *Baskerville* v. *Vose*, 15 P. R. 122.

Order of Trial Judge under Rules 1170, 1172.]—In an action for damages for malicious

prosecution and arrest brought in the High Court of Justice and tried by a jury, the plaintiff recovered a verdict for $50. The trial Judge entered judgment for this sum with costs to the plaintiff on the scale of the County Court, and ordered that the defendant should not be allowed to set off his extra costs occasioned by the action being brought in the High Court. He was of opinion that the plaintiff had reasonable grounds for bringing the action in the High Court; that the conduct of the defendant was wrong; and that the verdict might well have been larger:—

Held, that there was no "good cause" under rule 1170 for depriving the defendant of the set-off provided for by Rule 1172.

McNair v. *Boyd*, 14 P. R. 132, followed. *Carton* v. *Bradburn*, 15 P. R. 147.

Order of Trial Judge under Rule 1170—*Amending Rule—Cases Already Tried.*]—The Rule of the Supreme Court of Judicature for Ontario, passed on 4th November, 1893, amending Rule 1170 by providing that where an action is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, the trial Judge, in his discretion, otherwise orders, does not apply to actions tried before it was passed.

And where the jury in an action of tort, tried before the passing of the new Rule, assessed the plaintiff's damages at $100, and the trial Judge did not give judgment till after the passing of the new Rule, and then ordered that the plaintiff should have costs on the High Court scale:—

Held, that he had no power to so order, unless for "good cause shewn" within the meaning of Rule 1170, as it stood at the date of the trial.

The right to costs or to set-off costs is a substantial right, and not a mere matter of procedure.

But, under Rule 1170, the Court has the power to make such order as to costs as may seem just, irrespective of good cause; and, as in this case, the awarding of so small a sum as $100, assuming the plaintiff's right to recover, was almost preverse, and the plaintiff had a right to expect an award well beyond the jurisdiction of the County Court, the Divisional Court affirmed the trial Judge's disposition of the costs.

Stratford v. *Sherwood*, 5 O. S. 169, at pp. 170, 171, followed. *Island* v. *Township of Amaranth*, 16 P. R. 3.

Order of Trial Judge under Rule 1170—*Amending Rule—Cases Already Tried.*]—In an action of tort, tried before the passing of the Rule of 4th November, 1893, amending Rule 1170, the jury assessed the plaintiff's damages at $200, and judgment was given for the plaintiff for that amount, but the trial Judge did not give judgment upon the question of costs till after the passing of the new Rule, and then ordered that the plaintiff should have costs on the High Court scale.

An appeal from this order was dismissed by a Divisional Court.

Per Boyd, C.—The amendment of the Rule was to be regarded by the trial Judge, while the application of the plaintiff for full costs was before him, and while the action was still pending. Changes in the law as to costs since the Judicature Act are matters of procedure, and, as such, act retrospectively or with reference to current and uncompleted proceedings. But even if Rule 1170 in its unamended form applied, the Divisional Court had under it an alternative power over the costs, not limited by the condition as to good cause, and, as this was not a case in which the costs of the plaintiff should be diminished by taxation on a lower scale, or by the allowance of a set-off, the jurisdiction should be exercised in accordance with the view of the trial Judge.

Meredith, J., *dubitante*, considered himself bound by the decision of the Common Pleas Division in *Island* v. *Township of Amaranth*, 16 P. R. 3, to arrive at the same conclusion. *McGillivray* v. *Town of Lindsay*, 16 P. R. 11.

Order as to Costs under Rule 1170—*Divisional Court—Amending Rule 1274.*]—Under Rule 1170, as it stood before the amendment made by Rule 1274, a Divisional Court had the power to make such order as to costs as might seem just, irrespective of "good cause."

Decision of the Common Pleas Division affirmed.

Meyers v. *Defries*, 4 Ex. D. 176; *Marsden* v. *Lancashire, etc., R. W. Co.*, 7 Q. B. D. 641, followed.

Island v. *Township of Amaranth*, 16 P. R. 3, approved.

Where similar motions are made to the same Court in two actions, and the parties in the first agree that the decision in the second shall govern, there is nothing to preclude an appeal in the first action, even though there is no appeal in the second, unless it was agreed that the decision in the latter should be final.

Per Maclennan, J.A.—Rule 1274 was inapplicable to this action, which was tried before it came into force. *Coutts* v. *Dodds*, 16 P. R. 273.

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4. *Payment into Court.*

Strict Rights.]—The defendants having paid into Court twenty cents less than the correct amount due by them, the plaintiff was held entitled to full costs. *Henderson* v. *Bank of Hamilton*, 25 O. R. 641. Affirmed in appeal, 22 A. R. 414.

Tender.]—Discussion as to the effect of the defences of tender and payment into Court upon the question of costs and otherwise.

Rules 632-640 considered. *Davis* v. *National Assurance Co.*, 16 P. R. 116.

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5. *Unnecessary Proceedings.*

Administration—*Action Instead of Motion.*]—The order and decision of Robertson, J., 13 P. R. 403, upon appeal from taxation of costs between solicitor and client, disallowing to the solicitors the additional costs occasioned by their bringing on their client's behalf an action for administration, where a summary application would have sufficed, was affirmed by the Court of Appeal, Burton, J.A., dissenting.

In the administration action the additional costs incurred by the defendants in that action were allowed to them by way of set-off against the costs awarded to the plaintiff:—

Held, that no relief could be obtained by the client, upon a proceeding for taxation of costs, in respect of the loss suffered by her in virtually paying these costs to the defendants. *Re Allenby and Weir*, 14 P. R. 227.

Court Instead of Chambers.]—Where a motion to stay proceedings was made in Court it was enlarged into Chambers, and costs were ordered against the applicants. *Lee* v. *Mimico Real Estate Co.*, 15 P. R. 288.

Expensive Defence.]—Where an objection might have been raised by a demurrer, the costs of defence were given as of a successful demurrer, to be set off against the costs of a judgment on the pleadings for an admitted debt. *Wallis* v. *Skain*, 21 O. R. 532.

Injunction.]—The plaintiff was ordered to pay the costs of an interim injunction obtained by him, because the facts proved at the trial shewed no anticipation of such immediate and serious damage as to justify the application for it. *Sklitzsky* v. *Cranston*, 22 O. R. 590.

Printing.]—The costs of printing unnecessary material disallowed. *Bryce* v. *Lontit*, 21 A. R. 100.

III. Scale of Costs.

Arbitration.]—Where upon an arbitration under section 385 *et seq.* of the Municipal Act, 1892, the arbitrators made their award and directed that the costs should be paid by the land-owners, but did not fix the amount nor direct on what scale they should be taxed, as required by section 399 :—

Held, that there was no authority for their taxation either upon the High Court or the County Court scale.

But *semble*, that upon a proper application the award would be referred back to the arbitrators to complete it in the matter of costs. *Re Village of Preston and Klotz*, 16 P. R. 318.

Bond—*Penalty.*]—In an action on a bond for $500 given to secure payment of costs in the Supreme Court of Canada in a prior action, judgment was given for the plaintiff for $318.55, the amount at which such costs were taxed and certified in the Supreme Court :—

Held, that the amount recovered was not ascertained by the act of the parties or by the signature of the defendants, within R. S. O. ch. 47, sec. 19, and the plaintiff was entitled to costs of the action on the scale of the High Court. *Hager* v. *Jackson*, 16 P. R. 485.

County Court—*Action for Goods Sold and Delivered.*]—Where in an action in the High Court an order was made by a local Judge upon consent, allowing the plaintiffs to judgment for $233, with costs of suit to be :—

Held, that full costs were not implied unless it was a case for suing in the High Court; and the jurisdiction of the taxing officer to decide as to the scale of costs was not ousted.

History of Rule 1174.

The claim was $233, the price of furniture sold by the plaintiffs to the defendant, according to prices indorsed on the writ, and duly delivered. By his statement of defence the defendant admitted $160.50, which he paid into Court. As to the balance he pleaded that it was not payable, because the goods ordered in respect thereof were not supplied or delivered, and that there was no agreement therefor within the Statute of Frauds :—

Held, that the pleadings only must be looked at to ascertain what was in dispute; that the cause of action was one and indivisible; and that the *whole* cause of action was not for an ascertained amount within County Court competence.

Vogt v. *Boyle*, 9 P. R. 249, distinguished. *Brown* v. *Hose*, 14 P. R. 3.

County Court—*Amount in Controversy.*]—Where the plaintiffs in an action in the High Court of Justice to recover a sum for work and labour and materials, the amount not being liquidated or ascertained, recovered $190.01 for debt, and $14.54 for interest from the issue of the writ of summons :—

Held, that the amount recovered was not within the jurisdiction of a County Court, and the plaintiffs were entitled to costs on the scale of the High Court. *Malcolm* v. *Leys*, 15 P. R. 75.

County Court Action Transferred to High Court.]—The provisions of Rule 1219 are applicable to an action transferred from a County Court to the High Court by virtue of 54 Vict. ch. 14 (O.); and the costs of the proceedings after the transfer should be taxed upon the lower scale where the case falls within sub-section (4) of the Rule, by reason of the plaintiff seeking equitable relief and the subject matter involved not exceeding $200. *Struthers* v. *Green*, 14 P. R. 486.

Covenant—*Landlord and Tenant—Title to Land—Division Courts Act—Custom.*]—In an action brought in the High Court by a landlord against a tenant for damages for breach of the latter's covenants in a farm lease, the statement of claim alleged that the plaintiff by deed let to the defendant the land described for a term of years, and that the defendant thereby covenanted as set forth, and assigned as breaches of the covenants that the defendant did not cultivate the farm in a good, husband-like, and proper manner. By the statement of defence the defendant denied all the allegations of the statement of claim, and further alleged that the defendant had used the premises in a tenant-like and proper manner, "according to the custom of the country where the same was situate." The plaintiff recovered a verdict of $100, the action being tried with a jury. The title to the land was not brought into question at the trial, but it was contended that it came in question on the pleadings :—

Held, not so; for the defendant was, on the face of the record, estopped from pleading *non demisit*, and his denial could only be read as a traverse of the actual execution of the lease.

Purser v. *Bradburne*, 7 P. R. 18, commented on :—

Held, also, that the "custom" pleaded was not the "custom" meant by section 69, subsection 4, of the Division Courts Act, R. S. O. ch. 51, which refers to some legal custom by which the right or title to property is acquired, or on which it depends.

Leyh v. *Hewitt*, 4 East 154, followed:—

Held, therefore, that the action was within the competence of the Division Court, and that the costs should follow the event in accordance with Rules 1170, 1172. *Talbot* v. *Poole*, 15 P. R. 99.

Delivery Up of Promissory Note for $230.]—In an action brought in the High Court to restrain the defendants by injunction from negotiating a promissory note for $230, and to compel them to deliver it up to the plaintiff, or for damages for its detention, it was determined that the note was wrongfully held by the defendants, who had obtained it under the pretence of discounting it, but really with the view of making it the subject of garnishment:—

Held, that the action sounded in tort and not in contract, and could not have been brought in a County Court; and the successful plaintiff was therefore entitled to tax his costs on the High Court scale.

Johnson v. *Kenyon*, 13 P. R. 24, distinguished. *Robb* v. *Murray*, 16 A. R. 502, followed. *Plummer* v. *Coldwell*, 15 P. R. 144.

Interest upon Verdict.]—The interest which a verdict or judgment bears by virtue of R. S. O. ch. 44, sec. 88, is no part of the claim; and the question as to the scale upon which costs are to be taxed is to be determined by the amount of the verdict or judgment irrespective of such interest.

Malcolm v. *Leys*, 15 P. R. 75, distinguished. *Sproule* v. *Wilson*, 15 P. R. 349.

Mechanics' Liens.]—The costs of lien-holders subsequent to judgment of reference should be taxed upon the scale appropriate to the amount found due to each. *Hall* v. *Hogg*, 14 P. R. 45.

Title to Land.]—Where in an action by a monthly tenant against his landlord and other persons for wrongful entry upon the demised premises, the landlord denied the plaintiff's tenancy:—

Held, that the title to land was brought in question, and the costs of the plaintiffs were properly taxed on the High Court scale, although the damages recovered were only $104.

Worman v. *Brady*, 12 P. R. 613, and *Danaher* v. *Little*, 13 P. R. 361, followed.

Tomkins v. *Jones*, 22 Q. B. D. 599, specially referred to. *Flett* v. *Way*, 14 P. R. 312.

Water Privilege — *Appeal from Order of County Court Judge.*]—The disposition of the costs of an appeal is not a part of the practice and proceedings upon the appeal.

Upon an appeal from an order of a County Court Judge, under R. S. O. ch. 119, with respect to a water privilege, the Court of Appeal has power, under section 18, to direct that the costs shall be taxed on the scale applicable to High Court, County Court, or Division Court appeals; and the Judge to whom application for leave to appeal is made under section 16 has no power to control the discretion of the Court in this respect. *Re Burnham*, 16 P. R. 390.

See, also, County Court, I., and Division Court, II.

IV. Security for Costs.

1. *When Ordered.*

Admission of Claim—*Defendants Possessed of Plaintiff's Funds.*]—In cases where the defendants are possessed of funds belonging to the plaintiff, the discretion of the Court will be exercised against hampering the plaintiff by ordering security for costs.

The plaintiff who lived out of the jurisdiction and had lately attained his majority, sued the defendants for an account and payment of funds which he alleged they held as joint trustees for him, he having had no account. The recept of trust funds by both defendants was proved, but one defendant put the blame of their not being forthcoming on the other, and swore that he had a good defence to the action, though he did not disclose it. The other defendant did not defend:—

Held, not a case in which the plaintiff should be required to give security for costs. *Duffy* v. *Donovan*, 14 P. R. 159.

Admission of Debt.]—Where there was an admission by the defendant of the debt sued for, sworn to and not contradicted, and the writ of summons was specially indorsed so as to enable the plaintiffs to move for judgment under Rule 739, an order for security for costs obtained by the defendant on *præcipe*, after appearance, the plaintiffs being out of the jurisdiction, was set aside, notwithstanding that the plaintiffs might have paid $50 into Court under Rule 1251 and proceeded to move for judgment.

Doer v. *Rand*, 10 P. R. 165, followed.

Payne v. *Newberry*, 13 P. R. 354, not followed. *Thibaudeau* v. *Herbert*, 16 P. R. 420.

Attachment.]—The judgment creditor obtained an attaching order, which was set aside by the local Judge who granted it; the judgment creditor then appealed to a Judge in Chambers unsuccessfully, and had given notice of a further appeal to a Divisional Court, when his proceedings were stayed by an order of the Master in Chambers requiring him to give security for costs, on the ground that he was insolvent and was proceeding for the benefit of another:—

Held, that the order for security could not be sustained; the judgment creditor was not proceeding either by action or petition; and there was no authority for ordering security.

Re Rees, 10 P. R. 425, overruled. *Palmer* v. *Lovett*, 14 P. R. 415.

Contempt—*Leaving Jurisdiction to Avoid Arrest.*]—Where the plaintiff after the commencement of the action left the Province to escape arrest under orders of committal for contempt of Court in other actions, he was ordered to give security for costs. *Codd* v. *Delap*, 15 P. R. 374.

Executors and Administrators.]—An executrix stands in no different position as to the liability to give security for costs from a litigant suing in his own right.

And an executrix resident abroad, applying for payment out of Court of moneys to the credit of her testator, was ordered to give security for the costs of an alleged assignee of the fund, who opposed the application.

The rule as to security applies to a motion as well as to a petition. *Re Parker, Parker* v. *Parker*, 16 P. R. 392.

False Address—*Temporary Residence within Jurisdiction—Incarceration under Criminal Sentence.*]—Where the plaintiff, who for two years previous to the commencement of the action had been a resident of the Province of Quebec, indorsed a false address, within Ontario, upon the writ of summons, for the purpose of misleading and escaping giving security for costs, and was, at the time an application was made therefor, a prisoner in Ontario under a criminal sentence, he was ordered to give security for costs.

Swanzy v. *Swanzy*, 4 K. & J. 237, followed.

Redondo v. *Chaytor*, 4 Q. B. D. 453, commented on. *Fournier* v. *Hogarth*, 15 P. R. 72.

False Address—*Mistake—Residence out of the Jurisdiction — Temporary Return.*]—The plaintiff, who was a sailor on the lakes, at the time of the issue of the writ of summons was residing out of Ontario. The writ was, by a mistake of the plaintiff's solicitor, indorsed with a statement that the plaintiff resided in Windsor, Ontario; and, upon the defendants moving for security for costs on the ground that the plaintiff had given a false address, the plaintiff declared that naming Windsor was a mistake, and that his true place of residence was Collingwood, Ontario. Collingwood was not then his actual place of residence. Pending the motion, however, he returned to Ontario, and went to reside temporarily at Sarnia:—

Held, that the plaintiff by giving a false address entitled the defendants to move for security for costs, and it lay on the plaintiff to shew that his misstatement was not made *bonâ fide*. That being shewn, the plaintiff would be driven to amend, or the defendants would be entitled to the order. But the plaintiff could not amend by substituting Collingwood, for he did not reside there at the date of the writ; and the defendants would have been entitled to the order but for the plaintiff's subsequent return to the jurisdiction. And:—

Held, following *Redondo* v. *Chaytor*, 4 Q. B. D. 453, and *Ebrard* v. *Gassier*, 28 Ch. D. 232, that where a foreigner comes within the jurisdiction, pending a motion for security for costs and before judgment, although for the temporary purpose of enforcing his claim by action, he cannot be called upon to give security.

The motion for security was refused, without costs to either party, and leave was reserved to the defendants to apply again if the plaintiff should go to reside out of the jurisdiction before the termination of the action. *Anderson* v. *Quebec Fire Ins. Co.*, 15 P. R. 132.

Foreign Commission.]—An order for a foreign commission being discretionary, there is power to impose proper terms in making it.

And the plaintiff was required to give security for the costs of a commission to examine a witness abroad, where the information as to his exact locality was slender and it seemed doubtful whether he would attend to be examined.

Langen v. *Tate*, 24 Ch. D. 522, followed. *Coleman* v. *Bank of Montreal*, 16 P. R. 159.

Foreign Corporation—*Assets in Ontario.*]—The plaintiffs, a foreign corporation, having acquired the patent right to manufacture and sell a certain incandescent light in the Dominion of Canada, entered into an agreement with another company by which the latter were to act as the agents of the plaintiffs in Ontario, and to manufacture and sell the lights at a fixed price or lease them, and the plaintiffs were to receive the net profits, guaranteeing the other company against loss. The other company carried on the business and leased the lights in their own name. A large number of these lights were in existence in Ontario, under lease to different persons:—

Held, that as the lights could not be made available in execution without a taking of accounts between the two companies, they were not assets of the plaintiffs in Ontario sufficient to answer a motion for security for costs.

Nor could the plaintiffs be regarded as resident in Ontario by reason of their doing business through the medium of the other company. *Welsbach Incandescent Gaslight Co.* v. *St. Leger*, 16 P. R. 382.

Former Action.]—The practice by which, when the defendant's costs of a former action for the same or substantially the same cause were unpaid, the defendant was entitled to have the latter action stayed until they should be paid, is now superseded by the effect of Rule 3, the defendant's only remedy being to apply under Rule 1243 for security for costs in the second action. *Campbell* v. *Elgie*, 16 P. R. 440.

Infants.]—Infants having a *bonâ fide* cause of action are privileged suitors; and the same rule as to security for costs should not be applied as in the case of adults.

If the next friend of the infant plaintiffs, being the natural guardian, is within the jurisdiction when the action is begun, and so continues *pendente lite*, the Court will not too anxiously scrutinize the tenure of his residence.

And where the infant plaintiffs and their natural guardian and next friend were foreigners, and came within the jurisdiction merely for the purpose of bringing the actions, but continued therein up to the time of an application for security for costs, and it appeared that they had a *bonâ fide* cause of action, an order staying proceedings until a new next friend within the jurisdiction should be found, was reversed. *Scott* v. *Niagara Navigation Co.*, 15 P. R. 409. Affirmed by the Divisional Court, 15 P. R. 455.

Interpleader.]—Security for costs may be ordered in interpleader proceedings.

Swain v. *Stoddard*, 12 P. R. 590, approved and followed.

Belmonte v. *Aynard*, 4 C. P. D. 221, 352, distinguished.

The party substantially and in fact moving the proceedings, whether plaintiff or defendant in the interpleader issue, should, if resident out

of the jurisdiction, give security to the opposite party. *Re Ancient Order of Foresters and Castner*, 14 P. R. 47.

Justice of the Peace—*Character of Property of Plaintiff.*]—Upon applications under 53 Vict. ch. 23 (O.), for security for costs in actions against justices of the peace, the rule should not be more, but rather less, onerous than in ordinary applications for security where the plaintiff is out of the country.

Section 2 of the Act provides that it is to be shewn that the plaintiff is not possessed of property sufficient to answer the costs of the action :—

Held, that the Court should be less exacting as to the character of the property where the person is a *bond fide* resident than in the ordinary case of a stranger who seeks to justify upon property within the jurisdiction ; the test is : is it such property as would be forthcoming and available in execution?

And where the plaintiff had property, partly real and partly personal, to the value of $800 over and above debts, incumbrances, and exemptions, security for costs was not ordered. *Bready* v. *Robertson*, 14 P. R. 7.

Justice of the Peace—*Merits.*]—In an action against a justice of the peace for false arrest and imprisonment, it appeared that there was a valid warrant of commitment against the plaintiff in the county of O., which was, in the absence of the police magistrate, indorsed by the defendant for execution in the city of T., and under which the plaintiff was there arrested.

The plaintiff alleged that the arrest was illegal because the defendant's mandate was not actually endorsed upon the warrant, and because the defendant's authority was not shewn on the face of his mandate. It appeared, however, that the defendant's mandate was pasted or annexed to the warrant, and that the defendant in fact had authority, though it was not set out. It was admitted that the plaintiff was not possessed of property sufficient to answer costs :—

Held, that the defendant was entitled to security for costs under 53 Vict. ch. 23 (O.).

Per Robertson and Meredith, JJ., that it was not intended by the statute that the merits of the action should be determined upon an application for security for costs. *Southwick* v. *Hare*, 15 P. R. 222.

Justice of the Peace—*Time.*]—An order under 53 Vict. ch. 23 for security for costs in an action against a justice of the peace should not limit a time within which security is to be given nor provide for dismissal of the action in default ; the order should be simply "that the plaintiff do give security for the costs of the defendant to be incurred in the action." *Thompson* v. *Williamson*, 16 P. R. 368.

Libel—*Candidate for Public Office.*]—The plaintiff was a candidate at an election of a member of the Legislative Assembly of Ontario, and brought this action in respect of several libels alleged to have been published by the defendant in his newspaper, some of them before the date of the writ for the election, and some after that date but before the election :—

Held, that the plaintiff was not a candidate for a public office in this Province within the meaning of R. S. O. ch. 57, sec. 5, sub-sec. (2) (*a*), before the date of the writ for the election ; and that as to the libels alleged to have been published before that date, a notice before action under the statute was necessary ; but the paragraphs of the statement of claim charging these libels could not, on the ground that the notice was not given, be struck out under Rule 387, nor the action as to them summarily dismissed ; and as to the libels alleged to have been published after that date, security for costs could not be ordered under the statute, because the plaintiff was then a candidate for a public office within the meaning of section 5, sub-section (2) (*a*), and the statute did not apply, there having been no retraction. *Conmee* v. *Wadman*, 16 P. R. 239.

Libel—*Newspaper—Criminal Charge.*]—The legislation in R. S. O. ch. 57, sec. 9, as to security for costs in actions for libel contained in newspapers, is unique, and the intention is to protect newspapers reasonably well conducted, with a view to the information of the public.

In a newspaper article published by the defendants the plaintiff was referred to as an "unmitigated scoundrel," and it was stated that he had endeavoured to ruin his wife by inciting another person to commit adultery with her :—

Held, that this did not involve a criminal charge within the meaning of section 9 (*a*).

The defendants did not contend that the grounds of action were trivial or frivolous ; and it was conceded by the plaintiff that he had not sufficient property to answer the costs of the action.

The manager of the defendants swore to a belief in the substantial truth of what was published, and that it was so published in good faith and without malice or ill-will towards the plaintiff :—

Held, that, under these circumstances, an appeal from the discretion of a Judge in Chambers in reversing a referee's decision and ordering security for costs, should not prevail. *Bennett* v. *Empire Printing and Publishing Co.*, 16 P. R. 63.

Libel—*Newspaper—Criminal Charge.*]—The words "involves a criminal charge" in R. S. O. ch. 57, sec. 9, sub sec. (1) (*a*), mean "involves a charge that the plaintiff has been guilty of a criminal offence."

And where the words published by the defendants in their newspaper of which the plaintiffs, an incorporated company, complained in an action of libel, alleged that the plaintiffs had tried to bribe aldermen by issuing to them paid-up stock in the company :—

Held, upon an application for security for costs under the above section, that the words did not involve a criminal charge, for a corporation cannot be charged criminally with a crime involving malice or the intention of the offender.

Mayor, etc., of Manchester v. *Williams*, [1891] 1 Q. B. 94, followed.

Journal Printing Co. v. *MacLean*, 25 O. R. 509, distinguished.

And where the defendants by affidavit shewed publication in good faith and other circumstances sufficient under the above section to

entitle them to security for costs, and the case made was not displaced by the cross-examination of the deponent on his affidavit, an order was made for such security. *Georgian Bay Ship Canal Co.* v. *World Newspaper Co.*, 16 P. R. 320.

Libel — *Newspaper — Criminal Charge — "Blackmail."*]—Upon an application under R. S. O. ch. 57, sec. 9, for security for costs in an action for libel, in which the words complained of, published in the defendants' newspaper, accused the plaintiff of attempted "blackmail":—

Held, that the words might bear such a meaning as to charge the indictable offence defined by section 460 of the Criminal Code, and the question whether they did so, when read with the context, was for the jury, and one which should not be determined upon this application; and the Master in Chambers having held that they "involved a criminal charge," his decision should not be interfered with.

An action cannot be considered "trivial or frivolous" within the meaning of section 9 merely because the existence of a good defence on the merits is shewn by the defendant's affidavit, and not contravened by an affidavit of the plaintiff. The latter may properly consider that upon an application for security for costs a denial on oath of the truth of the charges against him is unnecessary. *Macdonald* v. *World Newspaper Co.*, 16 P. R. 324.

Libel — *Newspaper — Frivolous Action.*]—Where an action of libel was brought by one Græme complaining of statements published in a newspaper imputing a crime to one Graham, and it appeared that it was stated in the article complained of that no one would believe the charge against Graham, and that in an article published in the same newspaper, after the commencement of the action, it was stated that the person referred to in the former article was not the plaintiff, and there were other facts shewing that the plaintiff was not the person referred to:—

Held, that the action was frivolous, and the defendants were entitled to security for costs under R. S. O. ch. 57, sec. 9. *Græme* v. *Globe Printing Co.*, 14 P. R. 72.

Libel — *Newspaper — Good Faith.*]—On an application under R. S. O. ch. 57, sec. 9, for security for costs in an action of libel, the Judge is not to try the merits of the action; if it appears on the affidavits filed by the defendant that there is a *prima facie* case of justification or privilege, and that the plaintiff is not possessed of property sufficient to answer costs, the statute is satisfied, and security should be ordered; it is not for the Judge to pass upon disputed facts disclosed in conflicting affidavits filed against the application. *Swain* v. *Mail Printing Co.*, 16 P. R. 132.

Libel — *Newspaper — Good Faith.*]—In an action of libel against the publishers and editor of a newspaper, the defence suggested by affidavits filed upon an application under R. S. O. ch. 57, sec. 9, for security for costs, was that the statements complained of as defamatory did not refer to the plaintiff.

The Judge who heard an appeal from an order made by a Master for security being of opinion that, upon the fair reading of the statements complained of, they did refer to the plaintiff:—

Held, that it did not appear that the defendants had a good defence on the merits, and that the statements complained of were published in good faith, and therefore the order should be set aside.

Swain v. *Mail Printing Co.*, 16 P. R. 132, distinguished. *Lennox* v. *Star Printing and Publishing Co.*, 16 P. R. 488.

Motion to Quash By-law — *Recognizance.*]—On a motion to quash a municipal by-law a recognizance is necessary; a bond cannot be substituted. *Re Burton and Village of Arthur*, 16 P. R. 160.

Nominal Plaintiff — *Amount of Security.*]—An action was begun by D. as plaintiff, suing on behalf of himself and all other shareholders in the defendant company, to set aside a judgment obtained by the defendant C. against the company. D., who lived out of the jurisdiction, amended the writ of summons, before serving it, by adding A., another shareholder, as a plaintiff. Upon motion by C. for security for costs, A. was examined, and it appeared from his examination that he had never intended bringing any action himself; that he did not know the nature or the position of the action; and that he did not know D. He had, however, written a formal letter authorizing D.'s solicitors to have him added as a plaintiff. It also appeared that A. had no property except some household furniture of trifling value:—

Held, that A. was merely a nominal plaintiff, and that C. was entitled to an order for security for costs.

There being reason to suppose that the action would be an expensive one, the plaintiffs were ordered to give security in the sum of $1,000. *Delap* v. *Charlebois*, 15 P. R. 45.

Nominal Plaintiff — *Action to Establish Right of Way — Mortgagor and Mortgagee.*]—Where an action is brought to establish a right of way over lands adjoining those of which the plaintiff is the owner subject to a mortgage, and, having regard to the value of the property, the amount of the mortgage, and other circumstances, the lands may be said to be really the mortgagee's, and the action substantially his, the defendant is entitled to security for costs, if the plaintiff be without substance:—

Held, per MacMahon, J., in Chambers, that the mortgagee was not a necessary party to the action.

But *semble*, per Meredith, J., in the Divisional Court, that he was a proper party and should have been added. *Gordon* v. *Armstrong*, 16 P. R. 432.

Several Plaintiffs — *Only One in Jurisdiction — Joint Action.*]—Action by the widow, as dowress, and the children, as heirs-at-law, of a deceased person, to recover possession of land alleged to be the property of the deceased:—

Held, that the action was a joint one, and although the plaintiffs other than the widow resided out of the jurisdiction, they could not be ordered to give security for costs.

D'Hormusgee v. *Grey*, 10 Q. B. D. 13, followed. *Smith* v. *Silverthorne*, 15 P. R. 197.

Slander.]—In an action for slander brought under 52 Vict. ch. 14 (O.), the defamatory words

complained of imputing want of chastity to the plaintiff, an unmarried female, and also for an assault, the defendant moved under sub-section 3 of section 1 of the Act, for security for costs, upon an affidavit which stated, among other things, that the defendant had a good defence on the merits, but did not disclose such defence :—

Held that the affidavit was not sufficient, for a *prima facie* defence must be shewn ; but the cross-examination of the defendant upon her affidavit might be read in aid of the affidavit itself ; and counter affidavits could not be received :—

Held, also, that the stay of proceedings in the order made for security for costs should not apply to the count for assault. *Lancaster* v. *Ryckman*, 15 P. R. 199.

Slander—*Burden of Proof.*]—Upon an application under 52 Vict. ch. 14, sec. 1, sub-sec. 3 (O.), for security for costs of an action for slander imputing unchastity to a female, the onus is on the defendant to shew that the plaintiff has not sufficient property to answer the costs of the action ; and to defeat such an application it is not necessary that the plaintiff should have property to the amount of $800 over and above debts, incumbrances, and exemptions.

And where it was shewn that the plaintiff had property of the value of $500 at least, and it was not shewn that she had not property of much greater value, the application was refused. *Bready* v. *Robertson*, 14 P. R. 7, considered. *Feaster* v. *Cooney*, 15 P. R. 290.

Winding-up Act—*Intervening Shareholder out of the Jurisdiction.*]—An order was made by the Court delegating the powers exercisable by the Court for the purpose of winding-up a company, to a referee, pursuant to R. S. C. ch. 129, sec. 77, as amended by 52 Vict. ch. 32, sec. 20 (D.) :—

Held, that power was delegated to the referee to order security for costs and to stay proceedings till security should be given by a shareholder resident out of the jurisdiction, who intervened :—

Held, also, that the liquidator and others opposing the applications made by the intervening shareholder were not barred of their right to security by not applying till after the original applications of the shareholder had been dismissed, and appeals taken ; but that the security should be limited to the costs of the appeals. *Re Sarnia Oil Co.*, 14 P. R. 335.

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2. *Miscellaneous Cases.*

Compliance with Order Under Protest—*Right to Appeal.*]—*See Duffy* v. *Donovan*, 14 P. R. 159, *ante* 19.

Delivery Out of Bond.]—Where a plaintiff, being out of the jurisdiction, has given security for the defendant's costs of the action, and has succeeded in the Court of first instance and in the Court of Appeal, he is entitled, notwithstanding that the defendant is appealing to the Supreme Court of Canada, to have his security delivered out to him.

Hamill v. *Lilley*, 3 Times L. R. 546 ; 56 L. T. N. S. 620, followed. *Marsh* v. *Webb*, 15 P. R. 64.

Delivery Out of Bond.]—A defendant is not entitled to have delivered out to him for suit a bond for security for his costs of the action filed by the plaintiff, after judgment in the defendant's favour with costs in the High Court, while an appeal by the plaintiff to the Court of Appeal is pending, notwithstanding that there is no stay of execution for the costs awarded to the defendant.

Hately v. *Merchants' Despatch Co.*, 12 A. R. 640, applied and followed. *Coffey* v. *Scane*, 16 P. R. 307.

Disallowance of Bond.]—A bond was filed by the defendant for the purposes of an appeal to the Court of Appeal. Leave to appeal was, however, necessary, and had not been obtained before filing the bond which was, therefore, on the 4th April, 1891, disallowed. Leave to appeal was afterwards obtained, and the same bond was, on the 18th September, 1891, refiled without the consent of the sureties, and was again disallowed :—

Held, rightly so ; for the sureties might object that the bond had been improperly used by the defendant ; and the respondent was entitled to a security free from any objections of that nature.

The plaintiff objected to the bond on the ground of the insufficiency of one of the sureties, and in support of that objection read the sworn statements of such surety in another action :—

Held, that such statements were admissible against the defendant, who was putting forward the surety as a person of substance. *Jones* v. *Macdonald*, 14 P. R. 535.

Dismissing Action—"*Sufficient Cause.*"]—The fact that the plaintiff has lodged an appeal against an order for security for costs is "sufficient cause," within the meaning of Rule 1246, to exempt him from having his action dismissed for failure to comply with the order, pending the appeal.

And if a motion to dismiss is made, the better practice is to enlarge it before the appellate tribunal, to be dealt with after the main question has been determined. *Bennett* v. *Empire Printing and Publishing Co.*, 15 P. R. 430.

Dismissing Action.]—Where an order for security for costs directs that unless security be given within a limited time the action shall be dismissed, and security is not given within the time limited, the action is to be regarded as dismissed, unless the defendant treats it as still alive.

Carter v. *Stubbs*, 7 Q. B. D. 116, followed.

Rule 1251 does not give a plaintiff any further time for or relieve him from the obligation of putting in his security for costs ; it only enables him to remove the stay effected by the order, for the sole purpose of making a motion for judgment under Rule 739 ; and if he does not succeed in that motion, he must obey the order by putting in the full security.

But where the defendant, after the time for giving security under the order had expired, opposed a motion for judgment under Rule 739 and appealed to a Judge in Chambers, and afterwards to a Divisional Court from the order made upon such motion, without taking the objection that the action was at an end :—

Held, that he had waived the objection; and a bond filed after the time limited was allowed. *Hollender* v. *Ffoulkes*, 16 P. R. 225.

Upon appeal to the Divisional Court the decision was varied by extending, pursuant to Rule 485, the time for giving security. *Hollender* v. *Ffoulkes*, 16 P. R. 315.

Examination of Surety—*Affidavit of Justification—Partnership.*]—A surety on a bond, who is a member of a mercantile partnership, but justifies on his own individual property, not on his share in the partnership, is not compellable, upon cross-examination on his affidavit of justification, to disclose the liabilities of the partnership. *Douglas* v. *Blackey*, 14 P. R. 504.

Parties to Bond—*Condition of Bond.*]—In an appeal to the Supreme Court of Canada, although it is not necessary that the appellant should be a party to the appeal bond, if he is made a party and does not execute the bond, the respondent is entitled to have it disallowed.

In an appeal bond, where the object was not only to secure payment of the costs which might be awarded by the Supreme Court of Canada under section 46 of R. S. C. ch. 135, but also under section 47 (e) to procure a stay of execution of the judgment appealed from as to the costs thereby awarded against the appellant, the condition was "shall effectually prosecute the said appeal and pay such costs and damages as may be awarded against the appellant by the Supreme Court of Canada, and shall pay the amount *by the said mentioned judgment* directed to be paid, either as a debt or for damages or costs," etc. :—

Held, that this did not cover the costs awarded against the appellant by the judgment appealed from. *Robinson* v. *Harris*, 14 P. R. 373.

Parties to Bond—*Condition of Bond.*]—Where, upon an application by one of several defendants, an order is made for security for costs, it may properly provide that the security is to answer the costs of all the defendants.

Construction of Rules 1245 and 1247.

Execution by the plaintiffs of a bond for security for costs may be dispensed with in a proper case. *Delap* v. *Charlebois*, 15 P. R. 325.

Security for Costs of Appeal.]—*See* COUNTY COURT—COURT OF APPEAL—DIVISION COURT—SUPREME COURT OF CANADA.

V. TAXATION AND RECOVERY OF COSTS.

1. *Appeals from Taxation.*

Appeal to Master under Rule 854—*Further Appeal to Judge—Appeal from Certificate of Taxing Officer.*]—An appeal by the defendant in an action of alimony from the certificate of a taxing officer, upon taxation of the plaintiff's costs of the action and reference between solicitor and client, as directed by the judgment.

Pending the taxation there was an appeal by the plaintiff to the Master in Chambers under Rule 854, upon which the Master made an order allowing the appeal. The taxing officer in his certificate simply followed the order of the Master, and the present appeal was in respect only of the items in question before the Master. The order of the Master was not appealed from, and the time for appealing from it had elapsed :—

Held, that the appeal under Rule 854 should be looked upon as an intermediate thing and directory in character, and that the defendant was not precluded from appealing from the certificate of the taxing officer because he did not appeal from the order of the Master.

Re Nelson, 13 P. R. 30, followed.

Re Monteith, 11 P. R. 361, distinguished.

Heaslip v. *Heaslip*, 14 P. R. 21. Affirmed by the Divisional Court, 14 P. R. 165.

Appeal to Divisional Court.]—An appeal lies to a Divisional Court from an order of a Judge in Chambers upon appeal from a certificate of taxation of costs.

The discretion of a taxing officer as to the amount of counsel fees will not be interfered with upon appeal. *Talbot* v. *Poole*, 15 P. R. 274.

Objections.]—A party should not be deprived of his appeal from the taxation by reason of the officer having issued his certificate before the party has carried in his objections, as required by Rule 1230, where he has not delayed, and has acted in good faith, relying on the officer not issuing his certificate until after the taxation of interlocutory costs.

Cuerrier v. *White*, 12 P. R. 571, distinguished. *Cousineau* v. *Park*, 15 P. R. 37.

Solicitor and Client—*Bill of Costs.*]—By R. S. O. ch. 147, sec. 42, any person not chargeable as the principal party who is liable to pay or has paid a solicitor's bill of costs, may apply to a Judge of the High Court, or of the County Court, for an order for taxation.

An action was brought against school trustees and a ratepayer of the district applied to a Judge of the High Court for an order under this section to tax the bill of the solicitor of the plaintiff, who had recovered judgment. The application was refused, but on appeal to the Divisional Court, the judgment refusing it was reversed, 21 O. R. 289.

There was no appeal as of right to the Court of Appeal from the latter decision, but leave to appeal was granted and the Court of Appeal reversed the judgment of the Divisional Court and restored the original judgment refusing the application, 19 A. R. 56. From this last decision an appeal was sought to the Supreme Court of Canada :—

Held, per Ritchie, C.J., Strong and Gwynne, JJ., that assuming the Court had jurisdiction to entertain the appeal, the subject matter being one of taxation of costs, this Court should not interfere with the decision of the Provincial Courts which are the most competent tribunals to deal with such matters.

Per Ritchie, C.J., Strong and Patterson, JJ., that a ratepayer is not entitled to an order for taxation under said section.

Per Taschereau, J., the Court has no jurisdiction to entertain the appeal, as the judgment appealed from was not a final judgment within the meaning of the Supreme Court Act; the matter was one in the discretion of the Court below; and the proceedings did not originate in a Superior Court.

Per Patterson, J., the making or refusing to make the order applied for is a matter of discretion and the case is, therefore, not appealable. *McGugan* v. *McGugan*, 21 S. C. R. 267.

Solicitor and Client — *Report — Court or Chambers.*]—The certificate of a taxing officer upon a reference to taxation of a solicitor's bill of costs, at the instance of a client, is a report; and, under Rules 848, 849 and 850, the appeal therefrom should be to a Judge in Court upon seven clear days' notice. *Re Crothers*, 15 P. R. 92.

Solicitor and Client—*Report.*]—The report or certificate of an officer upon the taxation of the costs of a solicitor as against his client falls under the provision of Rule 1226 (*d*) as to its confirmation, and is, for the purposes of an appeal, a report within the meaning of Rules 848 and 849. *Ford* v. *Mason*, 16 P. R. 25.

See Knickerbocker Co v. *Ratz*, 16 P. R. 191, *post* 233.

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2. *Apportionment.*

Two Branches.]—Where an action was, roughly speaking, divisible into two parts, one claiming compensation for land, and the other seeking to restrain the defendants from proceeding to estimate it in an improper way, and the judgment gave the plaintiff the costs of the first branch and no costs of the second to either party:—

Held, that the taxing officer had not erred in principle in allowing the plaintiff one-half of the general costs and also items which exclusively related to the first branch. *Vanzant* v. *Village of Markham*, 15 P. R. 412.

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3. *Costs Allowed.*

Abstract of Title.]—Attendance to bespeak and for registrar's abstract of title, to prepare for litigation or prove title, is not taxable against the opposite party. *Carlisle* v. *Roblin*, 16 P. R. 328.

Affidavits on Production.]—The plaintiffs made six affidavits on production, either prompted by the action of the defence or by way of voluntary supplement to the original affidavit:—

Held, that they were entitled to tax the costs of one affidavit only, with extra folios for the additional matter contained in the subsequent affidavits. *Baldwin* v. *Quinn*; *Baldwin* v. *McGuire*, 16 P. R. 248.

Affidavit on Production.]—Attendance to search affidavit on production is not taxable against the opposite party. *Carlisle* v. *Roblin*, 16 P. R. 328.

Brief.]—Where fees paid to witnesses are disallowed, the portions of counsel's brief containing their evidence should also be disallowed. *Carlisle* v. *Roblin*, 16 P. R. 328.

Brief.]—*See Re Robinson*, 16 P. R. 423, *post* 228.

Copies.]—A writ of summons is a "pleading or other document" within the meaning of Rule 395, and more than four copies cannot be taxed.

The provision of Rule 395 as to four copies covers all copies required during litigation, and extends to the copy of pleadings in the brief. *Sparks* v. *Purdy*, 15 P. R. 1.

Copies—*Depositions.*]—*See Re Robinson*, 16 P. R. 423, *post* 228.

Counsel Fees—*Advising on Evidence—Reference — Brief — Copies of Depositions.*] — Upon appeal from the taxation between solicitor and client of a bill of costs for the defence of an action of redemption in which, before the beginning of the Sittings at which the action was entered for trial, an arrangement had been made between the parties that all the matters in question should be referred to a Master, and accordingly no witnesses were subpœnaed, and a reference was directed at the Sittings:—

Held, that the taxing officer had no discretion to allow an increased counsel fee with brief at the trial, as the action could not be said to be of a special and important character, nor to allow a fee for advising on evidence.

The reference lasted for 137 hours, 18 of which were occupied in argument. Nearly the whole of the time was devoted to the main matter in contest, viz., whether the defendants should be charged with an occupation rent, and if so at what amount. The Master found that they were chargeable with a rent of $312.50. The taxing officer allowed the solicitor $302 for the time occupied in taking the evidence and $47 for the argument:—

Held, that the allowance of counsel fees upon a reference, under clause 107 of the tariff, should be exceptional and made only when matters of special importance or difficulty are involved at some particular sitting; and also that the taxing officer should have taken into consideration the unreasonable time occupied over so small a matter, and have exercised his discretion by confining the solicitor to the minimum allowance of $1 an hour, under clause 104 of the tariff, for the argument as well as for the taking of the evidence.

The taxing officer allowed the solicitor $77.50 for brief upon appeal from the Master's report; this amount included $67.80 paid to the Master for copies of the depositions:—

Held that the solicitor had no *prima facie* right to order and charge for these copies, and, in the absence of any authority from his clients, should not be allowed for them upon taxation.

The taxing officer allowed the solicitor $35 counsel fee upon the appeal, $12 for travelling expenses, and $10 counsel fee upon the plaintiff's motion for judgment, which came before the Court with the appeal:—

Held, that these allowances, though liberal, were not so clearly wrong as to justify the Court in interfering. *Re Robinson*, 16 P. R. 423. An appeal to the Court of Appeal was dismissed, the members of the Court being divided in opinion as to the regularity of the taxation.

Counsel Fees.]—The discretion of a taxing officer as to the amount of counsel fees will not be interfered with upon appeal. *Talbot* v. *Poole*, 15 P. R. 274.

Counsel Fees.]—The question of the allowance of counsel fees is one for the discretion of the taxing officer; and where the action is strenuously contested on both sides, it is proper to allow fees to both senior and junior counsel. *Carlisle* v. *Roblin*, 16 P. R. 328.

Discontinuance.]—Where the plaintiff serves a notice of discontinuance under Rule 641, the defendant is entitled to a reasonable time within which to apply for an appointment to tax his costs, and until after the lapse of that time an appointment will not be granted to the plaintiff, even where he is entitled upon the final taxation to tax interlocutory costs which may exceed the defendant's general costs.

Under Rule 641 it is not necessary for the plaintiff to ascertain the amount of the defendant's costs and pay them to make the notice of discontinuance effectual. *Barry* v. *Hartley*, 15 P. R. 376.

Evidence—*Advising on.*]—*See Re Robinson*, 16 P. R. 423, *ante* 228.

Examination.]—An objection that a person examined by the defendants for discovery was not an officer or representative of the plaintiffs should have been taken at the outset and was not open on taxation. *Township of Logan* v. *Kirk*, 14 P. R. 130.

Examination for Discovery.] — By Rule 1384, Rule 1177 was rescinded and a new Rule substituted, providing that the costs of every interlocutory examination should be borne by the examining party, unless otherwise ordered.

Where an action was begun and the defendants examined for discovery before the Rule was passed, but was tried and judgment given after it was passed, but before it came into force:—

Held, that the new Rule applied, and the taxing officer had no power to tax to the successful plaintiff the costs of the examination without an order therefor.

Application for such order should be made to the trial Judge at the trial or immediately after judgment. *McClary* v. *Plunkett*, 16 P. R. 310.

Ex parte Order.]—Counsel fee on attendance to obtain *ex parte* order is not taxable against the opposite party. *Carlisle* v. *Roblin*, 16 P. R. 328.

Foreign Commission.]—Upon taxation a fee was properly allowed for counsel in British Columbia attending upon examination of witnesses there. *Township of Logan* v. *Kirk*, 14 P. R. 130.

Interlocutory Costs.] — Where under the judgment in an action the costs thereof are to be taxed to one party, and under interlocutory orders certain costs are payable to the opposite party in any event on the final taxation, the taxing officer should not close the taxation of the costs of the action and certify the result until the interlocutory costs are taxed, unless there is unreasonable delay in bringing in a bill of the latter costs. *Cousineau* v. *Park*, 15 P. R. 37.

Motion for Judgment.]—Held, that upon the taxation "between solicitor and client" of the plaintiffs' costs, they were not entitled to the costs of a motion for summary judgment under Rule 739, which was useless and not according to the practice, and was refused because the indorsement on the writ of summons claimed "interest on arrears of rent," and was, therefore, not a good special indorsement. *Baldwin* v. *Quinn*; *Baldwin* v. *McGuire*, 16 P. R. 248.

Notice of Trial.] — Where one of several defendants gives notice of trial, and afterwards, becoming aware that the action is not at issue against the other defendants, abandons his notice, he cannot tax the costs of it against the opposite party. *Strachan* v. *Ruttan*, 15 P. R. 109.

Reference.]—*See Re Robinson*, 16 P. R. 423, *ante* 228.

Retaining Fee.]—Where the defendant was ordered to pay the plaintiffs' costs of a former action, as between solicitor and client, an unpaid retaining fee which the plaintiffs had agreed in writing to pay to their solicitors, over and above the costs of the action, was held not to be taxable. *Re Geddes and Wilson*, 2 Ch. Ch. 447, and *Ford* v. *Mason*, 16 P. R. 25, approved and followed.

Re Fraser, 13 P. R. 407, distinguished.

McKee v. *Hamlin*; *Hamlin* v. *Connelly*, 16 P. R. 207.

Service out of the Jurisdiction.] — Held, that where the plaintiff, before serving the writ of summons on defendants out of the jurisdiction, obtains an order shortening the time for appearance, he should include in it an order allowing the issue of the writ for service out of the jurisdiction, and should not have taxed to him the costs of a subsequent order allowing the service.

Rule 274 and Form 121 considered. *Sparks* v. *Purdy*, 15 P. R. 1.

Settling Bond.]—A disbursement charged in a bill of costs of $1 paid in stamps to an officer of the Court upon settling a bond was disallowed upon appeal from taxation.

Such a fee is not authorized by tariff B. annexed to the Consolidated Rules under the item "Every reference, inquiry, examination, or other special matter." *Casey* v. *Morden*, 16 P. R. 127.

Subpœna.]—Engrossment of order for subpœna and attendance to file the order are not taxable against the opposite party. *Carlisle* v. *Roblin*, 16 P. R. 328.

Witnesses.]—A plaintiff who is entitled only to Division Court costs of an action can tax as part of such costs his travelling expenses from abroad to attend the trial, if he is a necessary and material witness. *Talbot* v. *Poole*, 15 P. R. 274.

Witnesses.]—Where witnesses in attendance at the trial are not called, the onus is on the party subpœnaing them to shew their relevancy. *Carlisle* v. *Roblin*, 16 P. R. 328.

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4. *Recovery of Costs.*

Discontinuance.]—Where the plaintiff serves a notice of discontinuance under Rule 641, the

defendant is entitled to a reasonable time within which to apply for an appointment to tax his costs, and until after the lapse of that time an appointment will not be granted to the plaintiff, even where he is entitled upon the final taxation to tax interlocutory costs which may exceed the defendant's general costs.

Under Rule 641 it is not necessary for the plaintiff to ascertain the amount of the defendant's costs and pay them to make the notice of discontinuance effectual. *Barry* v. *Hartley*, 15 P. R. 376.

Execution for.]—The word "immediately" in Rule 863 means "instanter;" and a party to whom costs are awarded by an order may issue execution therefor on the day of the taxation. *Clarke* v. *Creighton*, 14 P. R. 34.

Notice of Taxation — *Retaxation.*] — The defendant obtained an order dismissing the action with costs for non-prosecution, upon notice to the plaintiff, who did not appear upon the motion. The defendant did not serve the plaintiff with a copy of the order, and went on and taxed his costs, without notice to the plaintiff, and issued execution for the amount taxed:—

Held, no ground for setting aside the execution that the order had not been served before the taxation.

Hopton v. *Robertson*, 23 Q. B. D. 126*n*, distinguished:—

Held, also, that the absence of a notice of taxation was not an irregularity entitling the plaintiff to set aside the execution, but only to a retaxation of the costs.

Lloyd v. *Kent*, 5 Dowl. 125, followed. *Cranston* v. *Blair*, 15 P. R. 167.

Undertakings of Solicitors.]—*Semble*, that payment out of the moneys in Court to the defendant of his costs of the High Court and Court of Appeal, upon the undertaking of his solicitors to repay in the event of the further appeal succeeding, could not properly be ordered. *Kelly* v. *Imperial Loan Co.*, 10 P. R. 499, commented on. *Agricultural Insurance Co.* v. *Sargent*, 16 P. R. 397.

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5. Set-off.

Interlocutory Costs.]—Proceedings may be considered "interlocutory" within the meaning of Rule 1205, till satisfaction is obtained in respect of the moneys, costs, or subject matter in controversy; and where judgment was given for payment by the plaintiff to the insolvent defendant of the costs of the action, and the defendant's solicitors were by an order declared to have a lien upon such judgment, and the plaintiff became entitled against the defendant to costs of garnishing proceedings upon the judgment, begun before the solicitor's lien was declared, a set-off was allowed. *Clarke* v. *Creighton*, 14 P. R. 34. *See* the next case.

Interlocutory Costs.]—Where judgment was given for payment by the plaintiff to the insolvent defendant of the costs of the action, and the defendant's solicitors were by an order of Court declared to have a lien upon such judgment, and to have the sole right to control the judgment and execution to the extent of their costs between solicitor and client, and the plaintiff became entitled against the defendant to costs of garnishing proceedings upon the judgment, begun before the lien was declared:—

Held, reversing upon this point the decision of Boyd, C., 14 P. R. 31, that Rule 1205 did not apply to enable a set-off of the costs to be made. *Clarke* v. *Creighton* 14 P. R. 100.

Interlocutory Costs.]—Where, under the judgment in an action, the costs thereof are to be taxed to one party, and under interlocutory orders certain costs are payable in any event on the final taxation, the taxing officer should not close the taxation of the costs of the action and certify the result until the interlocutory costs are taxed, unless there is unreasonable delay in bringing in a bill of the latter costs. *Cousineau* v. *Park*, 15 P. R. 37.

Interlocutory Costs.]—In the course of a proceeding for the taxation, at the instance of the client, of the solicitors' bills of costs, there were several interlocutory applications and appeals by the solicitors, which were dismissed with costs to be paid by the solicitors forthwith:—

Held, that the solicitors were not entitled to have these costs set-off against the amount of costs alleged to be due to them upon the bills then being taxed. *Re Clarke and Holmes*, 15 P. R. 269. *See* the next case.

Interlocutory Costs.—Decisions of the Master in Chambers and Rose, J., 15 P. R. 269, refusing to order a set-off of certain interlocutory costs against the amount alleged to be due to the solicitors upon bills in course of taxation, affirmed on appeal:—

Held, that, as the taxation had never been completed, and the solicitors declined to proceed with it, they were not entitled to the set-off.

If the taxation had been completed, the fact of the interlocutory costs being ordered to be paid forthwith after taxation, would not have prevented their being ordered to be set-off; but it raised an inference that it was not intended that they should be set off.

Whether the costs in question should be set off or not, was in the Master's discretion, and, having regard to the fact that they had been assigned, and to the other circumstances before the Court, it could not be said that an improper discretion had been exercised. *Re Clarke and Holmes*, 16 P. R. 94.

Successful and Unsuccessful Defendants.]—By the judgment in the action costs were awarded to the plaintiff against the chief defendant, and to the other defendants against the plaintiff, without any direction as to setting off costs, and the plaintiff's solicitor asserted a lien upon the costs awarded to his client against the chief defendant. The defendants all defended by the same solicitor:—

Held, that, under Rule 1204, the question of setting off costs was in the judicial discretion of the taxing officer, and that discretion was rightly exercised by the officer in refusing to set off the costs ordered to be paid to the plaintiff by the chief defendant against the costs

ordered to be paid by the plaintiff to the other defendants.

Construction of Rules 1204 and 1205.

The older decisions as to set-off are not applicable since Rule 3. *Flett* v. *Way*, 14 P. R. 312.

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6. *Settlement of Action.*

Collusion—*Costs of Solicitor.*]—*See Bellamy* v. *Connolly*, 15 P. R. 87; and *Sandidge* v. *Ireland*, 14 P. R. 29, *ante* 10.

Motion for Costs—*Power of Master or Judge in Chambers to Dispose of Costs.*]—Action by plaintiffs against defendants for infringement of a patent of the plaintiffs. The defendants were, before action, notified of the infringement, but denied it. In the action, the defendants, besides denying the allegations in the statement of claim, set up that they had not used the machine alleged to be an infringement for two years, and did not intend to use it again, and offered to give a covenant against further use, and paid $10 into Court as damages. This the plaintiffs accepted, and moved in Chambers for the costs of the action, which the Master gave them; but Robertson, J., upon appeal, ordered that the parties should pay their own costs up to the time of the motion (which the defendants had offered before the motion), and that the plaintiffs should pay the costs of the motion and appeal.

Upon further appeal to a Divisional Court composed of Boyd, C., and Meredith, J., there was a division of opinion, and the appeal was dismissed without costs.

Per Boyd, C.—The plaintiffs, believing the machine to be an invasion of their rights, were not obliged to rest upon the mere intention of the defendants not to use it. All that the plaintiffs claimed before action was conceded by the settlement after action, and the litigation was provoked by the response of the defendants to the letter before action. The plaintiffs having given notice of their demand before action, there was nothing to take the case out of the ordinary rule that the person in the wrong should answer in costs. If the main question in dispute is settled, leaving only costs to be determined, the proper course is for the parties to agree to leave them on affidavits to the Judge or Master in Chambers, whose judgment is subject to appeal to the same extent as in other cases of costs.

Per Meredith, J.—The Master in Chambers had no power to try and determine the question of costs, unless as an arbitrator chosen by the parties; nor had the Judge in Chambers any such power; and the Court could not properly entertain the appeal. *Knickerbocker Co.* v. *Ratz*, 16 P. R. 30. *See* the next case.

Power of Master or Judge in Chambers to Dispose of Costs—*Appeal.*]—An appeal by the plaintiffs from the above order, 16 P. R. 30, was allowed and the Master's order restored:—

Held, that he had a jurisdiction to make the order which did not necessarily depend upon consent of the parties to go before him.

North v. *Great Northern R. W. Co.*, 2 Giff. 64, and *Thompson* v. *Knights*, 7 Jur. N. S. 704, followed.

2. That the Judge in Chambers had exercised his discretion and reversed the Master's order upon a wrong principle, and his decision was appealable.

Wansley v. *Smallwood*, 11 A. R. 439, and *Crowther* v. *Elgood*, 34 Ch. D. 691, followed.

3. Agreeing with the opinion of Boyd, C., in the Court below, that when the action was begun the circumstances justified it, and there was nothing to take the case out of the ordinary rule that the person in the wrong shall answer in costs.

Proctor v. *Bayley*, 42 Ch. D. 390, distinguished. *Knickerbocker Co.* v. *Ratz*, 16 P. R. 191.

Validating Act.]—Held, that the plaintiffs were entitled to the costs of the action down to the time of the passing of an Act validating the by-law complained of, and in addition to the costs of a motion in Chambers for the disposal of the action, and that the defendants were entitled to the subsequent costs and to the costs of the appeal.

Observations on the course taken by the legislature in passing Acts to validate proceedings which are under attack in a pending action, leaving the costs of the action to be disposed of by the Court as if the Act had not passed. *Dwyer* v. *Town of Port Arthur*, 19 A. R. 555. Reversed by the Supreme Court on the merits, 22 S. C. R. 241.

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7. *Severance.*

Contractor and Sureties.]—In an action by a municipality against a contractor, one of his sureties, and the executors of a deceased surety, three separate defences were delivered by different solicitors. It did not appear that separate solicitors were employed for the mere purpose of increasing costs:—

Held, that the defendants were not liable in any joint character, and were entitled to tax separate bills of costs. *Township of Logan* v. *Kirk*, 14 P. R. 130.

Indemnified Defendant.]—One defendant agreed to save another harmless as regards the costs of an action. In the written retainer of the latter to his solicitors it was provided that the costs should be charged to the former defendant. The plaintiffs having been ordered to pay the costs of the defendants:—

Held, per Boyd, C., 16 P. R. 346, a proper case to allow two sets of costs, and that no disability existed on the part of the indemnified defendant to tax and recover his costs against the plaintiffs.

Jarvis v. *Great Western R. W. Co.*, 8 C. P. 280, and *Stevenson* v. *City of Kingston*, 31 C. P. 333, distinguished:—

Held, by the Divisional Court on appeal, that the indemnified defendant was not entitled to costs against the plaintiffs.

Jarvis v. *Great Western R. W. Co.*, 8 C. P. 280, and *Stevenson* v. *City of Kingston*, 31 C. P. 333, followed. *Meriden Britannia Company* v. *Braden*, 16 P. R. 346, 410. Affirmed in appeal, 17 P. R. 77.

Tenants.]—Two actions were brought by the same plaintiffs against different defendants to

recover rent for different parcels of land, in which the defences were not identical. A compromise was effected, and it was agreed between the parties "that judgment shall be entered in each of the said actions for the amounts claimed therein by the plaintiffs, with costs of suit between solicitor and client; and judgments were entered accordingly:—

Held, that the plaintiffs were entitled to tax a separate set of costs for each action. *Baldwin* v. *Quinn*; *Baldwin* v. *McGuire*, 16 P. R. 248.

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8. *Solicitor and Client.*

Payable by Opposite Party.]—Where costs have to be paid by the opposite party and not by the client, there is no difference between "costs as between solicitor and client," and "costs between solicitor and client;" both mean costs between party and party, to be taxed as between solicitor and client; and that the plaintiff was entitled to tax against the defendant, under the words of the judgment, only such costs as a solicitor can tax against a resisting client under the general retainsr only to prosecute or defend the action; but that the taxation should be as liberal as possible, under the practice, in favour of the plaintiff.

Cousineau v. *City of London Fire Ins. Co.*, 12 P. R. 512, followed. *Heaslip* v. *Heaslip*, 14 P. R. 21. *See* the next case.

Payable by Opposite Party.—The decision of Ferguson, J., 14 P. R. 21, as to the taxation of costs under a judgment for payment by the defendant to the plaintiff of costs "between solicitor and client," and as to the procedure where there has been an appeal to a Master under Rule 854, affirmed.

Per Boyd, C.—The real distinction in taxations "between" and "as between" solicitor and client turns upon the source of payment, and where the payment is by the opposite party, the taxation is on a less liberal scale than where the client himself pays.

Per Meredith, J.—The words "between solicitor and client" are not technically appropriate or applicable to a case where the costs of the action are to be paid by one party to another; and these words cannot have any greater effect or more extended meaning than the appropriate words "as between solicitor and client." *Heaslip* v. *Heaslip*, 14 P. R. 165.

Taxable Costs.]—The words "taxable costs of defence," used in Rule 1172, do not mean costs as between solicitor and client. *Talbot* v. *Poole*, 15 P. R. 274.

See SOLICITOR, III.

VI. COSTS IN PARTICULAR MATTERS OR BY OR TO PARTICULAR INDIVIDUALS.

Arbitration—*Second Counsel Fee.*]—In taxing the costs of an arbitration, a taxing officer has jurisdiction, in his discretion, to allow a second counsel fee.

The provision of R. S. O. ch. 53, sec. 25, that not more than one counsel fee shall be taxed, is inconsistent with item 164 of the tariff of costs appended to the Consolidated Rules, 1888, and, by virtue of 51 Vict. ch. 2, sec. 4, must be taken to be repealed.

Re McKeen and Township of South Gower, 12 P. R. 553, followed.

Howard v. *Herrington*, 20 A. R. 175, and *Arscott* v. *Lilley*, 14 A. R. 283, distinguished. *Re Pollock and City of Toronto*, 15 P. R. 355.

Arbitrator's Fees.]—*See* ARBITRATION AND AWARD, IV.

Assignee.]—The assignee for the benefit of creditors, may be ordered to pay the costs of the action personally as any other unsuccessful litigant may be. *Macdonald* v. *Balfour*, 20 A. R. 404.

Assignee—*Costs of Litigation in Respect to Disputed Claim.*]—An assignee for the benefit of creditors, on instructions of the inspectors, contested the plaintiff's claim, who then brought an action, which was dismissed with costs, but, on appeal to the Divisional Court, this decision was reversed, with costs to be paid by the defendant, the assignee. The creditors, after taking counsel's opinion, resolved to appeal to the Court of Appeal, but the appeal to that Court was dismissed with costs. The assignee charged against the estate the total sum he had to pay in respect of the costs of these proceedings:—

Held, that he was entitled so to do.

Decision of Robertson, J., affirmed. *Smith* v. *Beal*, 25 O. R. 368.

Assignee—*Removal of Assignee.*]—Where a Judge of a County Court, acting under R. S. O. ch. 124, sec. 6, orders the removal of an assignee, he exercises a statutory jurisdiction as *persona designata*, and has no power to order payment of costs.

The proceedings in such a case are not in any Court; and Rule 1170 (a) does not apply to them.

Re Pacquette, 11 P. R. 463, followed.

History and construction of Rule 1170 (a). *Re Young*, 14 P. R. 303.

See now 56 Vict. ch. 13 (O.).

Assignee—*Set-off.*]—The parties who initiate and intervene upon the taxation of a solicitor's bill of costs become personally liable to pay the costs of taxation.

And where solicitors rendered to the assignee of an insolvent their bill for services to the insolvent, and the assignee taxed the bill and had it reduced by more than one-sixth:—

Held, that he had a right personally to recover from the solicitors the costs of the taxation, and that there should be no set-off against the amount coming to the solicitors from the estate of the insolvent as a dividend upon their bill. *Re Rogers and Farewell*, 14 P. R. 38.

Barrister Conducting his own Case.]—A counsel conducting his own case in Court cannot tax a counsel fee against the opposite party. *Smith* v. *Graham*, 2 U. C. R. 268, followed. *Clarke* v. *Creighton*, 15 P. R. 105.

Barrister and Solicitor Acting for Himself and Co-Trustees.]—One of several trustees who is a barrister and solicitor, and acts

for himself and his co-trustees as solicitor and counsel in an action, may tax against the opposite party his full costs, including instructions and counsel fees.

Cradock v. *Piper*, 1 Macn. & G. 664, followed. *Smith* v. *Graham*, 2 U. C. R. 268, distinguished. *Strachan* v. *Ruttan*, 15 P. R. 109.

Building Societies—*Petition.*]—A person died in the United States of America having moneys to his credit deposited upon savings bank account with two building societies doing business in Ontario, incorporated under R. S. O. ch. 169. An administrator appointed by a Court in the foreign country applied to the building societies to have the moneys transferred to him, but the societies, entertaining doubts whether the words of section 47 of R. S. O. ch. 169, "share, bond, debenture, or obligation" applied to a savings bank account, petitioned the Court under sec. 49:—

Held, that the word "obligation" covered the liability of the petitioners to repay the amount deposited with them:—

Held, also, that the doubts of the petitioners were reasonable and they were entitled to costs. *Re Ging*, 20 O. R. 1.

Convictions.]—Remarks on the question of costs in quashing convictions. *Regina* v. *Westlake*, 21 O. R. 619.

Convictions.]—The Court in considering the question of costs suggested that in future with the notice of motion for a *certiorari*, a notice might also be served stating that unless the prosecution was then abandoned, and further proceedings rendered unnecessary, costs would be asked for, when a strong case would be made for granting the defendant costs in cases in which it would be unjust and unfair to put defendant to such costs. *Regina* v. *Westgate*, 21 O. R. 621.

Convictions.]—Convictions quashed with costs to be paid by the prosecutor. *Regina* v. *Hazen*, 23 O. R. 387.

Convictions.]—The practice is not to give costs on quashing a conviction.

Regina v. *Johnston*, 38 U. C. R. 546, followed. *Regina* v. *Somers*, 24 O. R. 244.

Convictions.]—Costs against the informant refused.

Regina v. *Somers*, 24 O. R. 244, followed. *Regina* v. *Coulson*, 24 O. R. 246.

Conviction—*No Denial of Guilt.*]—Costs of quashing conviction withheld from successful defendant, where he filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts. *Regina* v. *Steele*, 26 O. R. 540.

Demurrer.]—Where a demurrer has been left to be disposed of by the trial Judge, and has not been so disposed of by him when giving judgment in the action, nor by a Divisional Court on appeal, he has still power to dispose of the costs of it, and any application for that purpose should be made to him; but if to another Judge, it must be to a Judge in Court.

The Master in Chambers, having no jurisdiction to decide a demurrer, has none to determine the costs of it. *Jones* v. *Miller*, 16 P. R. 92.

Director—*Solicitor.*]—Where a director, who was also president, of a company was appointed by the board of directors and acted as solicitor for the company:—

Held, in winding-up proceedings, that he was entitled to profit costs in respect of causes in Court conducted by him as solicitor for the company, but not in respect of business done out of Court, and was entitled to set off the amount of such costs against the amount of his liability as a shareholder.

Decision of the Master in Ordinary reversed. *Cradock* v. *Piper*, 1 Macn. & G. 664, followed. *Re Mimico Sewer Pipe and Brick Manufacturing Co.*, *Pearson's Case*, 26 O. R. 289.

Drainage Actions.]—Where actions begun in the High Court were referred at the trial to the drainage referee, and upon appeal from his report an order was made by an appellate Court for taxation and payment of costs of the actions:—

Held, that they were not costs coming within the provisions of sec. 24, sub-sec. (4), of the Drainage Trials Act, 1891, but were to be taxed in the usual way in which costs of actions are taxed, and subject to the same right of appeal. *Crooks* v. *Township of Ellice*; *Hiles* v. *Township of Ellice*, 16 P. R. 553.

Executors and Administrators—*Just Allowances*—*Unsuccessful Litigation.*]—Where the administrators of the estate of a deceased assignee for creditors defended in good faith an action brought by his successor in the trust to recover damages for breach of trust committed by the intestate and being unsuccessful were obliged to pay the plaintiff's costs and those of their own solicitors, they were held entitled to credit for these payments in passing their accounts.

Where it is plain that a dispute can be settled only by litigation it is not necessary for a trustee to ask the advice of the Court before defending.

Judgment of the Surrogate Court of Grey reversed. *In re Williams*, 22 A. R. 196.

Executors—*Mortgage Action.*]—Where an action to enforce a mortgage by foreclosure is brought against the executors of a deceased mortgagor, and an order for payment of the mortgage debt is, in addition, asked against the executors, and judgment is entered for default of appearance, only the additional costs occasioned by the latter claim should be taxed against the executors personally. *Miles* v. *Brown*, 15 P. R. 375.

Executors—*Unsuccessful Action to Establish Will.*]—Where the person named as an executor in a written instrument failed, in the final result of this action, to establish it as the last will of the testator, and the Court of last resort refused to order that his costs incurred therein should be paid out of the estate:—

Held, that the Court of first instance could not make an order for payment, out of moneys paid into that Court by the administrators *pendente lite*, of these costs as costs of the litigation, because they were refused by the only tribunal

which had jurisdiction to award them, nor as costs and expenses properly incurred by the applicant in the performance of his duties as executor, because he never was an executor. *Purcell* v. *Bergin*, 16 P. R. 301.

Injunction.]—The plaintiff was ordered to pay the costs of an interim injunction obtained by him, because the facts proved at the trial shewed no anticipation of such immediate and serious damage as to justify the application for it. *Sklitzsky* v. *Cranston*, 22 O. R. 590.

Interpleader — *Sheriff's Fees and Costs—Divided Success.*]—Where an interpleader issue, ordered upon the application of a sheriff who had seized certain goods under the direction of the execution creditors, was determined as to part of the goods in favour of the claimant and as to the remainder in favour of the execution creditors, and no costs of the issue were given to either party to it:—

Held, that the execution creditors should pay the sheriff his fees and poundage on the value of the part of the goods they were found entitled to, and his costs of the interpleader application and of a subsequent application to dispose of the costs, etc.; and that the execution creditors should have an order over against the claimant for one-half of such costs. *Ontario Silver Co.* v. *Tasker*, 15 P. R. 180.

Interpleader—*Reservation.*]—The costs of an interpleader issue should not be reserved by the interpleader order to be disposed of in Chambers, but should be left to be dealt with by the trial Judge. *Grothe* v. *Pearce*, 15 P. R. 432.

Judgment Debtor.]—Under Rule 1180, the costs of proceedings to examine a judgment debtor may be allowed, in the discretion of the Court or a Judge, where the examination has not actually taken place.

And where the judgment debtor attended upon an appointment for his examination, procured an enlargement, and meanwhile, under force of the proceedings, paid the judgment debt, he was ordered to pay the costs of the proceedings. *Popham* v. *Flynn*, 15 P. R. 286.

Land Titles Act—*Costs as between Solicitor and Client—Costs as of a Court Motion.*]—A local Master of Titles has power by virtue of sections 137 and 74 of the Land Titles Act, R. S. O. ch. 116, in ordering that a caution be vacated, to direct payment by the cautioner of costs as between solicitor and client; and by Rule 16 (2) of the Rules in the Schedule to the Act has power to give a special direction that costs as of Court motion may be taxed.

And where a Master in his discretion so ordered, a Judge in Chambers refused to interfere, more especially as the appeal was late and could only be entertained as an indulgence. *Re Ross and Stobie*, 14 P. R. 241.

Litigant in Person.]—The judgment debtor appeared in person and argued his own case on appeal:—

Held, that he should be allowed to set off against the judgment debt his disbursements and a moderate allowance for his time and trouble on the argument. *Millar* v. *Macdonald*, 14 P. R. 499.

Married Woman.]—Where a solicitor sued a married woman and her husband upon an untaxed bill of costs, and, in default of appearance, signed judgment against both defendants personally for the amount of the bill and interest:—

Held, that the judgment was irregular and might have been set aside with costs if the defendants had applied promptly; and, under the circumstances, the judgment was amended by limiting it as to the married woman to her separate estate, by disallowing interest, and by directing that the amount should abide the result of taxation, with leave to the husband to dispute the retainer. *Cameron* v. *Heighs*, 14 P. R. 56.

Mechanics' Lien—*Costs of Owner—Costs of Lien-holders—Scale of Costs.*]—In an action by lien-holders to enforce their lien under the Mechanics' Lien Act it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lien-holders; but this can be done where they are added as defendants in the Master's office.

The amount due from the owner to the contractor should be paid into Court by the former, less his costs, which should be taxed as to a stake-holder watching the case.

The costs of lien-holders establishing their liens should be paid as a first charge on the fund.

The costs of lien-holders subsequent to judgment of reference should be taxed upon the scale appropriate to the amount found due to each. *Hall* v. *Hogg*, 14 P. R. 45.

Mechanics' Lien—*Payment into Court.*]—In a mechanics' lien action a certain sum was found due from the owner to the contractor, and the latter was found indebted to other lien-holders. Payment of the former sum into Court was ordered and made, the amount, however, being insufficient to pay the claims of lien-holders against the contractor. The latter then appealed unsuccessfully and was ordered to pay the costs of appeal to the owner, who claimed that these costs should be paid out of the moneys paid by her into Court:—

Held, that by the payment into Court for distribution she was discharged from her liability and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in. *Patten* v. *Laidlaw*, 26 O. R. 189.

Mortgage.]—In a mortgage action, where possession is claimed, the writ of summons if served on the official guardian need not be served personally on the infant heirs of the mortgagor, if they are not personally in possession, and the costs of such service will be disallowed.

Rules 258 and 259 considered. *Sparks* v. *Purdy*, 15 P. R. 1.

Partnership.]—In partnership actions, in the absence of special circumstances such as misconduct or negligence, the assets will be applied, first, in payment of creditors, next, in payment of the sum found due to the successful party, and lastly, in payment of the costs of all parties.

Hamer v. *Giles*, 11 Ch. D. 942, followed.

The fact of a balance being found due by one partner to the other is no reason for departing

from the ordinary rule as to costs. *Chapman* v. *Newell*, 14 P. R. 208.

Partnership.]—The fact that in an action to take the accounts of a partnership, one partner has succeeded in his contention as to such accounts as against the contention of his co-partner, is not sufficient to entitle him to the costs of the action against the latter.

Chapman v. *Newell*, 14 P. R. 208, followed. *Mitchell* v. *Lister*, 21 O. R. 318.

Salvage Action.]—*See The Gleniffer*, 3 Ex. C. R. 57, *post*, INSURANCE, VI.

Sessions—*Appeal to Sessions—Witness Fees.*]—Where an appeal to the Sessions is dismissed without being heard and determined on the merits there is no power to impose costs.

Re Madden, 31 U. C. R. 333, followed.

Section 58 of R. S. C. ch. 178 authorizes justices of the peace to allow witness fees. *Regina* v. *Becker*, 20 O. R. 676.

Sessions—*Order by to Sheriff to Abate Nuisance—Costs.*]—The defendant was convicted at the General Sessions on an indictment for a nuisance in obstructing the highway by the erection of a wall thereon, and directed to abate the nuisance, which not having been done, the Sessions made an order directing the sheriff to abate the same at defendant's costs and charges, and to pay the County Crown Attorney forthwith after taxation the costs of the application and order, and the sheriff's fees and costs and incidental expenses arising out of the execution of the order :—

Held, that the Sessions had no authority to make the order to the sheriff, the proper mode in such case being by a writ *de nocumento amovendo:* that the order being a judicial act was properly removed by *certiorari*, and must be quashed, but without costs.

Remarks as to the jurisdiction of the Sessions as to the costs. *Regina* v. *Grover*, 23 O. R. 92.

Solicitor—*Proceedings before Exchequer and Supreme Courts of Canada—Quantum Meruit.*]—In proceedings before the Exchequer and Supreme Courts, there being no tariff as between attorney and client an attorney has the right in an action for his costs to establish the *quantum meruit* of his services by oral evidence. *Paradis* v. *Bossé*, 21 S. C. R. 419.

Solicitor—*Notary—Services as Agent—Conveyancing Charges.*]—A solicitor, who is also a notary, and acting in the latter capacity obtains for a client the allowance of a pension from the United States Government, is entitled to charge for his services such sum as may be agreed upon, and is not bound by the statutory regulations affecting solicitors' charges, or liable to have his charges taxed.

The right to tax a solicitor's bill of charges for conveyancing in the absence of a special agreement, considered.

Judgment of the Queen's Bench Division reversed. *Ostrom* v. *Benjamin*, 20 A. R. 336.

Solicitor—*Action without Authority.*]—An action, brought by solicitors in the plaintiff's name, was dismissed with costs, and judgment entered against the plaintiff. The solicitors had acted without any written retainer from the plaintiff, or any instructions from her personally, relying on instructions received from plaintiff's husband, which she positively denied ever having given, and also on letters written to her, the sending of which was not strictly proved, and which she denied ever having received.

On a motion made therefor by the plaintiff the judgment and all subsequent proceedings were set aside, and the solicitors ordered to pay the plaintiff's costs as between solicitor and client, and the defendant's costs as between party and party. *Scribner* v. *Parcells*, 20 O. R. 554.

Solicitor—*Action without Authority.*]—Upon application to the Court therefor the next friend of an infant plaintiff may be allowed to withdraw, upon such terms as the circumstances of the case and the welfare of the infant may require.

Solicitors began an action in the name of an infant as plaintiff by her mother as next friend, with the consent of the latter. After the action had been some time in progress, the mother wrote a letter to the solicitor revoking the authority to use her name, to which they replied that proceedings would not be stayed unless she paid costs up to date, and that if she did not do so they would assume that she intended them to continue the action. She took no notice of this and they went on with some proceedings, whereupon the defendant, instructed by the mother, moved to dismiss the action on the ground that it was being prosecuted without authority, and asked for costs against the solicitors :—

Held, in staying the proceedings, that there was nothing to prevent the mother from renouncing her character of next friend and withdrawing from the litigation, subject to her remaining amenable to the jurisdiction of the Court as to liability for costs theretofore incurred.

As to costs :—

Held, that the Court reaches the solicitors of a plaintiff directly for the benefit of the defendant only where the plaintiff as client has a right to be recouped by the solicitor, and to the extent of that recoupment. The next friend here was liable to the solicitor for costs up to her letter, and the solicitor was liable to the next friend for costs subsequent thereto ; and as the former costs exceeded the latter, and, as between the next friend and the defendant, the former was liable for costs so long as she did not make a direct application against the solicitors, no order could be made in favour of the defendant ; but the next friend was entitled to be indemnified by the solicitors for costs incurred after her letter :—

Held, also, that it was competent for the defendant to move to stay the proceedings, although the normal practice is for the next friend to move. *Taylor* v. *Wood*, 14 P. R. 449.

Solicitor—*Action without Authority.*]—By a resolution of the council of a municipal corporation the mayor and clerk were instructed to grant a certificate under the corporate seal to the solicitors for the other plaintiffs authorizing them to join the corporation as plaintiffs in this action upon receiving a bond, to the satisfaction of the mayor, indemnifying the corporation against all costs. A bond

was accordingly handed to the mayor, who retained it, but the action was brought by the solicitors, and the corporation joined therein as plaintiffs, without the granting of any certificate under the corporate seal. After the action had been begun the mayor informed the defendants' solicitors that no certificate had been issued, and stated that he would not sign one until he had been properly advised by counsel:—

Held, that the action was brought in the name of the corporation without authority; and that the defendants had the right to move to have such name struck out.

Semble, that the corporation should have been parties to the motion:—

Held, also, that as the solicitors for the plaintiffs other than the corporation were not guilty of any intentional wrong-doing in joining the corporation as plaintiffs, they should not be made liable for the defendants' costs. *Town of Barrie* v. *Weaymouth*, 15 P. R. 95.

Solicitor—*Barrister Conducting his Own Case.*]—A counsel conducting his own case in Court cannot tax a counsel fee against the opposite party.

Smith v. *Graham*, 2 U. C. R. 268, followed. *Clarke* v. *Creighton*, 15 P. R. 105.

Solicitor—*Acting for Himself and Co-Trustees—Instructions—Counsel Fees.*]—One of several trustees who is a barrister and solicitor, and acts for himself and his co-trustees as solicitor and counsel in an action, may tax against the opposite party his full costs, including instructions and counsel fees.

Cradock v. *Piper*, 1 Macn. & G. 664, followed. *Smith* v. *Graham*, 2 U.C.R. 268, distinguished. *Strachan* v. *Ruttan*, 15 P. R. 109.

Solicitor—*Striking Name of Solicitor off Roll.*]—Where a client applies to strike the name of a solicitor off the roll for misconduct in neglecting to pay over the client's money in his hands as solicitor, the first application should be made to a Judge in Court, whereupon, in a proper case, an order will be made requiring the solicitor to pay over the money by a named day, and in default that his name be struck off. Upon default, no further application is necessary, except an application to have the roll brought into Court for the purpose of having the name struck off, and this should be on notice to the solicitor.

Ruling of a taxing officer that costs of the first application should be taxed as of a Chambers motion only, reversed on appeal. *Re Bridgman*, 16 P. R. 232.

Specific Performance.]—In an action for specific performance by a vendor, whose title was, to the knowledge of the purchaser, a possessory one of long standing, in conformity with a family arrangement, ample proof thereof having been offered before action, the vendor was held entitled to his costs of action and of proving his title in the Master's office.

Games v. *Bonnor*, 33 W. R. 64, followed. *Brady* v. *Walls*, 17 Gr. 699, and *Re Boustead & Warwick*, 12 O. R. 488, specially referred to. *Dame* v. *Slater*, 21 O. R. 375.

Third Party.]—Where in an action for negligence the defendants served a third party, under Rule 329, with notice of a claim for indemnity, but he did not appear thereto, and no order was made or applied for under Rule 332:—

Held, that he was under no obligation to take any proceeding, and was not bound by the result of the action; and his subsequently appearing at the trial and asking to be made a defendant was gratuitous, and he was not entitled to costs against the defendants. *Gibb* v. *Township of Camden*, 16 P. R. 316.

Trusts and Trustees.]—Upon a petition by a surviving trustee under a will to be discharged from the trusteeship, it appeared that a trust fund created by the will had become impaired, and a reference was directed to take an account of the dealings of the trustees with the fund. The Master reported that a portion of the fund had been lost in the hands of the petitioner's deceased co-trustee, and that the estate of the latter was liable therefor. Upon appeal the report was sent back to be amended by charging the petitioner with the portion of the fund so lost by his co-trustee:—

Held, that the inquiry as to the petitioner's liability having resulted unfavourably to him, he must bear the costs of it; but was entitled to receive out of the fund his costs of the petition and of bringing in his accounts; and, upon payment of the amount found due by him, and of the costs awarded to be paid by him, to his discharge. *Re Hawkins*, 16 P. R. 136.

Will.]—Costs ordered to be paid out of the real estate, as the litigation had related to it. *McMyler* v. *Lynch*, 24 O. R. 632.

Winding-up—*Personal Order against Liquidator for Costs.*]—An order was made by a County Court, under R. S. O. ch. 183, for the winding-up of the companies, and a liquidator was appointed, who brought in a list of contributories. The contributories shewed cause to their names being settled upon the list, and the Court made an order in the case of each of them, reciting that it appeared there was no jurisdiction to make the winding-up order and that all proceedings were irregular or null, and ordering that each contributory should have his costs of shewing cause, to be paid by the companies and the liquidator:—

Held, that if there was jurisdiction to make the winding-up order, the contributories could not defend themselves by shewing that it was irregular or erroneous; and if there was no jurisdiction, all the proceedings were *coram non judice*, and there was no jurisdiction, the Court being an inferior one, to order the liquidator or the companies to pay the costs.

And even if there was jurisdiction, in the circumstances of this case it should not have been exercised against the liquidator.

Rule 1256 does not apply to proceedings under the Winding-up Act, either by virtue of section 34 of the Act or otherwise.

Remarks as to multiplicity of orders taken out in the matters. *Re Cosmopolitan Life Association—Re Cosmopolitan Casualty Association*, 15 P. R. 185.

Winding-up—*Creditors' Solicitors.*]—Upon a reference for the winding-up of a company, the referee appointed a firm of solicitors to repre-

sent the general body of creditors, and ordered that they should be notified to attend whenever he so directed, and that their costs, as between solicitor and client, should be paid out of the assets:—

Held, that this class of order and liability was not favoured by the Courts, and should be invoked and attendance thereunder had only when there was any special question on which the appearance of some one to represent the creditors was desirable; that attendances and services should not be paid for out of the assets except where contemporaneously approved of by the referee; and it was not proper practice to extend this at the close of the proceedings by obtaining a certificate from him that, had he been applied to from time to time, he might have provided for other attendances and services.

Order of Meredith, C.J., varied. *Re Drury Nickel Co.*, 16 P. R. 525.

COUNTERCLAIM.

Mechanics' Lien.]—A defence filed by a lienholder within the period mentioned in section 23 of R. S. O. ch. 126, in an action by the owner of the property to set aside the lien is not a "proceeding to realize the claim" within the meaning of that section, though a counterclaim, if properly framed and a certificate thereof duly registered might be.

Per Osler, J.A.—Observations as to the effect of registration of the lien. *McVean* v. *Tiffin*, 13 A. R. 1, considered.

Per Maclennan, J.A.—The defendant in this action having commenced an independent action and registered his lien within the prescribed period, his lien was preserved and the registration of the certificate in the other action enured to his benefit in the present one, though after judgment establishing his lien he abandoned the other proceedings. *McNamara* v. *Kirkland*, 18 A. R. 271.

See PLEADING, III.

COUNTERFEIT NOTES.

See CRIMINAL LAW, IV.

COUNTY COURT.

I. JURISDICTION.

Declaration of Right—*Assignments Act.*]—An action asking for a declaration of right to rank on an insolvent estate is not within the jurisdiction of the County Court.

Judgment of the County Court of Huron affirmed, Hagarty, C.J.O., dissenting. *Whilden* v. *Jackson*, 18 A. R. 439.

Equity Jurisdiction—"*Personal Actions.*"]—Since 32 Vict. ch. 6, sec. 4 (O.), the County Courts have had common law jurisdiction only; the Judicature Act did not alter the jurisdiction of those Courts, but only made applicable to matters cognizable by them the several rules of law thereby enacted and declared.

An action by a ratepayer of a school section, on behalf of himself and all other ratepayers, against trustees of the section, seeking to compel the defendants to pay to the treasurer of the section such amount as might be disallowed upon taxation of a bill of costs paid by the trustees to a solicitor, is one of purely equitable jurisdiction, and is not cognizable by a County Court, even though the amount in question is not more than $200.

The term "personal actions" used in R. S. O. ch. 47, sec. 19, means common law actions. *Re McGugan* v. *McGugan*, 21 O. R. 289.

Equity Jurisdiction—*Action for Surplus after Mortgage.*]—A County Court has jurisdiction, whatever the amount of a mortgagee's claim at the time of the exercise of a power of sale, to entertain an action for the recovery of an alleged surplus derived from the sale and not exceeding $200, although the existence of the surplus is denied. *Reddick* v. *Traders' Bank of Canada*, 22 O. R. 449.

Liquidated or Ascertained Amount.]—Whenever a sum up to $400 is agreed on by the parties as the remuneration for a service to be performed, or as the price of any article sold, if the service be performed or the article be delivered in pursuance of the bargain, the amount may be recovered in the County Court, denial of the contract and price not availing to oust the jurisdiction.

Robb v. *Murray*, 16 A. R. 503, considered.

Judgment of the Queen's Bench Division affirmed. *Ostrom* v. *Benjamin*, 21 A. R. 467.

Liquidated or Ascertained Amount.]—An action was brought in a County Court to recover the amount of a broker's commission on the sale of land. The defendant disputed his liability, and the action was tried by a jury, who found that the plaintiff was entitled to recover $250. The amount was not ascertained otherwise than by the agreement of the parties, as found by the jury:—

Held, by Rose, J., that the amount was not ascertained within the meaning of R. S. O. ch. 47, sec. 19, sub-sec. 2, and the County Court had no jurisdiction.

Robb v. *Murray*, 16 A. R. 503, followed. *Re McKay* v. *Martin*, 21 O. R. 104.

Liquidated or Ascertained Amount—*Interest.*]—Where the plaintiffs in an action in the High Court of Justice to recover a sum for work and labour and materials, the amount not being liquidated or ascertained, recovered $197.01 for debt, and $14.54 for interest from the issue of the writ of summons:—

Held, that the amount recovered was not within the jurisdiction of a County Court, and the plaintiffs were entitled to costs on the scale of the High Court. *Malcolm* v. *Leys*, 15 P. R. 75.

Liquidated or Ascertained Amount—*Taxed Costs.*]—In an action on a bond for $500 given to secure payment of costs in the Supreme Court of Canada in a prior action, judgment was given for the plaintiff for $318.55, the amount at which such costs were taxed and certified in the Supreme Court:—

Held, that the amount recovered was not ascertained by the act of the parties or by the signature of the defendants, within R. S. O. ch. 47, sec. 19, and the plaintiff was entitled to costs of the action on the scale of the High Court. *Hayer* v. *Jackson*, 16 P. R. 485.

Liquidated Amount—*Guaranty—Amendment.*]—The County Court has no jurisdiction to entertain an action for more than $200 on a guaranty, in general terms, of payment of the price of goods, there being no liquidation or ascertainment of the amount as between the vendor and the guarantor, a liquidation or ascertainment by the debtor not binding the guarantor.

Where an action was for two unliquidated claims each within but together beyond the jurisdiction of the County Court, the plaintiff was allowed after judgment to amend by abandoning one of them.

Judgment of the County Court of Essex varied. *Thomson* v. *Eede*, 22 A. R. 105.

Liquidated Amount—*Goods Sold.*]—*See Brown* v. *Hose*, 14 P. R. 3, *ante* 213.

Mechanics' Liens.]—Held, that notwithstanding the apparently unlimited provisions of section 1, of 53 Vict. ch. 37 (O.), entitled an "Act to Simplify the Procedure for Enforcing Mechanics' Liens," the intention of the Act is to simplify such procedure in the High Court only, leaving the procedure provided for in County Courts and Division Courts unaffected by the passing of the Act. *Secord* v. *Trumm*, 20 O. R. 174.

Mechanics' Liens—*Mortgage—Account.*]—Section 23 of R. S. O. ch. 126, which allows proceedings to recover the amount of a mechanics' lien to be taken under certain circumstances in the County Court and Division Court applies only to actions in which the party seeking to enforce his lien is suing in the ordinary way to obtain judgment and execution. Those Courts cannot entertain an action in the nature of an action of account by a lien holder against a mortgagee who has sold the land in question under mortgage prior to the lien though there may be wider powers by way of summary application.

Judgment of the County Court of York affirmed, Maclennan, J.A., dissenting. *Hutson* v. *Valliers*, 19 A. R. 154.

Partnership Accounts.]—A County Court has jurisdiction, where the amount of the claim does not exceed the ordinary jurisdiction of the Court, to entertain an action by a partner against his co-partners for a purely money demand, which is part of the partnership assets, although it may involve the taking of the partnership accounts. *Allen* v. *Fairfax Cheese Co.*, 21 O. R. 598.

Tort—*Action to Compel Delivery up of Promissory Note for $230.*]—In an action brought in the High Court to restrain the defendants by injunction from negotiating a promissory note for $230, and to compel them to deliver it up to the plaintiff, or for damages for its detention, it was determined that the note was wrongfully held by the defendants, who had obtained it under the pretence of discounting it, but really with the view of making it the subject of garnishment:—

Held, that the action sounded in tort and not in contract, and could not have been brought in a County Court; and the successful plaintiff was therefore entitled to tax his costs on the High Court scale.

Johnson v. *Kenyon*, 13 P. R. 24, distinguished.

Robb v. *Murray*, 16 A. R. 502, followed.

Plummer v. *Coldwell*, 15 P. R. 144.

Winding-up—*Sale of Assets by Liquidator.*]—The liquidator of a company which was being voluntarily wound up upon the Ontario Winding-up Act, sold the assets thereof en bloc, without the sanction of the contributories, to a private individual, and then obtained from the County Court an order approving of the sale and making certain provisions for the disposition of the purchase moneys.

On appeal it was held that the order was made without authority, and that it was a nullity. *In re D. A. Jones Co.*, 19 A. R. 63.

Winding-up—*Ordering Liquidator to Pay Costs.*]—*See Re Cosmopolitan Life Association—Re Cosmopolitan Casualty Association*, 15 P. R. 185, *ante* 244.

See, also, the cases under COSTS, III.

II. PRACTICE.

1. *Appeals from the County Court.*

Attachment of Debts—*Judgment on Issue.*]—Under section 42 of the County Courts Act, R. S. O. ch. 47, an appeal lies to the Court of Appeal from the order or judgment of a County Court disposing of an issue directed by an order made in an action in such County Court upon a garnishing application; and the claimant, the plaintiff in the issue, though not a party to the original action, is a "party" within the meaning of section 42, and may be an appellant.

Sato v. *Hubbard*, 6 A. R. 546, distinguished. *Henderson* v. *Rogers*, 15 P. R. 241.

Attachment of Debts—*Issue sent from High Court to County Court.*]—The Master in Chambers made an order in an action in the High Court, by consent of parties, directing the trial in a County Court, between an execution creditor and a claimant, of an interpleader issue with respect to the ownership of certain goods, which the sheriff had not seized or intended to

seize, but which, by the consent of the parties recited in the order, were to be regarded as if the sheriff had seized them and applied for an interpleader order:—

Held, that there was no jurisdiction, under Rule 1163 or otherwise, to make the order for trial of the issue in the County Court; and, as the absence of jurisdiction was apparent on the face of the order, all the proceedings under it were *coram non judice*, and there was no right of appeal to the Court of Appeal from the judgment of the County Court upon the issue. *Teskey* v. *Neil*, 15 P. R. 244.

Certificate of Judge—*Objection to Security—Order for Committal of Judgment Debtor.*]—1. An appeal lies to the Court of Appeal from an order of the Judge of a County Court, in a County Court action, committing the defendant to gaol, upon his examination as a judgment debtor, for concealing or making away with his property in order to defeat or defraud his creditors. Such an order is in its nature final, and therefore comes within sub-section 2 of section 42 of the County Courts Act, R. S. O. ch. 47, as controlled by the proviso at the end of the section.

2. It is not a valid objection to an appeal that the Judge of the County Court has not, in certifying the proceedings, expressed in his certificate that they are certified "to the Court of Appeal." *Baby* v. *Ross*, 14 P. R. 440.

Cross-Appeal.]—In County Court cases notice of cross-appeal is not necessary. *Hutson* v. *Valliers*, 19 A. R. 154.

Delay in Setting Down—*Dismissal.*]—The fact that the appellant in a County Court appeal has obtained from the Judge of the Court appealed from, under R. S. O. ch. 47, sec. 46, a stay of proceedings to enable him to give security, does not absolve him from the necessity of complying with Rule 836, by setting the appeal down for hearing at the first sittings of the Court which commence after the expiration of thirty days from the decision complained of, although such sittings commence before the expiration of the stay.

And where judgment in a County Court was entered on the 17th January, notice of appeal served on the 30th January, a stay of proceedings for thirty days granted on the 12th February, and security given on the 12th March, but the appeal was not set down for the March sittings of the Court of Appeal, nor the proceedings certified, an order was made dismissing it with costs, no sufficient excuse being given for the delay. *Paul* v. *Rutlidge*, 16 P. R. 140.

Delay in Setting Down—*Dismissal—Extending Time.*]—Section 46 of the County Courts Act, R. S. O. ch. 47, providing that the County Court Judge shall stay the proceedings for not more than thirty days to afford an appellant time to give security to enable him to appeal, and Rule 836, providing that a County Court appeal shall be set down for the first sittings which commences after the expiration of thirty days from the decision complained of, are, to some extent, in conflict.

Until, however, the proceedings in the Court below have been sent up to the Court of Appeal by the County Court Judge, as directed by section 51 of the County Courts Act, the appeal is not lodged, and the Court can neither dismiss it nor extend the time for setting it down for hearing.

But the Court can always extend the time, on application, where the appeal has been lodged, and will do so, as a matter of course, where there has been no wanton delay in giving the security within the time allowed by the County Court Judge.

Paul v. *Rutlidge*, 16 P. R. 140, commented on. *Gilmor* v. *McPhail*, 16 P. R. 151.

Interpleader—*Application of Stakeholder—Issue sent from High Court to County Court—Appeal from Judgment on Issue.*]—The Court of Appeal has no jurisdiction to entertain an appeal from the decision of a County Court upon an interpleader issue sent for trial by an order made in an action in the High Court, upon the application of a stakeholder.

Rule 1163 applies only to the case of an application by a sheriff, and not to a case coming within the first clause of Rule 1141; and in the latter case the High Court has no power by virtue of any of the Consolidated Rules to direct an interpleader issue, in or arising out of an action in the High Court, to be tried in a County Court; and, therefore, unless otherwise supportable, the proceedings under an order so directing are *coram non judice*.

But if the High Court has power to make such an order—and *semble*, it has—by force of section 110 of the Judicature Act, irrespective of the Consolidated Rules, preserving the old jurisdiction of the Court of Chancery, the appeal from the decision upon the issue is, in the first instance at all events, to the High Court, and not to the Court of Appeal. *Clancey* v. *Young*, 15 P. R. 248.

Winding-up.]—An order in a winding-up proceeding for the sale of assets is a "final order" as nothing further remains to be done under it and therefore is the subject of appeal. *In re D. A. Jones Co.*, 19 A. R. 63.

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2. *In General.*

Change of Venue—*Intituling Papers.*]—Where a motion is made to a Judge of the High Court or the Master in Chambers under Rule 1260 to change the venue in a County Court action, the papers should not be intituled in the High Court of Justice, but in the County Court. *Ferguson* v. *Golding*, 15 P. R. 43.

Trial—*Sheep Act.*]—The right of action given by R. S. O. ch. 214, sec. 15, to the owner of sheep killed by dogs, is to be prosecuted with the usual procedure of the appropriate forum. If, therefore, an action be properly brought in the County Court it may be tried before a jury, and where it is so tried, they, and not the Judge, should apportion the damages if an apportionment be required.

Judgment of the County Court of Wellington reversed. *Fox* v. *Williamson*, 20 A. R. 610.

Venue—*Replevin—Tax Collector.*]—A tax collector sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R. S. O. ch. 73, and

under section 15 of that Act, and section 4 of R. S. O. ch. 55, a County Court action against him for replevin of goods seized by him, and for damages for malicious seizure, must be brought in the county where the seizure and alleged trespass took place.

The Consolidated Rules as to venue do not override these statutory provisions.

Legacy v. *Pitcher*, 10 O. R. 620, distinguished.

Arscott v. *Lilley*, 14 A. R. 283, applied.

Judgment of the County Court of Hastings reversed. *Howard* v. *Herrington*, 20 A. R. 175.

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3. *Transfer of Action to High Court.*

Ascertained Amount.] — An action was brought in a County Court to recover the amount of a broker's commission on the sale of land. The defendant disputed his liability, and the action was tried by a jury, who found that the plaintiff was entitled to recover $250. The amount was not ascertained otherwise than by the agreement of the parties, as found by the jury :—

Held, by Rose, J., that the amount was not ascertained within the meaning of R. S. O. ch. 47, sec. 19, sub-sec. 2, and the County Court had no jurisdiction.

Robb v. *Murray*, 16 A. R. 503, followed :—

Held, by a Divisional Court, that the Act 54 Vict. ch. 14 (O.), passed after the determination that the County Court had no jurisdiction, was retrospective, and enabled the action to be transferred to the High Court. *Re McKay* v. *Martin*, 21 O. R. 104.

Equitable Relief.]—If a County Court has no jurisdiction over the plaintiff's cause of action, the proceedings in respect thereof in that Court are all *coram non judice*, and the Judge of that Court has no power over them ; sec. 38 of R. S. O. ch. 47, applies only where the action in which the equitable question is raised is within the jurisdiction of the County Court.

Prohibition granted to restrain a Judge from transferring to the High Court an action brought in a County Court for an equitable cause of action. *Re McGugan* v. *McGugan*, 21 O. R. 289.

Judgment Before Transfer.]—An action cannot be removed under 54 Vict. ch. 14 (O.), from a County Court to the High Court after verdict or judgment in the County Court in favour of the plaintiff, leaving that verdict or judgment in force, with the right to either party to move against it in the High Court.

Re McKay v. *Martin*, 21 O. R. 104, considered.

Judgment of the County Court of Haldimand reversed. *Sherk* v. *Evans*, 22 A. R. 242.

Scale of Costs of an Action Transferred from County Court to High Court.]—The provisions of Rule 1219 are applicable to an action transferred from a County Court to the High Court by virtue of 54 Vict. ch. 14 (O.), and the costs of the proceedings after the transfer should be taxed upon the lower scale where the case falls within sub-section (4) of the Rule, by reason of the plaintiff seeking equitable relief, and the subject matter involved not exceeding $200. *Struthers* v. *Green*, 14 P. R. 486.

COURT OF APPEAL.

I. Bond and Security.

Damages — *Vendor and Purchaser.*] — In winding-up proceedings a property was sold by tender under the power of sale in a mortgage with the consent of the liquidator, and an appeal by an unsuccessful tenderer to a Judge from the report confirming the sale was dismissed, whereupon a further appeal to the Court of Appeal was allowed upon the appellant giving security by bond to the successful tenderer to answer the damages which the latter as purchaser might sustain by being prejudicially affected in his purchase, by the appeal allowed, in case such appeal should fail. Possession was not taken by the purchaser until after the failure of the appeal. The conditions of sale provided that possession would be given upon payment of the balance of the purchase money within a time fixed, but the money was not paid, nor did it appear that it had been set aside for that purpose, nor was any provision made in the conditions as to the payment of interest or taxes :—

Held, that under the bond the purchaser was not entitled to payments made by him for care of the property or taxes, nor was he entitled to interest on the purchase money, or to damages for deterioration of the property. *Re Alger and Sarnia Oil Co.*, 23 O. R. 583.

Disallowance of Bond—*Refiling of, without Consent of Sureties.*]—A bond was filed by the defendant for the purpose of an appeal to the Court of Appeal. Leave to appeal was, however, necessary, and had not been obtained before filing the bond, which was, therefore, on the 4th of April, 1891, disallowed. Leave to appeal was afterwards obtained, and the same bond was on the 18th of September, 1891, refiled without the consent of the sureties, and was again disallowed :—

Held, rightly so ; for the sureties might object that the bond had been improperly used by the defendant ; and the respondent was entitled to a security free from any objections of that nature.

The plaintiff objected to the bond on the ground of the insufficiency of one of the sureties, and in support of that objection read the sworn statements of such surety in another action :—

Held, that such statements were admissible against the defendant, who was putting forward the surety as a person of substance. *Jones* v. *Macdonald*, 14 P. R. 535.

Manifold Judgment—*Stay as to Part.*]—The defendant in appealing to the Court of Appeal from a manifold judgment of the High Court in an action for specific performance, directing the execution by him of a conveyance, the delivery of documents, etc., and also the payment of a sum for costs of the action, gave security for the costs of the Court of Appeal and for payment of the costs of the action, but did not execute the conveyance, deposit the documents in Court, or otherwise comply with the judgment or the provisions of Rule 804, sub-secs. 1, 2, 3 :—

Held, that, upon the perfecting of the security, there was a stay of execution, amounting to a supersedeas, as to the costs of the action, by virtue of sub-section 4 of Rule 804 although the defendant had done nothing with respect to the parts of the judgment falling under the other sub-sections ; and garnishing proceedings taken for the purpose of collecting such costs were not sustainable. *Vigeon* v. *Northcote*, 15 P. R. 171.

Objection to Bond.]—The Court of Appeal will not entertain an objection to the security upon the appeal given in the County Court appealed from. *Baby* v. *Ross*, 14 P. R. 440.

Parties to Bond—*Non-execution by some of the Parties.*]—An appeal bond for the purpose of an appeal by the plaintiffs to the Court of Appeal was drawn up with the names of all the plaintiffs as parties therein, and was executed by the sureties and some of the plaintiffs in that shape, and an order was afterwards obtained dispensing with the execution of the bond by the other plaintiffs, except two, who had withdrawn from the appeal. The bond was also defective in the condition :—

Held, that the order should have been obtained before the execution of the bond, and that only those of the appellants actually executing it should have been named as parties to it ; and the bond was set aside. *Grothe* v. *Pearce*, 15 P. R. 195.

II. Cross-Appeal.

Discontinuance of Main Appeal.]—A proceeding under Rule 821 by way of cross-appeal, taken by the respondent to an appeal to the Court of Appeal, is a mere branch or off-shoot of the main appeal ; and if the appellant discontinues his appeal, or the respondent causes it to be dismissed for want of prosecution, the cross-appeal is bound up in it, and cannot be retained for any purpose.

The difference in the English practice pointed out.

The Beeswing, 10 P. D. 18, distinguished.

Semble, if a party does not wish his own objection to a judgment to be subject to the prosecution of his opponent's appeal his only course is to launch an independent appeal by giving notice and security, and under ordinary circumstances the two appeals would then be consolidated. *Pickering* v. *Toronto R. W. Co.*, 16 P. R. 144.

Enforcing Order.]—A respondent, in an appeal to the Court of Appeal, who desires to vary the decision appealed against, is in the same position as if he were an appellant, and whatever would be an answer to his contention if he had brought an independent appeal, would also be an answer to the same contention when urged by way of cross-appeal.

And where, before the hearing of an appeal, the respondent moved in Chambers for an order allowing him to enforce the order appealed against without prejudice to his cross-appeal :—

Held, that it was not for a Judge in Chambers, in advance of the appeal, to determine a question which might arise on the appeal itself, viz., whether the enforcement of the order would be an answer to the cross-appeal. *Re Charles Stark Co.*, 15 P. R. 451.

Third Parties.]—An order was made by a local Judge upon the *ex parte* application of the defendant, allowing him to serve a third party notice, but, upon the application of the third parties so called upon, this order was set aside by an order of the Master in Chambers, which was affirmed by a Judge at Chambers and by a Divisional Court upon the appeal of the defendant. That Court, however, at the same time made an order staying the proceedings until the plaintiffs should add the third parties as defendants, and from this order the plaintiffs appealed to the Court of Appeal, not making the third parties respondents. The defendant, however, served notice of cross-appeal upon the plaintiffs and the third parties, by which he asked that the order made by the local Judge might be restored ; and the third parties moved to strike out this notice :—

Held, that the word "parties" in Rule 821 means persons who are parties to the action or proceeding in question on the appeal ; and that what the defendant sought by the cross-appeal was not a variation of the order appealed from, which is what Rule 821 speaks of, but the substitution of one of an entirely different character ; and the notice was struck out. *Begg* v. *Ellison*, 14 P. R. 267.

III. Miscellaneous Cases.

Division of Opinion.]—The Court of Appeal for Ontario, composed of four Judges, pronounced judgment in an appeal before the Court, two of their Lordships being in favour of dismissing and the other two pronouncing no judgment. On an appeal from the judgment dismissing the appeal, it was objected that there was no decision arrived at :—

Held, that the appellate Court should not go behind the formal judgment which stated that the appeal was dismissed ; further, the position was the same as if the four Judges had been equally divided in opinion, in which case the appeal would have been properly dismissed. *Booth* v. *Ratté*, 21 S. C. R. 637.

Mistake in Certificate.]—Where the certificate of judgment of the Court of Appeal by inadvertence directed the dismissal of a County Court action with costs, instead of merely setting aside the judgment in the County Court for want of jurisdiction, the certificate was, on summary application, amended, and repayment of costs taxed and paid under it directed. *Sherk* v. *Evans*, 22 A. R. 242.

Order not Issued.]—The Court will not ordinarily quash or dismiss an appeal because the order or judgment appealed from has not been drawn up. *Henderson* v. *Rogers*, 15 P. R. 241.

Printing.]—The costs of printing unnecessary material disallowed. *Bryce* v. *Loutit*, 21 A. R. 100.

Time for Appeal—*Long Vacation.*]—Upon the true construction of Rule 484, the period of Long Vacation is not to be reckoned in the time allowed by section 71 of the Judicature Act for filing and serving notice of appeal to the Court of Appeal. *Hespeler* v. *Campbell*, 14 P. R. 18.

COURT OF REVISION.

See ASSESSMENT AND TAXES, I.

COVENANT.

Acceleration Clause.]—Where, by virtue of an acceleration clause in a mortgage deed, the whole of the mortgage money has become due by default of payment of interest, and judgment has been recovered for the whole by the mortgagee against the mortgagor, in an action solely upon the covenant for payment contained in the mortgage deed, the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside.

The accceleration is not in the nature of a penalty, but is to be regarded as the contract of the parties.

Rules 359, 360, and 361, and the long form of the acceleration clause, R. S. O. ch. 107, schedule B., sec. 16, considered. *Wilson* v. *Campbell*, 15 P. R. 254.

Beneficial Right Thereunder—*Action by Stranger to Enforce.*]—Where the effect of a contract is to give a stranger to it a beneficial right thereunder, he may enforce such right by action.

And where in an agreement for the exchange of certain lands between the sons of the defendant and a third party, which was carried out, and in which the defendant released her dower, and also conveyed lands of her own to the third party for the benefit of her sons, in consideration whereof they jointly with her covenanted with such third party to pay her an annuity to be secured by mortgage, it was :—

Held, that although not named as a covenantee, she was entitled to maintain an action to enforce such covenant, and that a judgment creditor of hers was entitled to have equitable execution against her, and a receiver appointed to receive payment of the annuity. *Moot* v. *Gibson*, 21 O. R. 248.

Beneficial Right—*Covenant with Mother—Action by Child for Breach of.*]—The defendants' mother having conveyed her farm to them, they mortgaged it to her in consideration of the conveyance and of $2,500, and covenanted in the mortgage, *inter alia*, to educate their younger brother. The latter was not a party to the covenant, nor was there anything in the mortgage giving him a right to maintain an action upon it, but there was a stipulation that if the defendants failed to educate him, the mother or her executors might distrain upon them for such sums as might be required from time to time to secure the due performance of the agreement. After the death of the mother, this action was brought by her executors and the younger brother for damages for breach of the covenant :—

Held, that there was no trust in favour of the younger brother, and that the action was not maintainable by him :—

Held, however, that it was maintainable by the executors to the extent that they might recover such sum as would enable them to perform the covenant to educate their co-plaintiff.

West v. *Houghton*, 4 C. P. D. 197, distinguished. *Faulkner* v. *Faulkner*, 23 O. R. 252.

Breach—*Damages—Easement.*]—The defendants granted to the predecessor in title of the plaintiff, with covenants for title under the Short Forms Act, certain lands with the right and easement of erecting a dam at a certain spot. It was afterwards held that they had no power to grant such a right, but it was shewn that it was not, in any event, practicable to maintain a dam at the spot in question :—

Held, that the defendants were not liable to repay the full purchase money less the actual value of the land without the supposed right, but only the actual practical value of the supposed right, which was nothing.

Judgment of Ferguson, J., affirmed, Osler, J.A., dissenting. *Platt* v. *Grand Trunk R. W. Co.*, 19 A. R. 403.

Indemnity—*Assignment of Covenant to Indemnify.*]—*See Sutherland* v. *Webster*, 21 A. R. 228, *ante* 131 ; *Ball* v. *Tennant*, 21 A. R. 602, *ante* 67.

Restraint of Trade—*Reasonableness—Certainty.*]—The male defendant sold his business of a wholesale and retail confectioner to the plaintiff, and covenanted that he would not during a limited period, either by himself alone or jointly with or as agent for any other person, carry on or be employed in carrying on the business of a retail confectioner in the same city, which should in any way interfere with the business sold to the plaintiff, and that he would, to the utmost of his power, endeavour to promote the interest of the plaintiff amongst his (the defendant's) customers. This defendant had carried on his wholesale business in the basement of his premises, and his retail business in the shop above, of which latter his wife, the other defendant, had the management. The business carried on in the shop included the sale of cakes, candy, etc., and the serving of lunches. In the sale to the plaintiff were included an

assignment of the lease of these premises and all the chattels and fixtures, as well those used in the serving of lunches as in other ways. During the period limited by the covenant, and while the plaintiff was carrying on the business in the same way as the male defendant had previously carried it on and upon the same premises, the defendants began a precisely similar business in a shop in the same street, the shop being leased and the retail business carried on in the name of the wife, and that branch of the business conducted by her as theretofore, while the husband carried on the wholesale business in the basement. The jury found that the retail business was in fact that of the husband:—

Held, that the serving of lunches was part of the business of a retail confectioner according to the meaning to be ascribed to those words in the covenant.

2. That the covenant was reasonable and sufficiently certain to be enforced by the Court.

3. That general loss of custom after the commencement of the new business by the defendants could be shewn by the plaintiff as evidence to go to the jury of damages resulting to him from such business.

Ratcliffe v. *Evans*, [1892] 2 Q. B. 524, applied and followed.

4. That damages were properly assessed up to the date of the judgment.

Stalker v. *Dunwich*, 15 O. R. 342, followed.

5. It is no ground for a new trial that the Judge refused to submit any particular question to the jury, but if the Judge refuses to charge the jury in respect to the subject matter of any question which counsel desire to have submitted, it may be made the subject of a motion for a new trial for non-direction. *Turner* v. *Burns*, 24 O. R. 28.

Restraint of Trade—*Limited Time—Reasonableness—Public Policy.*]—On the purchase of a manufacturing business by the plaintiff from the defendants, the latter entered into a covenant with the plaintiff which was part of the terms of sale, that they would not engage directly or indirectly in the manufacture or sale of "bamboo ware and fancy furniture, either as principal, agent or employee, at any place in the Dominion of Canada for the term of ten years from the date hereof. This clause does not prevent" (defendants) "from engaging in the retail business of furniture and bamboo ware selling. It covers wholesale or jobbing business":—

Held, that as the restraint of trade was partial only, being confined to manufacturing certain articles and to selling them by wholesale or by jobbing and for a limited time, and as there was no evidence on which it could be held to be unreasonable, and the interests of the public were not interfered with, the agreement was not contrary to public policy. *Cook* v. *Shaw*, 25 O. R. 124.

CREDITORS' RELIEF ACT.

See EXECUTION, I.

CRIMINAL CODE.

See CRIMINAL LAW, III., IV.

17

CRIMINAL LAW.

I. ACCESSORIES.

Fraudulent Appropriation—*Unlawful Receiving — Simultaneous Acts.*] — A fraudulent appropriation by a principal and a fraudulent receiving by an accessory may take place at the same time and by the same act. *McIntosh* v. *The Queen*, 23 S. C. R. 180.

Stakeholder—*Illegal Bet.*] — *See Walsh* v. *Trebilcock*, 23 S. C. R. 695, *post*, GAMING.

II. EVIDENCE.

1. *As to Specific Offences.*

Bigamy—*Proof of First Marriage.*]—Upon an indictment for bigamy the first marriage must be strictly proved as a marriage *de jure*.

Evidence of a confession by the prisoner of his first marriage is not evidence upon which he can be convicted. *Regina* v. *Ray*, 20 O. R. 212.

Conspiracy—*Agreement—Overt Acts—Acts of Co-conspirators—Acts Before Date Alleged in Indictment—Engineer's Report—Entries in Books — Secondary Evidence — Examination in Civil Action—Present to Official—Fictitious Tenders.*]—L. C. & Co., a firm of contractors in Quebec, tendered to harbour commissioners for certain work to be done with the approval of the Government, sending in three tenders, one in their own name, and two in the names of others, with a common mistake as to price of a portion of the work in all three. The defendant McG., whose brother had been admitted to the firm as a partner without the payment of any capital, was both a member of Parliament and of the harbour commission. The three tenders with others were received and opened by the commissioners, the defendant McG. being present, and were then forwarded to the Government at Ottawa, Ontario. The defendant McG. went to Ottawa and succeeded in obtaining from the government engineer particulars of the calculations and results of all the tenders sent in, of which he advised his brother by letters. When the mistake in the price was notified by the government engineer to

the three tenderers, one tender was withdrawn, one was varied, so as to make it higher than others, and the firm's was allowed to remain as it was with the manifest error, and so became the lowest tender, and was thus accepted. One government engineer was given a situation on the harbour commission, and the chief engineer of the Public Works Department received a valuable present from the firm. As soon as the contract was executed, promissory notes to an amount of many thousand dollars were signed by the firm and given to the defendant McG., and he also received money from his brother, whose only means of paying were his profits as a partner. On an indictment for conspiracy against McG. and C., a member of the firm :—

Held, that there is no unvarying rule that the agreement to conspire must first be established before the particular acts of the individuals implicated are admissible in evidence, and that the letters written by the defendant McG. at Ottawa were overt acts there in furtherance of the common design, and admissible in evidence against all privy to the conspiracy for which they might be prosecuted in this Province, and as the defendant C. was, by his own admission, privy to the large payment after it was made, it was a matter for the jury to say whether he was not throughout a participator in the proceedings : *Mulcahy* v. *The Queen*, I. R. 1 C. L. 12, followed :—

(2) The transactions, conversations, and written communications between R. H., McG. (the partner), and his brother, the defendant McG., and the other members of the firm, were receivable in evidence in the circumstances of this case. If at first not available against both defendants they became so when the proof had so far advanced and cumulated as to indicate the existence of a common design :—

(3) Evidence as to the manner in which other contracts were obtained by the firm previous to the date mentioned in the indictment was properly received as introductory to the transaction in question :—

(4) Letters written by a member of the firm in the name of an employee, and purporting to be signed by him, were also properly in evidence :—

(5) The report of the government engineer recommending the acceptance of the firm's tender, was also properly in evidence as the object of all that was done was to obtain a report in favour of the firm :—

(6) Entries in the books of the firm were evidence against the defendant C., and statements prepared therefrom by an accountant were good secondary evidence in the absence of the books withheld by the defendants :—

Query.—How far they were evidence against the defendant McG. who was not a member of the firm.

(7) The examination of the defendant C. in a civil action arising out of these matters, he not having claimed privilege therein, could be used against him on this trial :—

(8) The evidence of an expert in calculating results on *data* supplied and proper for an engineer to work upon, was admissible :—

(9) Evidence of a present being made to an engineer in charge of the work with the knowledge of one of the defendants was proper to be considered by the jury as casting light on the relations between the firm and that officer :—

(10) The use of fictitious tenders was a *deceit*, and if done to evade the results of fair competition for the contracts it was "unlawful." *Regina* v. *Connolly*, 25 O. R. 151.

Forgery.]—*See Re Garbutt*, 21 O. R. 179 ; 21 O. R. 465 ; and *Re Murphy*, 26 O. R. 163 ; 22 A. R. 386, *post*, EXTRADITION.

Liquor License Act.]—On motion to quash a conviction, it was objected that the evidence taken before the magistrates and returned by them was not shewn to have been read over and signed by the witnesses :—

Held, that the maxim *omnia præsumuntur esse rite acta* applied, and, as the contrary was not shewn, it would be presumed to have been done. *Regina* v. *Excell*, 20 O. R. 633.

Liquor License Act.]—In proof of defendant being a licensed hotel-keeper under the Act, a witness in giving evidence, stated defendant to be such, and although defendant was present and represented by counsel, he allowed the statement to pass unchallenged :—

Held, sufficient, as the witness might have obtained his information from the defendant. *Regina* v. *Flynn*, 20 O. R. 638.

Liquor License Act.]—An objection that it did not appear that the evidence had been read over to the witnesses was overruled, following *Regina* v. *Excell*, 20 O. R. 633.

The direction in sub-section 2 of section 96, as to the witnesses signing their evidence is not imperative but directory merely. *Regina* v. *Scott*, 20 O. R. 646.

Murder—*Motive.*]—On a trial for murder, the alleged motive being the obtaining of insurance moneys on policies effected by the prisoner on the life of the deceased, evidence of a previous attempt by the prisoner to insure another person for his own benefit cannot be given in evidence against him. *Regina* v. *Hendershott*, 26 O. R. 678.

Prostitution — *Evidence of Reputation of Bawdy House.*]—On an indictment for attempting to procure a woman to become a common prostitute, in corroboration of her evidence that for such purposes the prisoner had taken her to a bawdy house, evidence of the general reputation of the house is admissible. *Regina* v. *McNamara*, 20 O. R. 489.

Rape.]—On a trial for rape, the evidence of the prosecution was that the prisoner knocked her down, got on her, pulled up her clothes and committed a rape on her. A witness proved that the prisoner stated that he did no more than her husband would have done.

Evidence was admitted of a statement made by prisoner's counsel at a previous trial on behalf of prisoner, that prisoner had had connection with the woman with her consent, and that he had paid her $1.00 :—

Held, that there was sufficient evidence of the commission of the offence ; and that the statement of the prisoner's counsel was properly admitted. *Regina* v. *Bedere*, 21 O. R. 189.

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2. *Competent Witnesses.*

Fortune Telling.]—The statute 9 Geo. II. ch. 5 is in force in this Province.

By the statute the mere undertaking to tell fortunes constitutes the offence; and a conviction was affirmed where it was obtained upon the evidence of a person who was not a dupe or victim but a decoy. *Regina* v. *Milford*, 20 O. R. 306.

Judge—*Juror.*]—Review of the cases on the questions whether either a Judge or a juror can be properly a witness in a case which he is trying. *Regina* v. *Petrie*, 20 O. R. 317.

"The Liquor License Act"—*Evidence of License Inspector and Defendant.*]—For an offence under "The Liquor License Act," R. S. O. ch. 194, the license inspector who lays the information is a competent witness. *Regina* v. *Fearman*, 22 O. R. 456.

Offences Under By-Law—*Admissibility of Evidence of Defendant.*]—On the trial of an offence against a city by-law in the erection of a wooden building within the fire limits, the defendant is not either a competent or compellable witness; and, therefore, where in such a case, the defendant's evidence was received and a conviction made against him, it was quashed with costs. *Regina* v. *Hart*, 20 O. R. 611.

Unlawfully Pointing Firearms.] — On appeal to the Divisional Court, a conviction for unlawfully and maliciously pointing a loaded firearm at a person, was quashed on an objection taken for the first time, that the defendant who was called as a witness at the trial, was not a competent or compellable witness.

Regina v. *Hart*, 20 O. R. 611, followed. *Regina* v. *Becker*, 20 O. R. 676.

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3. *Confessions and Admissions.*

Statements to Detective.]—During the trial of the prisoner for murder questions arose as to the admissibility in evidence of statements made by him to certain detectives, in answer to questions put to him by them, he being at the time in their custody:—

Held, upon a case reserved, that the statements were admissible in evidence. *Regina* v. *Day*, 20 O. R. 209.

Statements to Detective.]—In the course of a conversation between the prisoner and a detective relative to the purchase of counterfeit money, the prisoner asked the detective whether he had received a letter written by the former stating his desire to purchase counterfeit money; and upon the detective shewing prisoner the letter he admitted it was his:—

Held, that the letter was admissible as in a sense forming part of the subject matter of the conversation. *Regina* v. *Attwood*, 20 O. R. 574.

Statements Made by Prisoner's Counsel at a Previous Trial.]—*See Regina* v. *Bedere*, 21 O. R. 189, *ante* 260.

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4. *Corroboration.*

Forgery.]—Where on a charge of forgery, in addition to evidence of one witness that the forged documents were written by the accused, it was also proved by the same witness that certain names in a book written by the same hand as the forged documents, were in the handwriting of the accused:—

Held, that this was not sufficient corroboration under section 684 of the Criminal Code, 1892. *Regina* v. *McBride*, 26 O. R. 639.

Forgery—*Interest of Witness.*]—On the trial of an indictment for uttering a forged note evidence was given by a person who had no interest therein of the note being forged. The wife of the person on whose behalf the note was received, and who, when receiving it, was in attendance in her husband's shop as his agent, proved the uttering.

Per MacMahon, J.—The note having been proved to be forged by a person having no interest, the question as to corroboration of the wife's evidence, on the ground of interest, did not arise under section 218 of the Criminal Procedure Act, R. S. C. ch. 174.

Per Rose, J.—The wife had no interest in the forged document; her interest, if any, was to prove its genuineness; but in any event there was abundant evidence of corroboration. *Regina* v. *Rhodes*, 22 O. R. 480.

Forgery.]—*See Re Garbutt*, 21 O. R. 179; 21 O. R. 465; and *Re Murphy*, 26 O. R. 163; 22 A. R. 386, *post*, EXTRADITION.

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5. *Evidence in Other Proceedings.*

Committee of House of Commons.]—At the hearing of a criminal charge before a County Judge, sitting as Police Magistrate, evidence was given before a special Committee of the House of Commons, and taken by stenographers, was tendered before the magistrate and refused by him:—

Held, that the Court had no power to grant a mandamus to the County Judge directing him to receive such evidence.

Rose, J., while concurring in the decision that a mandamus should not issue, was of opinion that Parliament, having ordered the prosecution, the evidence should have been received by the magistrate.

Subsequent resolution of the House of Commons, authorizing the evidence to be given. *Regina* v. *Connolly*, 22 O. R. 220.

Coroner's Inquest.]—A coroner's Court is a criminal Court, and the depositions of a witness before such Court, who is subsequently charged with murder, cannot, since the Canada Evidence Act, 1893, be received in evidence against him at the trial, notwithstanding privilege was not claimed by him at the inquest. *Regina* v. *Hendershott*, 26 O. R. 678.

Examination in Civil Action.]—The examination of the defendant C. in a civil action arising out of the matters in question, he not having claimed privilege therein, was allowed to be used against him on his trial for criminal conspiracy. *Regina* v. *Connolly*, 25 O. R. 151.

6. *Procuring Attendance or Evidence of Witnesses.*

Appeal to Sessions—*Subpœna to Witnesses in Another Province.*]—Under the provisions of sections 584 and 843 of the Criminal Code, 1892, it is competent for a Judge of the High Court or County Court to make an order for the issue of a subpœna to witnesses in another Province to compel their attendance upon an appeal to the General Sessions from the action of the justices of the peace under sections 879 and 881. *Regina* v. *Gillespie*, 16 P. R. 155.

Foreign Commission—*Prosecution for Indictable Offence.*]—A prosecution for an indictable offence is "*pending*" within the meaning of section 683 of the Criminal Code, 1892, when an information has been laid charging such an offence; and a commission to take evidence abroad for use before a magistrate upon a preliminary inquiry may then be ordered.

But the discretion of the Judge in ordering the issue of a commission is to be exercised upon a sworn statement of what it is expected the witnesses can prove, and he must be satisfied as to the materiality of the evidence.

And, under the circumstances of this case, a commission was granted to take the evidence of only one of three witnesses whom the Crown proposed to examine, it appearing that the other two had not been asked to come into the jurisdiction, and that their evidence would be in corroboration only of a statement of the third witness that he was with the defendant upon a certain occasion. *Regina* v. *Verral*, 16 P. R. 444.

Police Magistrate—*Warrant to Compel Attendance of Witness—Right of Police to Search Witness Arrested.*]—Where a police magistrate acting within his jurisdiction under R. S. C. ch. 174, sec. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice, liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest.

Judgment of the Common Pleas Division, 24 O. R. 576, affirmed.

The right of the police to search or handcuff a person arrested on a warrant to compel attendance as a witness and the duty of the constable on making the arrest, considered.

Judgment of the Common Pleas Division, 24 O. R. 576, reversed, Maclennan, J.A., dissenting. *Gordon* v. *Denison*, 22 A. R. 315.

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7. *View by Judge.*

Trial of Prisoner by Judge Without Jury—*Right of Judge to View Locality of Offence—Absence of Prisoner.*]—The prisoner was tried without a jury by a County Court Judge exercising jurisdiction under the "Speedy Trials Act," upon an indictment for feloniously displacing a railway switch. After hearing the evidence and the addresses of counsel, the Judge reserved his decision. Before giving it, having occasion to pass the place, he examined the switch in question, neither the prisoner nor any one on his behalf being present. The prisoner was found guilty:—

Held, that there was no authority for the Judge taking a "view" of the place, and his so doing was unwarranted; and even if he had been warranted in taking the view, the manner of his taking it, without the presence of the prisoner, or of any one on his behalf, was unwarranted;—

Held, also, that the question whether the Judge had the right to take a view was a question of law arising on the trial, and was a proper question to reserve under R. S. C. ch. 174, sec. 259. *Regina* v. *Petrie*, 20 O. R. 317.

III. Practice and Procedure.

Appeal—*Criminal Trial—Motion for Reserved Case—Unanimity on One of Several Grounds.*]—Where the Court appealed from has affirmed the refusal to reserve a case moved for at a criminal trial on two grounds, and is unanimous as to one of such grounds but not as to the other, the Supreme Court on appeal can only take into consideration the ground of motion in which there was dissent. *McIntosh* v. *The Queen*, 23 S. C. R. 180. [Not followed. [N.]

Appeal—*Jurisdiction of the Chancery Division in Criminal Matters.*]—On an appeal from an order for *certiorari*, which the Judge (Ferguson, J.) granting it, refused to make returnable in the Chancery Division:—

Held, per Robertson, J.—That the Chancery Division of the High Court of Justice has no jurisdiction in criminal matters:—

Held, per Meredith, J.—That it has; and ought to exercise it.

Boyd, C.—While adhering to his views as expressed in *Regina* v. *Birchall*, 19 O. R. 697, that it has, thought that when there is an equally divided opinion for and against jurisdiction entertained by the individual Judges constituting the Division, it would be unseemly that by a mere accident, such as the constitution of the Court, jurisdiction should be affirmed on one day and negatived on the next; and as there was jurisdiction in the other divisions of the High Court, he agreed with Robertson, J., that the motion be not entertained. *Regina* v. *Davis*, 22 O. R. 652.

Appeal—*Public Health—Conviction Under By-law in Schedule.*]—Where there is a conviction for an offence under the by-law set out in the schedule to the Public Health Act, R. S. O. ch. 205, as distinguished from any of the provisions in the Act itself, an appeal will lie from such conviction to the Sessions notwithstanding section 112, which has no application. *Regina* v. *Coursey*, 26 O. R. 635. *See S. C.* on appeal, 27 O. R. 181.

Assault and Battery—*Bar of Civil Remedy.*]—Sections 865 and 866 of the Criminal Code, 1892, whereby it is enacted that a person who has obtained a certificate of the Justice, who had tried the case, that a charge against him of assault and battery has been dismissed, or who has paid the penalty or suffered the imprisonment awarded, shall be released from all further proceedings, civil or criminal, for the same cause, are *intra vires* the Dominion Parliament. *Flick* v. *Brisbin*, 26 O. R. 423.

Extradition Proceedings.]—*See* Extradition.

Information—*Two Offences.*]—An information stated that the defendant, "within the space of thirty days last past, to wit: on the 30th and 31st days of July, 1892, . . . did unlawfully sell intoxicating liquor without the license therefor by law required":—

Per Hagarty, C. J. O., and Boyd, C.—Such an information does not charge two offences but only the single offence of selling unlawfully within the thirty days.

Per Osler and Maclennan, JJ. A.—Such an information does charge two offences, and is in contravention of section 845 (3) of the Criminal Code, 1892.

But, per *Curiam*, assuming that an information so worded does contravene the provisions of section 845 (3) of the Criminal Code, 1892, the defect is one "in substance or in form" within the meaning of the curative section (847) and does not invalidate an otherwise valid conviction for a single offence.

The provision of section 857, that no adjournment shall be for more than eight days is matter of procedure, and may be waived, and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect.

A conviction for a first offence under section 70 of the Liquor License Act, R. S. O. ch. 194, properly awards imprisonment in default of payment of the fine, and not in default of sufficient distress.

Regina v. *Smith*, 46 U. C. R. 442, and *Regina* v. *Hartley*, 20 O. R. 481, approved.

Judgment of the Queen's Bench Division, 23 O. R. 387, reversed. *Regina* v. *Hazen*, 20 A. R. 633.

Locality of Offence—*Affidavit Evidence.*]—A Judge cannot, upon the return to a *habeas corpus*, where a warrant shews jurisdiction, try on affidavit evidence the question where the alleged offence was committed.

Sections 4 and 5, R. S. O. ch. 70, are not intended to apply to criminal cases where no preliminary examination has taken place.

Section 752 of the Criminal Code, 56-56 Vict. ch. 29 (D.), only applies where the Court or Judge making the direction as to furthur proceedings and enquiries mentioned therein has power to enforce it, and a Court or Judge in Ontario has no power over a Judge or Justice in Quebec to compel him to "take an" proceedings or hear such evidence," etc. *Regina* v. *Defries*, *Regina* v. *Tamblyn*, 25 O. R. 645.

Recognizance of Bail—*Estreat—Writ of Fieri Facias and Capias.*]—A recognizance of bail is taken in open Court by the clerk of the Court addressing the parties, being then before him in open Court, by name, and stating the substance of the recognizance; and the verbal acknowledgment of the parties so taken is quite sufficient without more.

2. In this case a recognizance was drawn up which stated that the principal and sureties personally came before the clerk of Assize, in open Court, and acknowledged, etc.; and also stated that it was taken and acknowledged in open Court before the clerk of Assize. As a matter of fact the parties actually came before the Court, and properly acknowledged the debt to the Crown in open Court:—

Held, that the recognizance should have stated that the parties personally came before the Court, and that the recognizance was taken and acknowledged in open Court; and the name of the clerk should merely have been subscribed to it; but the errors made in drawing it up were not sufficient to avoid it.

3. Notice to the sureties of the recognizance is not necessary where it is taken as, and where this one was.

4. The provision of R. S. C. ch. 179, secs. 10 and 11, and R. S. O. ch. 88, secs. 7 and 8, requiring the written order of the Judge for the estreating or putting in process of a recognizance, applies only to recognizances, to appear to prosecute, or to give evidence, or to answer for any common assault, or to articles of the peace, and does not apply to a recognizance such as the one here in question, whereby the bail became bound for the appearance of their principal to stand his trial upon an indictment for conspiracy.

5. The estreat roll was sufficiently signed by the clerk when he signed the affidavit at the foot of the roll.

6. It is no part of the duty of the clerk in making up the roll to instruct the sheriff as to what disposition he is to make of the money therein mentioned when collected.

And where the clerk, making it up, stated it to be made in accordance with a Provincial statute, and also with two Dominion statutes, thus leaving it uncertain whether the moneys were to be paid over to the Provincial Treasurer or to the Dominion Minister of Finance:—

Held, that the words so used were surplusage, and did not affect the validity of the roll, and should be stricken out.

7. The estreat roll, as drawn up, stated that it was a roll of fines, issues, amerciaments, and forfeited recognizances, set, imposed, lost, or forfeited, by or before the Court, etc., commenced, etc., and contained the names of parties, residences, etc., with the amounts for which the bail were bound, filled in under the heading "amount of fine imposed":—

Held, that the roll sufficiently shewed the recognizance to have been forfeited, and that it was fairly entered and extracted on the roll as a forfeited recognizance:—

8. Held, that the proceedings to collect the debt due to the Crown, under the recognizances, were civil and not criminal proceedings, and were to be regulated by R. S. O. ch. 88; and the writ of *fieri facias* and *capias* issued in this case, following the form given in the schedule to the Act, was not open to any objection:—

9. Held, that, under the circumstances set forth in the affidavits, the Court would not be justified in releasing the bail from their liability. *Re Talbot's Bail*, 23 O. R. 65.

Recognizance.]—Where the affidavit accompanying a recognizance filed on a motion for a rule *nisi* to quash a conviction did not negative the fact of the sureties being sureties in any other matter, and omitted to state that they were worth $100 over and above any amount for which they might be liable as sureties, it was held insufficient.

The rule in force as to recognizances prior to the passing of the Criminal Code is still in force. *Regina* v. *Robinet*, 16 P. R. 49.

Right of Crown to Stand Aside Jurors when Panel of Jurors has been gone through.]—When a panel had been gone through and a full jury had not been obtained the Crown on the second calling over of the panel was permitted, against the objection of the prisoner, to direct eleven of the jurymen on the panel to stand aside a second time, and the Judge presiding at the trial was not asked to reserve and neither reserved nor refused to reserve the objection. After conviction and judgment a writ of error was issued :—

Held, per Taschereau, Gwynne and Patterson, JJ., affirming the judgment of the Court below, that the question was one of law arising on the trial which could have been reserved under section 259 of ch. 174 R. S. C., and the writ of error should therefore be quashed. Section 266 ch. 174 R. S. C.

Per Ritchie, C.J. and Strong and Fournier, JJ., that the question arose before the trial commenced and could not have been reserved, and as the error of law appeared on the face of the record the remedy by writ of error was applicable. *Brisebois* v. *The Queen*, 15 S. C. R. 421, referred to.

Per Ritchie, C.J., and Strong, Fournier and Patterson, JJ., that the Crown could not without shewing cause for challenge direct a juror to stand aside a second time. Section 164 ch. 174 R. S. C. *The Queen* v. *Lacombe*, 13 L. C. Jur. 259, overruled.

Per Gwynne, J., that all the prisoner could complain of was a mere irregularity in procedure which could not constitute a mistrial. *Morin* v. *The Queen*, 18 S. C. R. 407.

Right of Reply.]—It was held in a prosecution for conspiracy that although evidence was called by only one of the defendants, it might have enured to the benefit of both, and that the right to a general reply was with the counsel for the Crown. *Regina* v. *Connolly*, 25 O. R. 151.

Speedy Trials Act — *Territorial Jurisdiction.*]—The Speedy Trials Act, 51 Vict. ch. 47 (D.), is not a statute conferring jurisdiction but is an exercise of the power of Parliament to regulate criminal procedure. By this Act jurisdiction is given "to any Judge of a County Court" to try certain criminal offences :—

Held, that the expression "any Judge of a County Court," in such Act, means any Judge having, by force of the provincial law regulating the constitution and organization of County Courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a County Court Judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the provincial legislature so to do. *In re County Courts of British Columbia*, 21 S. C. R. 446.

Speedy Trials Act—*Bail Surrendering—Right to Elect to be Tried Summarily.*]—The surrender of defendants out on bail, including the surrender by a defendant himself out on his own bail, committed to gaol for trial, has the effect of remitting them to custody, and enables them to avail themselves of the Speedy Trials Act, 52 Vict. ch. 47 (D.), and to appear before the County Judge and elect to be tried summarily; and where defendants had so elected, indictments subsequently laid against them at the Assizes were held bad and quashed, even after plea pleaded where done through inadvertence, section 143 of R. S. C. ch. 174 not being in such case any bar.

Two indictments were laid against defendants, one for conspiracy to procure W. to sign two promissory notes; and the other for fraudulently inducing W. to sign the documents representing them to be agreements, whereas they were in fact promissory notes :—

Held, that several offences were not set up in each count of the indictments; that it was no objection to the indictments that the notes might not be of value until delivered to defendants; and further, that under section 78 of R. S. C. ch. 164, an indictment would lie for inducing W. to write his name on papers which might afterwards be dealt with as valuable securities.

Rex v. *Danger*, 1 Dears. & B. 307, 3 Jur. N. S. 1011; *Regina* v. *Gordon*, 23 Q. B. D. 354, considered. *Regina* v. *Burke*, 24 O. R. 64.

Substituting New Charge.]—The defendant was brought before justices of the peace on an information charging him with the indictable offence of shooting with intent to murder, and they, not finding sufficient evidence to warrant them in committing for trial, of their own motion, at the close of the case, summarily convicted the defendant for that he did "procure a revolver with intent therewith unlawfully to do injury to one J. S." It appeared by the evidence that the weapon was bought and carried and used by the defendant personally.

By the Criminal Code, section 108, it is matter of summary conviction if one has on his person a pistol with intent therewith unlawfully to do any injury to any other person.

The return to a writ of *habeas corpus* shewed the detention of the defendant under a warrant of commitment based upon the above conviction; and upon a motion for his discharge :—

Held, that the detention was for an offence unknown to the law; and, although the evidence and the finding shewed an offence against section 108, the motion should not be enlarged to allow the magistrates to substitute a proper conviction, for it was unwarrantable to convict on a charge not formulated, as to which the evidence was not addressed, upon which the defendant was not called to make his defence, and as to which no complaint was laid; and the prisoner should, therefore, be discharged. *Regina* v. *Mines*, 25 O. R. 577.

Variance between Indictment and Charge —*False Pretences.*]—On a charge of stealing 2,200 bushels of beans for which he was committed for trial the evidence before the magistrate disclosed that the prisoner had obtained certain cheques on the false pretence that "there were 2,680 bushels of beans" in his warehouse. At the Assizes he was indicted for obtaining the cheques on the false pretence "that there was then a large quantity of beans, to wit, 2,680 bushels" in his warehouse. During the progress of the trial the indictment was amended by striking out the words "a large quantity of beans, to wit," and the prisoner was convicted thereon :—

Held, no such variation as prevented the indictment being preferred for a charge founded

upon the facts or evidence ... osed within the meaning of section 641 of the Criminal Code, 1892:—

Held, also, that the prisoner not having been misled or prejudiced by the amendment, it was properly made. *Regina* v. *Patterson*, 26 O. R. 656.

IV. Specific Offences.

Bigamy—*Offence Committed in Foreign Country.*]—Conviction for bigamy quashed where the second marriage took place in a foreign country, and there was evidence that the defendant, who was a British subject, resident in Canada, left there with the intent to commit the offence.

The provisions of section 275 of the Criminal Code, making such a marriage an offence, are *ultra vires* the Parliament of Canada.

Macleod v. *Attorney-General for New South Wales*, [1891] A. C. 455, followed. *Regina* v. *Plowman*, 25 O. R.. 656.

Circus—*Merry-go-Round.*]—A city by-law, passed under sub-section 25 of section 489 of the Con. Mun. Act (1892), 55 Vict. ch. 42 (O.), prohibited exhibitions of wax works, menageries, circus riding and other such like shows, usually exhibited by showmen:—

Held, that this would not support a conviction for exhibiting a machine called a merry-go-round, as constituting an offence under the by-law or statute. *Regina* v. *Whitaker*, 24 O. R. 437.

Clandestine Removal of Goods by Tenant.]—A tenant is not liable to prosecution under 11 Geo. II. ch. 19, for the fraudulent and clandestine removal of goods from the demised premises, unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises. *Martin* v. *Hutchinson*, 21 O. R. 388.

Conspiracy—*Indictment of One of Two Conspirators.*]—A conspiracy to defraud is indictable, even though the conspirators are unsuccessful in carrying out the fraud.

One of two conspirators can be tried on an indictment against him alone, charging him with conspiring with another to defraud, the other conspirator being known in the country. *Regina* v. *Frawley*, 25 O. R. 431.

Conspiracy.]—It is a crime under section 394 of the Code to conspire by any fraudulent means to defraud any person, and so a conspiracy to permit persons to travel free on a railroad, as alleged in these cases, would be a conspiracy against the railway company. *Regina* v. *Defries*, *Regina* v. *Tamblyn*, 25 O. R. 645.

Counterfeit Notes—*Evidence Shewing Notes to be Genuine, Though Believed by Prisoner to be Counterfeit.*]—A person indicted for offering to purchase counterfeit tokens of value cannot be convicted on evidence shewing that the notes which he offered to purchase were not counterfeit, but genuine bank notes unsigned, though he believed them to be counterfeit, and offered to purchase under such belief. Galt, C. J., dissenting. *Regina* v. *Attwood*, 20 O. R. 574.

Forgery—*Incomplete Note—Payee's Name in Blank.*]—Where, in an instrument in the form of a promissory note, a blank is left for the payee's name, it is not a complete note so as to support a conviction for the forgery thereof, or for the forgery of an indorsement thereon; nor is it a document, writing or instrument within secs. 46, 47 or 50 of R. S. C. ch. 165.

Semble, a conviction might have been sustained on an indictment for forgery at common law. *Regina* v. *Cormack*, 21 O. R. 213.

Forgery.]—*See Re Garbutt*, 21 O. R. 179; 21 O. R. 465; and *Re Murphy*, 26 O. R. 163; 22 A. R. 386; *post*, Extradition.

Fortune-Telling.]—The statute 9 Geo. II. ch. 5 is in force in this Province.

By the statute the mere undertaking to tell fortunes constitutes the offence; and a conviction was affirmed where it was obtained upon the evidence of a person who was not a dupe or victim, but a decoy. *Regina* v. *Milford*, 20 O. R. 306.

Fraudulent Sale of Goods.]—Under the 28th section of R. S. C. ch. 173, every one who makes or causes to be made, amongst other things, any assignment, sale, etc., of any of his goods and chattels, with intent to defraud his creditors, or any of them, is guilty of a misdemeanour:—

Held, it is not essential, under the Act, that the debt of the creditor should, at the time of the sale, etc., be actually due. *Regina* v. *Henry*, 21 O. R. 113.

Fraudulent Transfer of Goods—*Joinder of Action for Recovery of Penalty—Notes, Goods and Chattels.*]—An action by the party aggrieved to recover the moiety of the penalty imposed by section 3 of 13 Eliz. ch. 5, may be joined with an action to set aside a fraudulent transfer under that Act, in this case the transfer of certain promissory notes.

Bills and notes are, by virtue of the legislation passed since 13 Eliz., goods and chattels within that Act.

Section 28 of the R. S. C. ch. 173 only applies to the concluding part of said section 3, namely that relating to imprisonment and conviction, etc. *Millar* v. *McTaggart*, 20 O. R. 617.

Gaming—*Betting—Horse Race in Foreign Country.*]—The defendant occupied a tent in a village open to and frequented by the public, in which there was a telegraph wire to an incorporated race track in the United States, where horse racing and betting were legalized. In the tent was a blackboard on which were the names of the horses and jockeys taking part in the race, with the weights and the track quotations, and as the race was being run, an operator called off the progress thereof, giving the name of the winner and of the second and third horses, and marked them on the board. Duplicate tickets were furnished in the tent to applicants, which requested defendant to telegraph one B. at the race track to place a certain amount of money on a horse named by the applicant at track quotations, and upon transmission thereof, the applicant agreed to pay defendant ten cents, and that all liability on defendant's part should cease. On the tickets being handed in, one of them was stamped with the date of its receipt and returned

to the applicant. The aggregate amount of the money so received was notified by telegram to B. and placed by him before the race with bookmakers on the track, B. paying defendant a percentage on the moneys received for him and ten cents on each application. B. had an agent in another part of the village, whom he furnished with money to pay any winnings by remitting same to him or giving him orders on defendant for stated sums :—

Held, that the defendant was properly convicted under sections 197 and 198 of the Code, of keeping a common betting house, the place in question being opened and kept for the reception of money by defendant on behalf of B. as consideration for an undertaking to pay money thereafter to the depositor on the event of a horse race. *Regina* v. *Giles*, 26 O. R. 586.

Gaming — *Becoming Custodian of Wager—Restriction to Events to take Place in Canada.*]—R. S. C. ch. 159, sec. 9, provides that 'every one who becomes the custodian or depositary of any money, property, or valuable thing staked, wagered, or pledged upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast, is guilty of a misdemeanour" :—

Held, that this enactment does not extend to the result of any election, race, contest, etc., to take place outside of the Dominion of Canada. *Wells* v. *Porter*, 3 Scott 141, followed. *Regina* v. *Smiley*, 22 O. R. 686.

Gaming—*Keeping a Common Gaming House—Offence in United States.*]—In a betting game called "policy," the actual betting and payment of the money, if won, took place in the United States ; all that was done in Canada being the happening of the chance, on which the bet was staked, by means of implements operated in the house of the defendant :—

Held, there was no offence under section 198 of the Criminal Code of 1892 of keeping a common gaming house within that section. *Regina* v. *Wettman*, 25 O. R. 459.

Gaming—*Betting on Election.*]—*See Walsh* v. *Trebilcock*, 23 S. C. R. 695, *post*, GAMING.

Larceny.]—A conviction under section 85 of the Larceny Act, R. S. C. ch. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under section 65. Two bills of indictment were presented against A. and B. under sections 85 and 83 of the Larceny Act. By the first count each was charged with having unlawfully and with intent to defraud taken and appropriated to his own use $7,000 belonging to the heirs of C., so as to deprive them of their beneficiary interest in the same. The second count charged B. (the appellant) with having unlawfully received the $7,000, the property of the heirs which had before then been unlawfully obtained and taken and appropriated by said A., the taking and receiving being a misdemeanour under section 85, ch. 164 R. S. C. at the time when he so received the money. A. who was the executor of C.'s estate, and was the custodian of the money, pleaded guilty to the charge on the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving. On the question submitted, in a reserved case, whether B. could be found guilty of unlawfully receiving money from A., who was custodian of the money as executor, the Court of Queen's Bench for Lower Canada (on appeal), Sir A. Lacoste, C.J., dissenting, held the conviction good. At the trial it was proved that A. and B. agreed to appropriate the money and that when A. drew the money he purchased his railway ticket for the United States, made a parcel of the money, took it to B.'s store, and handed it to him saying: "Here is the boodle; take good care of it." On the same evening, he absconded to New York. One appeal to the Supreme Court of Canada :—

Held, affirming the judgment of the Court below, that whether A. be a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B. or previously, B. was properly convicted under section 85 ch. 164, R. S. C. of receiving it knowing it to have been unlawfully obtained. Gwynne, J., dissenting. *McIntosh* v. *The Queen*, 23 S. C. R. 180.

Marriage—*Solemnization of—Minister—"Religious Denomination."*] — "The Reorganized Church of Jesus Christ of Latter Day Saints," is a religious denomination within the meaning of R. S. O. ch. 131, sec. 1 ; and a duly ordained priest thereof is a minister authorized to solemnize the ceremony of marriage.

Upon a case reserved, a conviction of such a priest for unlawfully solemnizing a marriage was quashed.

Semble, the words of the statute "church and religious denomination" should not be construed so as to confine them to Christian bodies. *Regina* v. *Dickout*, 24 O. R. 250.

Misbehaviour in Office—*Audit Department—Pecuniary Damage.*]—An officer in the public service of Canada having charge of the public dredging and whose duty it was to audit the expenditure therefor, used property of his own in connection with the dredging, having first placed it in the name of a third party, in whose name also he made out the accounts. No undue gains were made by him, but as such public officer he certified to the correctness of the accounts respecting the use of his said property as though for services rendered by contractors with the Government, and thereby received for himself a payment for these services :—

Held, that he had been guilty of misbehaviour in office, which is an indictable offence at common law, and that to constitute the offence it was not essential that pecuniary damage should have resulted to the public by reason of such irregular conduct, nor that the defendant should have acted from corrupt motives. *Regina* v. *Arnoldi*, 23 O. R. 201.

Practising Medicine—*Apothecary.*]—A person went into a druggist's shop, stating he was sick, and describing his complaint, which the druggist said he believed to be diarrhœa, and after advising him as to diet, gave him a bottle of medicine, for which he charged fifty cents. The druggist stated that he had several kinds of diarrhœa mixture, and had sometimes to inquire as to symptoms in order to decide what mixture to give :—

Held, that this was practising medicine for gain within section 45 of the Medical Act, R. S. O. ch. 148 :—

Held, also, that the fact of the druggist being registered under the Pharmacy Act, R. S. O. ch. 151, which entitled him to act as an apothecary as well as a druggist, did not authorize the practice of medicine.

The meaning of "apothecary" considered. *Regina* v. *Howarth*, 24 O. R. 561.

Public Health.]—Held, that the unloading of manure from a car on a certain part of railway premises into waggons, to be carried away, came within the terms of a by-law, amending the by-law appended to the Public Health Act, R. S. O. ch. 205, and prohibiting the unloading of manure on said part of said premises; that the use of the word "manure" in the amending by-law was not of itself objectionable; and that it was not essential to shew that the manure might endanger the public health.

A conviction for unloading a car of manure on the premises, as contrary to the by-law, was therefore affirmed. *Regina* v. *Redmond*, *Regina* v. *Ryan*, *Regina* v. *Burk*, 24 O. R. 331.

Public Morals—*By-law against Swearing in Street or Public Place—Private Office in Custom House.*]—A city by-law enacted that no person should make use of any profane swearing, obscene, blasphemous or grossly insulting language, or be guilty of any other immorality or indecency in any street or public place :—

Held, that the object of the by-law was to prevent an injury to public morals, and applied to a street or a public place *ejusdem generis* with a street, and not to a private office in the custom house. *Regina* v. *Bell*, 25 O. R. 272.

Ratification of Criminal Act.]—*See Scott* v. *Bank of New Brunswick*, 23 S. C. R. 277, *post*, FRAUD AND MISREPRESENTATION.

Seduction—*Rape.*]—A prisoner indicted and tried under section 3, clause (*a*), of the Act respecting offences against public morals and public convenience, R. S. C. ch. 157, with having seduced a girl under sixteen :—

Held, properly convicted of such offence, although the evidence given, if believed in whole, would have supported a conviction for rape, an indictment for which had been previously ignored by the grand jury. *Regina* v. *Doty*, 25 O. R. 362.

Threatening Letter—*Accusation of Abortion.*]—A crime punishable by law with imprisonment for a term not less than seven years means a crime the minimum punishment for which is seven years; and, as no minimum term is prescribed for the crime of abortion, sending a letter threatening to accuse a person of that crime is not a felony within the meaning of R. S. C. ch. 173, sec. 3. *Regina* v. *Popplewell*, 20 O. R. 303.

CROPS.

Chattel Mortgage of Crops.]—*See Bloomfield* v. *Hellyer*, 22 A. R. 232; and *Canada Permanent Loan and Savings Co.* v. *Todd*, 22 A. R. 515, *ante* 110.

Damages for Furnishing Inferior Seed.]—*See Stewart* v. *Scalthorpe*, 25 O. R. 544, *post* 328.

CROSS-APPEAL.

See COUNTY COURT — COURT OF APPEAL — SUPREME COURT OF CANADA.

CROWN.

I. EXPROPRIATION OF LAND.

1. *Assessment of Damages.*

(a) *General Rules.*

Enhancement of Future Value of Property by Railway—*Tender by the Crown—Bare Indemnity—Costs.*]—Upon an expropriation of land under the provisions of 50-51 Vict. ch. 17, the measure of compensation is the depreciation in the value of the premises assessed, not only in reference to the damage occasioned by the construction of the railway, but also in reference to the loss which may probably result from its operation.

2. Where there was evidence that the railway would enhance the value for manufacturing purposes of certain portions of land remaining to claimant upon an expropriation, but it did not appear that there then was, or in the near future would be, any demand for the land for such purposes, the Court did not consider this a sufficient ground upon which to reduce the amount of compensation to which the claimant was otherwise entitled.

3. In assessing the value of lands taken or injuriously affected by a public work the owner should be allowed a liberal, not a bare indemnity.

4. Where the tender was not unreasonable and the claim very extravagant, the claimant was not given costs although the amount of the award exceeded somewhat the amount tendered. *McLeod* v. *The Queen*, 2 Ex. C. R. 106.

Imperial Lands Clauses Consolidation Act, and Railway Clauses Consolidation Act—"*The Government Railways Act, 1881.*"]—In so far as "The Government Railways Act, 1881," re-enacts the provisions of the Lands Clauses Consolidation Act, 8-9 Vict. (Imp.) ch. 18, and the Railway Clauses Consolidation Act, 8-9 Vict. (Imp.) ch. 20, where the latter statutes have been authoritatively construed by a Court of Appeal in England such construction should be adopted by the Courts in Canada. *Trimble* v. *Hill*, 5 App. Cas. 342, and *City Bank* v. *Barrow*, 5 App. Cas. 664 referred to. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Loss both by Construction and Operation of Railway.]—Where lands are taken and others held therewith injuriously affected, the measure of compensation is the depreciation in value of the premises damaged, assessed not only with reference to the injury occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user. *Straits of Canseau Marine R. W. Co.* v. *The Queen*, 2 Ex. C. R. 113.

Market Value — *Real Value to Owner at Time of Expropriation.*]—In an expropriation matter the Court should assess damages in the same way a jury would do in an action for forcible eviction. It is not merely the depreciation in the actual market value of the land that a claimant has to be indemnified for, it is the depreciation in such value as it had to him that should be the basis of compensation. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Minerals—*Tests.*]—In a case of expropriation the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land.

Brown v. *Commissioner for Railways*, 15 App. Cas. 240, referred to.

Where, however, such tests or experiments have not been resorted to, the Court, or jury, must find the facts as best it can from the indications and probabilities disclosed by the evidence. *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Municipal Assessment Rolls.]—The valuation of a property appearing upon the municipal assessment rolls does not constitute a test of the actual value upon which compensation should be based where such valuation is made arbitrarily, and without consideration of the trade carried on upon the property or the profits derivable therefrom. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Offer to Settle Claim.]—Where claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in the pleadings, the Court, while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses. *Falconer* v. *The Queen*, 2 Ex. C. R. 82.

Official Arbitrators—*Jurisdiction.*]—Section 34 of 31 Vict. (D.) ch. 12, The Public Works Act, which provides for the reference to the Board of Official Arbitrators of claims for damages arising from the construction, or connected with the execution, of any public work only contemplates claims for direct or consequent damages to the property, and not to the person or to the business of the claimant. *McPherson* v. *The Queen*, 1 Ex. C. R. 53.

Potential Advantages Derived from a Public Work.]—Notwithstanding the generality of the terms of 44 Vict. ch. 25, sec. 16, re-enacted by R. S. C. ch. 40, sec. 15, and 50 & 51 Vict. ch. 16, sec. 31, which provides that the official arbitrators shall take into consideration the advantages accrued, or likely to accrue to the claimant, or his estate, as well as the injury or damage occasioned by reason of the public work, such advantages must be limited to those which are special and direct to such estate, and not construed to include the general benefits shared in common with all the neighbouring estates. *The Queen* v. *Carrier*, 2 Ex. C. R. 36.

Profits.]—The loss of profits derivable from the prosecution of a certain business is of a personal character, and cannot be construed as a direct or consequent damage to property within the meaning of section 34 of 31 Vict. ch. 12. *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121

Profits]—Where lands are injuriously affected but no part thereof expropriated, damages to a man's trade or business, or any damage not arising out of injury to the land itself, are not grounds of compensation; but where land has been taken, compensation should be assessed for all direct and immediate damages arising from the expropriation, as well as from the construction and maintenance of the works.

Jubb v. *Hull Dock Co.*, 9 Q. B. 443, and *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 Ex. 221, and L. R. 5 H. L. 418, referred to. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Prospective Capabilities of Property — *Value to owner—Unity of Estate—Advantage Accruing to Paper Town from Railway.*]—In assessing damages in cases of expropriation, regard should be had to the prospective capabilities of the property arising from its situation and character.

2. In awarding compensation for property expropriated, the Court should consider the value thereof to the owner and not to the authority expropriating the same. *Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37, followed.

3. In assessing damages where land has been expropriated, the unity of the estate must be considered, and if, by the severance of one of several lots so situated that the possession and control of each give an enhanced value to them all, the remainder is depreciated in value, such

depreciation is a substantive ground for compensation.

4. The advantage resulting to the owner of a paper town from the Crown making it the terminus of a Government railway, and constructing within its limits a station-house and other buildings, is one that should be taken into account by way of set-off under 50-51 Vict. ch. 16, sec. 31. *Paint* v. *The Queen*, 2 Ex. C. R. 149.

Prospective Value of Property Injur d by Construction or Operation of a Public Work.]—Under the provisions of 31 Vict. ch. 12, sec. 34, in assessing compensation in respect of damage to property arising from the construction or connected with the execution of any public work, the prospective capabilities of such property must be taken into consideration, as they may form an important element in determining its real value.

Mayor of Montreal v. *Brown*, 2 App. Cas. 168, referred to. *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121.

Quebec.]—Apart from any legislation of the Dominion Parliament, where lands have been expropriated for any purpose, a right to compensation obtains under the law of the Province of Quebec in the same way as under the law of England.

Under the law of the Province of Quebec where interest is allowed on an award by the official arbitrators, a claim for loss of profits or rent cannot be entertained by the Court on appeal, as such interest must be regarded as representing the profits. *Jones* v. *The Queen*, 1 Ex. C. R. 191.

Sales of Similarly Situated Properties.]—When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value. *Falconer* v. *The Queen*, 2 Ex. C. R. 82.

(b) *Lands Injuriously Affected.*

Drainage — *Prospective Damages — Acquittance by Predecessor in Title.*]—Where, by the construction of a railway, the claimant is put to greater trouble and expense in carrying off surface water from his lands through the boundary ditches between his farm and the farms adjoining he is entitled to compensation therefor.

(2.) The injury thereby occasioned to claimant is one that could have been foreseen at the time when part of his farm was taken for the purposes of the railway, and was discharged by an acquittance given to the company of all damages resulting from such expropriation. *Simoneau* v. *The Queen*, 2 Ex. C. R. 391.

Fire—*Increased Risk from Fire by Railway.*]—The plaintiffs were owners of a water-side property upon which they operated two marine railways. A portion of this property was expropriated for the right of way of a Government railway, the track of the latter being situated in such close proximity to the plaintiffs' works that the works, as well as ships in course of repair upon them, would be in danger of taking fire from locomotives when the Government railway was put in operation. In consequence of this increased risk from fire it was shewn that plaintiffs would have to pay higher rates of insurance upon their works than they had theretofore paid, and that ships might, for the same reason, be deterred from using the marine railways :—

Held, that the damage resulting from such increased risk from fire was a proper subject for compensation. *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, and *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, referred to.

(2.) Where lands are taken and others held therewith injuriously affected, the measure of compensation is the depreciation in value of the premises damaged assessed not only with reference to the injury occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user. *Straits of Canseau Marine R. W. Co.* v. *The Queen*, 2 Ex. C. R. 113.

Frightening Horses—*Interfering with Work —Market Value.*]—A portion of the claimant's property, although not damaged by the construction of the railway, was injuriously affected by its operation, inasmuch as near a certain point thereon trains emerged suddenly and without warning from a snow-shed, frightening the claimant's horses and thereby interfering with the prosecution of his work :—

Held, that this was a proper subject for compensation.

Where certain land remaining to the owner was not appreciably affected in respect of the value it had to him for the purposes of occupation, the damages were ascertained and assessed in respect of its depreciation in market value. *Vezina* v. *The Queen*, 2 Ex. C. R. 11.

Injury Done — *Lands Clauses Consolidation Act.*]—The phrase "injury done" in 31 Vict. (D.) ch. 12, sec. 40, is commensurate with, and has the same intendment as, the phrase "injuriously affected" in 8-9 Vict. ch. 18, sec. 68, Imperial Lands Clauses Consolidation Act, and, in so far as the similarity extends, cases decided under the Imperial Act may be cited with authority in construing the Canadian Statute. *McPherson* v. *The Queen*, 1 Ex. C. R. 53.

Obstruction of Access—*Construction of Railway Siding on Sidewalk Contiguous to Land.*]—Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under the Government Railways Act, 1881, unless the injury (1) is occasioned by an act made lawful by the statutory powers exercised, (2) is such an injury as would have sustained an action but for such statutory powers, and (3) is an injury to lands or some right or interest therein, and not a personal injury or an injury to trade.

2. The construction of a railway siding along the sidewalk contiguous to a claimant's lands whereby access to such lands is interfered with, and the frontage of the property destroyed for the uses for which it is held (in this case for sale in building lots), is such an injury thereto as will entitle the owner to compensation.

Quære.—Whether the rule that compensation, in cases of injurious affection only, must be confined to such damages as arise from the construction of the authorized works, and must not be extended to those resulting from the user of such works, is applicable to cases arising under the Government Railways Act, 1881? *The Queen* v. *Barry*, 2 Ex. C. R. 333.

Obstruction of Access.]—The defendant was the owner of a dwelling-house and property fronting on a public highway. In the construction of a Government railway, the Crown erected a bridge or overhead crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had theretofore freely enjoyed:—

Held, that the defendant was entitled to compensation under the Government Railways Act and the Expropriation Act. *Beckett* v. *Midland Railway Company*, L. R. 3 C. P. 82, referred to. *The Queen* v. *Malcolm*, 2 Ex. C. R. 357.

Obstruction of Canal.]—*See Fairbanks* v. *The Queen*, 24 S. C. R. 711.

Potential Advantage of Railway to Remaining Property.]—On appeal from an award of the official arbitrators, the Court, in assessing the amount of compensation to be paid to the owner, declined to take into consideration any advantage that would accrue to the property if a siding connecting the property with the railway were constructed, as there was no legal obligation upon the Crown to give such siding, and it might never be constructed. *Charland* v. *The Queen*, 1 Ex. C. R. 291.

Profits—*Flooding caused by Construction of Railway — Loss of Profits from Product of Farm.*]—In assessing damages for injury occasioned to a property by the construction of a railway, the annual loss of profits since the commencement of the injury as well as the permanent decrease in the value of the property, must be taken into consideration. *Pouliot* v. *The Queen*, 1 Ex. C. R. 313.

Profits—*Loss of Profits of Business in Consequence of Construction and Operation of a Railway.*]—Although a claimant is entitled to reasonable compensation for the damage sustained in respect of the injury to, and depreciation in value of, his property arising from the construction and operation of a railway in its immediate vicinity, he is not entitled to damages for loss and injury to his business consequent thereon; nor for extra rates of insurance it might become necessary for him to pay upon vessels in course of construction in his shipyard by reason of increased risk from fire from the operation of the railway. *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243, followed. *McPherson* v. *The Queen*, 1 Ex. C. R. 53.

Water Rights—*Prospective Capabilities of Property—Unnavigable Stream of Water Running through Claimant's Land.*]—Where the Crown in the construction of a public work had forever destroyed the milling capabilities of a property and deprived the owner of a future income derivable from the property as applied to such a use, and had rendered useless certain mills situate thereon, together with the machinery in the mills, upon a special case claiming damages in respect of these matters being submitted to the official arbitrators they dismissed the claim as not recoverable at law. On appeal from the award of the official arbitrators:—

Held, in assessing compensation in respect of damage to property arising from the construction, or connected with the execution, of any public work, under the provisions of 31 Vict. ch. 12, sec. 34, the prospective capabilities of such property must be taken into consideration, as they may form an important element in determining its real value. *Mayor of Montreal* v. *Brown*, 2 App. Cas. 168, referred to.

(2.) The owner of land through which unnavigable water flows in its natural course is proprietor of the latter by right of accession; it is at his exclusive disposition during the interval it crosses his property, and he is entitled to be indemnified for the destruction of any water power which has been or may be derivable therefrom. *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121.

(c) *Lands Taken.*

Assessment—*Valuation of Property.*]—The valuation of a property appearing upon the municipal assessment rolls does not constitute a test of the actual value upon which compensation should be based where such valuation is made arbitrarily, and without consideration of the trade carried on upon the property or the profits derivable therefrom. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Building Purposes.]—The Crown had expropriated a certain portion of land which the claimant contended was held for sale as building lots. It was established in evidence that such land had not been laid off into lots prior to the expropriation, and that none of it had theretofore been sold for building purposes. There was evidence, however, to shew that there was a remote probability that the land would become available for such purposes upon the extension of the limits of an adjoining town:—

Held, that while such remote probability added something to the value which the property would otherwise have had, compensation should not be based on any supposed value of the land for building purposes at the time of the expropriation. *Kearney* v. *The Queen*, 2 Ex. C. R. 21.

Building Purposes—*Sales of Similarly Situated Properties—Crossings.*]—When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value.

(2) There is no legal liability upon the Crown to give a claimant a crossing over any Government railway, and where the Crown offered by its pleadings to construct a crossing for claimant, the Court assessed damages in view of the fact that there was no means of

enforcing the performance of such undertaking. *See* now 52 Vict. ch. 38, sec. 3.

(3) Where claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in his pleadings the Court, while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses. *Falconer* v. *The Queen*, 2 Ex. C. R. 82.

Character of the Title.]—Claimants' title to a water lot at Levis, in the harbour of Quebec, was based on a grant from the Lieutenant-Governor of Quebec, prior to Confederation. The grant contained, *inter alia*, a provision that, upon giving the grantee twelve months' notice, and paying him a reasonable sum as indemnity for improvements, the Crown might resume possession of the said water lot for the purpose of public improvement :—

Held, the property being situated in a public harbour, this power of resuming possession for the purpose of public improvement, would be exercisable by the Crown as represented by the Government of Canada. *Holman* v. *Green*, 6 S. C. R. 707, referred to.

(2.) Inasmuch as the Crown had not exercised this power, but had proceeded under the expropriation clauses of *The Government Railways Act*, the claimants were entitled to recover the fair value of the lot at the date of expropriation. The value, however, should be determined with reference to the nature of the title. *Samson* v. *The Queen*, 2 Ex. C. R. 30.

Market Value.]—*It* is the real value of the land to the owner at the time of the expropriation that must be taken as the basis of compensation ; and where claimant sought to recover damages in respect of a portion of his farm as a gravel pit, but failed to shew that it had a value *quoad hoc* at the time of the taking, the Court declined to assess its value otherwise than as farm land. *Vezina* v. *The Queen*, 2 Ex. C. R. 11.

Market Value—*Nature of Title.*]—In assessing compensation to be paid to an owner whose land has been expropriated, the market value of the property should not be exclusively considered. Although the claimant has the right to sell his property, and should, therefore, be indemnified in respect of any loss which, in consequence of the expropriation he might make such sale, he is not bound to sell, and may reasonably prefer to keep his property for the purposes of his business ; and in that case should he indemnified for any depreciation in its value to him for the purposes for which he has been accustomed, and still desires to use it.

(2) In assessing compensation to be paid to a claimant, whose land has been expropriated, the Court will look at the nature of his title as one of the criteria of value. *The Queen* v. *Carrier*, 2 Ex. C. R. 36.

Market Value—*Real Value to Owner at Time of Expropriation.*]—In an expropriation matter the Court should assess damages in the same way a jury would do in an action for forcible eviction. It is not merely the depreciation in the actual market value of the land that a claimant has to be indemnified for, it is the depreciation in such value as it had to him that should be the basis of compensation. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Prospective Capabilities of Property—*Advantage Accruing to Projected Town from Railway.*]—In assessing damages in cases of expropriation, regard should be had to the prospective capabilities of the property arising from its situation and character.

(2) In awarding compensation for property expropriated, the Court should consider the value thereof to the owner, and not to the authority expropriating the same. *Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37, followed.

(3) In assessing damages where land has been expropriated, the unity of the estate must be considered, and if by the severance of one of several lots so situated that the possession and control of each give an enhanced value to them all, the remainder is depreciated in value, such depreciation is a substantive ground for compensation.

(4) The advantage resulting to the owner of a paper town from the Crown making it the terminus of a Government railway, and constructing within its limits a station-house and other buildings, is one that should be taken into account by way of set-off under 50-51 Vict. ch. 16, sec. 13. *Paint* v. *The Queen*, 2 Ex. C. R. 149. Affirmed by the Supreme Court, 18 S. C. R. 718.

Prospective Capabilities of Land for More than One Purpose—*Basis of Valuation.*]—B. & Co. were owners of a lot of uncleared land in the parish of St. Paul, Province of Manitoba, and upon which certain agents of the Dominion Government had entered at different times, under the provisions of sec. 25 of 31 Vict. ch. 12, and taken therefrom large quantities of sand and gravel for the purposes of the Canadian Pacific railway, amounting in all to some 82,000 cubic yards. For the sand and gravel so taken the Government offered B. & Co. $72.50, which they refused to accept. The claim was then referred to the official arbitrators, who valued the property as farm land, and awarded B. & Co. $100 in full compensation and satisfaction of their claim. On appeal from this award :—

Held, that the official arbitrators were wrong in assessing the damages in respect of the agricultural value of the land ; and that such assessment should have been made in respect of its value as a sand and gravel pit.

Semble, where lands are taken which possess capabilities rendering them available for more than one purpose, under section 40 of the Public Works Act, 31 Vict. ch. 12, compensation for such taking should be assessed in respect of that purpose which gives the lands their highest value. *Burton* v. *The Queen*, 1 Ex. C. R. 87.

Siding.]—On appeal from an award of the official arbitrators, the Court, in assessing the amount of compensation to be paid to the owner, declined to take into consideration any advantage that would accrue to the property if a siding connecting the property with the railway were constructed, as there was no legal obligation upon the Crown to give such siding, and it might never be constructed. *Charland* v. *The Queen*, 1 Ex. C. R. 291.

Special Value to Owners—*Advantages Derived from a Public Work—Nature of Title.*]—In assessing compensation to be paid to an owner whose land has been expropriated, the market value of the property should not be exclusively considered. Although the claimant has the right to sell his property, and should, therefore, be indemnified in respect of any loss which, in consequence of the expropriation, he might make on such sale, he is not bound to sell, and may reasonably prefer to keep his property for the purpose of his business; and in that case should be indemnified for any depreciation in its value to him for the purpose for which he has been accustomed, and still desires to use it.

(2) Notwithstanding the generality of the terms of 44 Vict. ch. 25, sec. 16, re-enacted by R. S. C. ch. 40, sec. 15, and 50-51 Vict. ch. 16, sec. 31, which provides that the official arbitrators shall take into consideration the advantages accrued, or likely to accrue, to the claimant or his estate, as well as the injury or damage occasioned by reason of the public work, such advantages must be limited to those which are special and direct to such estate, and not construed to include the general benefit shared in common with all the neighbouring estates.

(3) In assessing compensation to be paid to a claimant whose land has been expropriated, the Court will look at the nature of his title as one of the criteria of value. *The Queen* v. *Carrier*, 2 Ex. C. R. 36.

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2. *Crossings.*

Damage Occasioned by Want of Crossing.]—By the absence of a crossing over the railway, claimant was deprived of access to the shore, and thereby suffered loss in the use and occupation of the property remaining to her :—

Held, that claimant was entitled to compensation in respect of the damage resulting from the want of a crossing. *Kearney* v. *The Queen*, 2 Ex. C. R. 21.

Damage Occasioned by Want of Crossing.]—Where, upon the expropriation of land for the right of way of a Government railway through a claimant's property, a crossing over the railway is not provided by the Crown, damages will be allowed for the depreciation of his property resulting from the absence of such crossing. *Guay* v. *The Queen*, 2 Ex. C. R. 18.

Offer to Give Crossing — *Assessment of Damages in respect thereof.*]—There is no legal liability upon the Crown to give a claimant a crossing over any Government railway, and where the Crown offered by its pleadings to construct a crossing for claimant, the Court assessed damages in view of the fact that there was no means of enforcing the performance of such undertaking. *See* now 52 Vict. ch. 38, sec. 3. *Falconer* v. *The Queen*, 2 Ex. C. R. 82.

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3. *Miscellaneous Cases.*

Agreement to Accept a Certain Sum as Compensation.]—Defendants entered into a written agreement to sell and convey to the Crown, by a good and sufficient deed, a certain quantity of land, required for the purposes of the Cape Breton Railway, for the sum of $1,250. At the date of such agreement the centre line of the railway had been staked off through the defendants' property, and they were fully aware of the location of the right of way and the quantity of land to be taken from them for such purposes. Thereafter, and within one year from the date of such agreement, the land in dispute was set out and ascertained, and a plan and description thereof duly deposited of record, in pursuance of the provisions of R. S. C. ch. 39. Upon the defendants refusing to carry out their agreement on the ground that the damages were greater than they anticipated, and the matter being brought into Court on the information of the Attorney-General, the Court assessed the damages at the sum so agreed upon.

Quære.—Is the Crown in such a case entitled to specific performance? *The Queen* v. *McKenzie*, 2 Ex. C. R. 198.

Claimant's Acquiescence in Construction of Culverts.]—The suppliant sought to recover damages for the flooding of a portion of his farm at Isle Verte, P.Q., resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under the hand of the suppliant, given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the Intercolonial Railway, whereby he accepted a certain sum "in full compensation and final settlement for deprivation of water, fence-rails taken, damage by water, and all damages past, present and prospective arising out of the construction of the Intercolonial Railway," and released the Crown "from all claims and demands whatever in connection therewith." It was also proved that although the works were executed subsequent to the date of this release, they were undertaken at the request of the suppliant and for his benefit, and not for the benefit of the railway, and that, with respect to part of them, he was present when it was being constructed and actively interfered in such construction :—

Held, that he was not entitled to compensation. *Bertrand* v. *The Queen*, 2 Ex. C. R. 285.

Claimant's Damages—*Damages for Breach of Contract Claimant was Forced to Pay by Reason of an Expropriation for a Government Railway.*]—The claimants sought to recover from the Crown the amount of damages they alleged they were obliged to pay to a contractor who was prevented by the expropriation from completing the construction of a wharf he had undertaken to build for them :—

Held, that as the contractor had been prevented from completing the construction of the wharf by the exercise of powers conferred by Act of Parliament, the claimants were excused from any liability to him in respect of the breach of contract and could not maintain any claim against the Crown in that behalf. *Samson* v. *The Queen*, 2 Ex. C. R. 30.

Damage to Property from Works Executed on Government Railway—*Parol Undertaking to Indemnify Owners for Costs of Repairs by Officer of the Crown—Crown's Liability There-*

under.]—The claimant's property having been injuriously affected in the carrying out by the Crown of certain improvements in the yards and tracks of the Intercolonial Railway at and near its station in the city of St. John, N.B., A., the chief engineer of the railway, verbally agreed with the claimants that the works which it was necessary to execute in order to restore their property to its former safe and serviceable condition, should be executed under the direction of M., the claimants' engineer, and that the Crown would pay to the claimants the cost thereof.

The exact extent and character of the works to be so executed were never definitely settled. The works executed under M.'s direction exceeded what were necessary to remove the injury done, and to a certain extent added to the permanent value of the claimant's property. M. did not act in bad faith, but erred in judgment.

The work, however, was done upon and adjacent to the railway property, where it was open at all times to the inspection of the officers and engineers of the railway, and the necessary excavations were made for M. by men employed and paid on behalf of the Crown.

The case was referred to an official referee to ascertain the amount of damages, if any, and he reported in favour of claimants for $2,655.62, less certain deductions. On appeal from this report:—

Held, affirming the report, that while the claimants were entitled to take such steps and to execute such works as were necessary to make their property as good, safe and serviceable as it was before the interference therewith, and to recover from the Crown the expenses thereby incurred, they were not entitled to improve their water system and service at the Crown's expense. They were entitled to be fully indemnified for any injury done, but to nothing more.

2. The question of A.'s authority, under the circumstances, to make a contract whereby the Crown's liability would be extended, not being raised:—

Held, that the claimants were entitled, under the contract made with A., to recover the cost of the works executed under M.'s direction. *St. John Water Commissioners* v. *The Queen*, 2 Ex. C. R. 78. Affirmed by the Supreme Court, 19 S. C. R. 125.

Dedication of Highway.] — Prior to the construction of the St. Charles Branch of the Intercolonial Railway, the claimant was in possession of property in the village of Lauzon, in the County of Lévis, P.Q., which was divided into 41 lots with a street laid out through them. A plan of the lots shewing the location of the street, had been recorded in the Registry Office for the County of Lévis. In the construction of the railway the Crown diverted this street, purchasing for that purpose one of the 41 lots in the claimant's property. Although the municipal corporation had never taken any steps to declare the said street a public way, it was used as such, was opened at both ends, and formed a means of communication between two other streets in the village, and work had been done and repairs made thereon under the direction of the rural inspector of roads. The municipal council had also, at one time, passed a resolution for the construction of a sidewalk on the street, but nothing was done thereunder. Upon the hearing of the claim it was contended on behalf of the claimant that the street in question, at the time of the expropriation, was not a highway or public road within the meaning of the Government Railways Act, 1881, 44 Vict. ch. 25, but was her private property, and that she was entitled to compensation for its expropriation. The Crown's contention was that, at the date of the expropriation, the street was a highway or public road within the meaning of The Government Railways Act, 1881, 44 Vict. ch. 25, and that the Crown had satisfied the provisions of section 5, sub-section 8, and section 49 thereof, by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was therefore not entitled to compensation:—

Held, 1. That the question was one of dedication rather than of prescription; that the evidence showed that the claimant had dedicated the street to the public; and that it was not necessary for the Crown to prove user by the public for any particular time.

2. That the law of the Province of Quebec relating to the doctrine of dedication or destination is the same as the law of England.

Semble, that 18 Vict. ch. 100, sec. 41, sub-sec. 4, Prov. Can., is a temporary provision having reference to roads in existence on July 1st, 1855, which had been left open and used as such by the public without contestation during a period of ten years or upwards. *Myrand* v. *Légaré*, 6 Q. L. R. 120, and *Guy* v. *City of Montreal*, 25 L. C. J. 132, referred to. *Bourget* v. *The Queen*, 2 Ex. C. R. 1.

Filing Plans—*Contractor to Build Government Railway.*]—Section 109 of the Government Railway Act of 1881, 44 Vict. ch. 25, provides that "no action shall be brought against any officer, employee or servant of the Department of Railways and Canals for anything done by virtue of his office, service or employment, except within three months after the act committed, and upon one month's previous notice in writing:"—

Held, reversing the judgment of the Court below, Ritchie, C.J., and Gwynne, J., dissenting, that a contractor with the Minister of Railways and Canals, as representing the Crown, for the construction of a branch of the Intercolonial Railway, is not an "employee" of the department within this section:—

Held, per Patterson and Fournier, JJ., that the compulsory powers given to the Government of Canada to expropriate lands required for any public work can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds and a plan or description filed; if these provisions are not complied with, and there is no order in council authorizing land to be taken when an order in council is necessary, a contractor with the Crown who enters upon the land to construct such public work thereon is liable to the owner in trespass for such entry. *Kearney* v. *Oakes*, 18 S. C. R. 148.

Grantor (Auteur)—*Expropriation for Purposes of Lachine Canal—Easements and Servitudes Created by Claimants' Grantor (Auteur)—Claim for Present Damages Affected by—Com-*

pensation Paid to Grantor (Auteur)—Right of Action.]—Prior to the construction of the Lachine Canal, farm lots (cadastral) Nos. 3617 and 3912, situate in the parish of Côte St. Paul, in the county of Hochelaga, P.Q., were drained, each in its own line, by a natural water-course on their northern boundary. In constructing the Lachine Canal the Dominion Government destroyed the natural drainage of the lots, and, as it was impossible to effect drainage into the canal on account of the height of the embankments, the Government built several culverts under such embankments to answer that purpose. To conduct the drainage from the four neighbouring farms west of lot 3617, as well as from lot 3617 itself and the two farms immediately east of it, to a culvert situated on lot 3912, the Government provided the said farms with a drain-ditch leading to the culvert. This system of drainage appears to have worked satisfactorily when not interfered with. For the purposes of the canal, the Government expropriated a portion of lot 3617 while it was in possession of P. J., the father of the claimants, and from whom they derived title thereto. In pursuance of an award of the official arbitrators, the Government paid the then proprietor $2,320.33, with interest from the date of expropriation, for the area of land so taken, and a further sum of $4,035.10, for all damages resulting from the expropriation. After lot 3617 came into the possession of the claimants, the occupant of one of the farms adjoining it obstructed the passage of water through the said drain-ditch and caused the said lot to become overflowed, whereby the claimants' barns and their contents were injuriously affected. Some time in the year 1853, and before lot 3912 came into possession of P. J., one of the claimants, the Government of Canada had paid for and obtained from the then owner certain easements and servitudes for the purposes of the said canal, and, in the exercise of the rights so acquired by the Crown, damage resulted to the lot and buildings erected thereon after they came into the possession of the last named claimant. Upon a claim against the Dominion Government for compensation for damages and loss of profits sustained by the claimants in respect of the use and occupation of the two lots, being submitted to the official arbitrators they found against and dismissed the same. On appeal from the award of the official arbitrators:—

Held, (1.) That in respect of lot 3617, inasmuch as compensation for all future damages arising from the expropriation had been paid to the claimants' grantor (*auteur*) while he was in possession, no right of action for such damages accrued to the claimants unless, as was not the case here, another expropriation had been made, or some new work performed, causing damages of a character not falling within the limits of those arising from the first expropriation. Moreover, if such new damages had arisen prior to the said claimants coming into possession of the lot, any right of action therefor could only have been exercised by the claimants' grantor (*auteur*).

2. That in respect to lot 3912, the claimant must abide by the easements and servitudes over and upon the property created by his grantor (*auteur*), and that the claim for damages arising out of the exercise of such rights by the Government was not well founded. *Jackson* v. *The Queen*, 1 Ex. C. R. 144.

P. E. I. Railway—*Effect of Non-Entry of Commissioners on Land Taken.*]—Under an Act of the Legislature of Prince Edward Island, 34 Vict. ch. 4, sec. 13, the Commissioners who had charge of the construction of the Prince Edward Island Railway were authorized to enter upon and take possession of any lands required for the tracks of the railway, and to the end that such taking should operate as a dedication to the public of such lands, they were required to lay off the same by metes and bounds and record a description and plan thereof in the office of the Registrar of Deeds and Keeper of Plans for the Island. By arrangement between the Commissioners and the defendant the boundary line between the railway and the latter's premises was deflected from the course originally intended, so that the same might not interfere with his buildings, and the land damages were paid and boundary fences erected and maintained in accordance with such arrangement. Commissioners subsequently appointed recorded in the office of such Registrar a description and plan which covered the land that their predecessors had by arrangement left in possession of the defendant, but they never laid off the same by metes and bounds, nor were in possession thereof:—

Held, that they had not complied with the statute, and that the Crown had not acquired title to such land. *The Queen* v. *Sigsworth*, 2 Ex. C. R. 194.

Railway—*Expropriation of a Railway by the Crown—Special Act—"Present Value of Work Done"—Allowance for Capital Expended in Railway.*]—The plaintiff company had entered into an agreement with the Dominion Government to construct, in consideration of a certain subsidy per mile, a line of railway between Oxford and New Glasgow, N. S. They entered upon the construction of the railway, but when it was partially completed abandoned active work upon it for lack of funds. The Government, having previously obtained from Parliament authority to pay all claims standing against the company on account of their partial construction of the line, and to set the same off against the company's subsidy, was empowered by 50-51 Vict. ch. 27, sec. 1, to acquire "by purchase, surrender or expropriation the works constructed and property owned by the said company" paying therefor the amount adjudged by the Court "for the present value of the work done on the said line of railway by the said company":—

Held, that the statute contemplated the taking of all the works constructed by the company and not a portion thereof; and where a portion only was taken compensation should be assessed in respect of the total value of the works.

(2) That the words "present value of the work done," as contained in section 1 of the said Act, should, in view of the preamble and surrounding circumstances, be construed to mean the value of the works constructed and the property owned by the company at the time of the passing of the Act.

(3) That the word "value" as used in the Act must be taken to mean the value of the property to the company and not to the Government; and that compensation for the taking should be

assessed at the fair value of the property at the time contemplated by the Act.

(4) The company were in possession of a right of way that had been acquired by proceedings taken under certain provincial statutes not applicable to the case, and for which the County Councils of Cumberland and Colchester had, in aid of the company's undertaking, paid the proprietors whose lands were situated in such counties :—

Held, that the company were entitled to compensation therefor :—

(5) Held, that the company were entitled to an allowance for the use of capital expended in the enterprise. *Montreal and European Short Line R. W. Co.* v. *The Queen*, 2 Ex. C. R. 159.

Unfinished Wharf—*Builder's Profit—Basis of Value.*]—Where a wharf in course of construction, and materials to be used in completing it, had been taken by the Crown, the Court allowed the claimants a sum representing the value of the wharf as it stood, together with that of the materials ; and to this amount added a reasonable sum for the superintendence of the work by the builder, who was one of the claimants, for the use of money advanced, and for the risks incurred by him during the construction thereof, in other words a sum to cover a fair profit to the builder on the work so far as completed. *Samson* v. *The Queen*, 2 Ex. C. R. 94.

Vesting Title in Crown—*Encumbrances.*]—An agreement by a proprietor to sell land to the Crown for a public work, followed by immediate possession and, within a year, by a deed of surrender, is sufficient under the Expropriation Act, sec. 6 R. S. C. ch. 39, to vest the title to such land in the Crown, and to defeat a conveyance thereof made subsequent to such agreement and possession, but prior to such surrender.

(2) Under section 11 of the said Act the compensation money for any land acquired or taken for a public work stands in the stead of such land, and any claim or incumbrance upon such land is converted into a claim to compensation, and such claim once created continues to exist as something distinct from the land and is not affected by any subsequent transfer or surrender of such land. *Partridge* v. *Great Western R. W. Co.*, 8 C. P. 97, and *Dixon* v. *Baltimore and Potomac R. W. Co.*, 1 Mackey 78, referred to. *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Waiver.]—The defendant was the owner of a dwelling-house and property fronting on a public highway. In the construction of a Government railway, the Crown erected a bridge or overhead crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had theretofore freely enjoyed :—

Held, that the defendant was entitled to compensation under the Government Railways Act and the Expropriation Act. *Berkett* v. *Midland Railway Company*, L. R. 3 C. P. 82, referred to.

(2) The defendant, and a number of other persons interested in the manner in which the crossing was to be made, met the chief engineer of Government railways and talked over the matter with him. The defendant, who does not appear to have taken any active part in the discussion, and the other persons mentioned, wished to have a crossing at rail level with gates ; but the chief engineer declining to authorize such gates, it was decided that there should be an overhead crossing with a grade of one in twenty. Subsequently the defendant signed a petition to have the grade increased to one in twelve, as the interference with the access to his property would in that way be lessened. The prayer of the petition was not granted :—

Held, that by his presence at such meeting the defendant did not waive his right to compensation.

The right of way for the line of railway had been previously acquired by the Western Counties Railway Company, and the defendant's predecessor in title had been paid the damages awarded to him. But it was clearly shewn that at the time when such damages were assessed there was no intention to construct an overhead bridge, and that they were assessed on the understanding that there was to be a crossing at rail level :—

Held, that the defendant was not, by reason of such payment, precluded from recovering compensation for injuries occasioned by the overhead bridge. *The Queen* v. *Malcolm*, 2 Ex. C. R. 357.

II. Liability.

1. *As Carriers.*

Regulations for Carriage of Freight—*Notice by Publication in Canada Gazette—Duty of Conductor of Train Carrying Live Stock in Box Cars.*]—Apart from statute the Crown is not liable for the loss or injury to goods or animals carried by a Government railway, occasioned by the negligence of the persons in charge of the train by which such goods or animals are shipped. By virtue of the several Acts of the Parliament of Canada relating to Government railways and other public works the Crown is in such a case liable, and, under the Act 50-51 Vict. ch. 16 a petition of right will lie for the recovery of damages resulting from such loss or injury. *The Queen* v. *McLeod*, 8 S. C. R. 1, and *The Queen* v. *McFarlane*, 7 S. C. R. 216, distinguished.

(2) The publication in the *Canada Gazette*, in accordance with provisions of the statute under which they are made, of regulations for the carriage of freight on a Government railway is a notice thereof to all persons having occasion to ship goods or animals by such railway.

(3) Under and by virtue of R. S. C. ch. 38, certain regulations were made by the Governor in Council whereby it was provided that all live stock carried over the Intercolonial Railway were to be loaded and discharged by the owner or his agent, and that he assumed all risk of loss or injury in the loading, unloading and transportation of the same. The regulations were, by section 44, to be read as part of the Act, and by section 50 it was enacted that the Crown should not be relieved from liability by any notice, condition or declaration where-

damage arose from the negligence, omission or default of any of its officers, employees or servants :—

Held, that the regulations did not relieve the Crown from liability where such negligence was shewn.

(4) The owner of a horse shipped in a box car, the doors of which can only be fastened from the outside, and who is inside the car with the horse, has a right to expect that the conductor of the train will see that the door of the car is closed and properly fastened before the train is started. *Lavoie* v. *The Queen*, 3 Ex. C. R. 96.

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2. *On Contracts.*

Carriage of Mails—*Authority of Postmaster-General to Bind the Crown.*]—An action will not lie against the Crown for breach of a contract for carrying mails for nine months at the rate of $10,000 a year, made by parol with the Postmaster-General and accepted by the contractor by letter, notwithstanding it was partly performed, as, if a permanent contract, being for a larger sum than $1,000 it could not be made without the authority of an order in council, and if temporary it was revocable at the will of the Postmaster-General. *Humphrey* v. *The Queen*, 20 S. C. R. 591.

Construction of Public Work — *Material Change in Plans, etc.— Waiver.*]— The appellants entered into a contract with the Dominion Government to construct a bridge for a specified sum. After the materials necessary for its construction according to the original plans and specifications had been procured, the Government altered the plans so much that an entirely new and more expensive structure became involved. The appellants were then given new plans and specifications by the Chief Engineer of Public Works, the proper officer of the Government in that behalf, and were directed by him to build the bridge upon the altered plans, being at the same time informed that the prices for the work would be subsequently ascertained. They thereupon proceeded with the construction of the bridge. Under the provisions of the written contract, the Chief Engineer was required to make out and certify the final estimate of the contractors in respect of the work done upon the bridge; and upon the completion of the bridge, a final estimate was so made and certified, whereby the appellants were declared to be entitled to a certain amount. The appellants, however, claimed to be entitled to a much larger amount, and their claim was ultimately referred by the Government to the official arbitrators, who awarded them a sum slightly in excess of that certified to be due in the final estimate. On appeal from this award :—

Held, (1) That section 7 of 31 Vict. ch. 12, which provides "that no deeds, contracts, documents or writings shall be deemed to be binding upon the Department of Public Works, or shall be held to be acts of the Minister of Public Works unless signed and sealed by him or his deputy, and countersigned by the Secretary," only refers to executory contracts, and does not affect the right of a party to recover for goods sold and delivered, or for work done and materials provided to and for another party and accepted by him.

(2) That the Crown, having referred the claim to arbitration, having raised no legal objection to the investigation of the claim before the arbitrators, and not having cross-appealed from their award, must be assumed to have waived all right to object to the validity of the second contract put forward by the claimants. *Starrs* v. *The Queen*, 1 Ex. C. R. 301.

Construction of Public Work—*Delay in Exercising Crown's Right to Inspect Materials —Independent Promise by Crown's Servant.*]—It was a term in suppliant's contract with the Crown for the construction of a public work that certain timber required in such construction should be treated in a special manner, to the satisfaction of the proper officer in that behalf of the Department of Railways and Canals. By another term of the contract it was declared that the express covenants and agreements contained therein should be the only ones upon which any rights against the Crown should be founded by the suppliant. The suppliant, immediately after entering upon the execution of his contract, notified A., the proper officer of the department in that behalf, that he intended to procure the timber at a certain place and have it treated there in the manner specified, before shipment. A. approved of the suppliant's proposal, and promised to appoint a suitable person to inspect the timber at such place. The inspector was not appointed until a considerable time afterwards, and by reason of such delay the suppliant had to pay a higher rate of freight on the timber than he otherwise would have had to pay, and was compelled to carry on his work in more unfavourable weather and at greater cost, for which he claimed damages :—

Held, on demurrer to the petition, that the Crown was not bound under the contract to have the inspection made at any particular place; and that in view of the 98th section of The Government Railways Act, 1881, and the express terms of the contract, A. had no power to vary or add to its terms, or to bind the Crown by any new promise.

(2) The suppliant's contract contained the following clause : "The contractor shall not have or make any claim or demand, or bring any action, or suit, or petition against Her Majesty for any damage which he may sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents; and it is agreed that, in the event of any such delay, the contractor shall have such further time for the completion of the work as may be fixed in that behalf by the Minister" :—

Held, that this clause covered delay by the Government's engineer in causing an inspection to be made of certain material whereby the suppliant suffered loss. *Mayes* v. *The Queen*, 2 Ex. C. R. 403. Affirmed by the Supreme Court, 23 S. C. R. 454.

Illegality of Contract—*Dominion Elections Act, 1874.*]—The information alleged an agreement with Her Majesty whereby in consideration of the conveyance by the Intercolonial Railway of certain passengers between certain stations, the defendants agreed to pay Her

Majesty, through the proper officers of that railway, the fares or passage money of such passengers at the rate therein mentioned as agreed to between the defendants and such officers. The defendants admitting the agreement as alleged, sought to avoid it by setting up as a defence that such passengers were carried on *bons* in blank signed by one of the defendants only :—

Held, on demurrer to the plea, to be no answer to the breach of contract alleged. *The Queen* v. *Pouliot*, 2 Ex. C. R. 49.

Measure of Damages for Breach of Contract for Book-binding.]—*See Boyd* v. *The Queen*, 1 Ex. C. R. 186, *post* 324.

Measure of Damages for Breach of Contract for Carrying Rails.—*See Kenney* v. *The Queen*, 1 Ex. C. R. 98, *post* 326.

Parol Contract Between Crown and Subject.]——*Quantum Meruit.*]—The provisions of section 11 of 42 Vict. ch. 7, and of the 23rd section of R. S. C. ch. 37, do not apply to the case of an executed contract ; and where the Crown has received the benefit of work and labour done for it, or of goods or materials supplied to it or of services rendered to it by the subject at the instance and request of its officer acting within the scope of his duties, the law implies a promise on the part of the Crown to pay the fair value of the same. *Hall* v. *The Queen*, 3 Ex. C. R. 373.

Undertaking by Government to Promote Legislation — *Damages — Ordnance Lands— Power of Minister of Interior to Lease Same.*]— A minister or officer of the Crown cannot bind the Crown without the authority of law.

(2) An order of His Excellency the Governor General in Council pledging the Government to promote legislation does not constitute a contract for the breach of which the Crown would be liable in damages. R. S. C. ch. 22, sec. 4 ; R. S. C. ch. 55, secs. 4 and 5, discussed.

Wood v. *The Queen*, 7 S. C. R. 631 ; *The Queen* v. *St. John Water Commissioners*, 19 S. C. R. 125 ; and *Hall* v. *The Queen*, 3 Ex. C. R. 373, referred to. *Quebec Skating Club* v. *The Queen*, 3 Ex. C. R. 387.

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3. *Intercolonial Railway.*

Boundary Ditches—*Non-Liability of Crown for Acts or Omissions of Grand Trunk Railway Company.*]—The Crown is not bound to keep in repair the boundary ditches between farms crossed by the Intercolonial Railway in the Province of Quebec.

(2) The Act 43 Vict. ch. 8, does not make the Crown liable for the acts or omissions of the Grand Trunk Railway Company in respect of the construction or management by the company of such portion of its railway in the Province of Quebec as was purchased by the Crown. *Simoneau* v. *The Queen*, 2 Ex. C. R. 391.

Boundary Ditches — *Damage to Farm from Overflow of Water — Negligence.*]— Held, affirming the judgment of the Exchequer Court, 2 Ex. C. R. 396, that under 43 Vict. ch. 8, confirming the agreement of sale by the Grand Trunk Railway Company to the Crown of the Rivière du Loup branch of their railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879 unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear, by the evidence relied on, to have been caused through the non-maintenance of the boundary ditches of claimant's farm, which the Crown is under no obligation to repair or keep open, the appellant's claim for damages must be dismissed. *Morin* v. *The Queen*, 20 S. C. R. 515.

Petition of Right — *Tort—Demurrer—Acts Authorized by Statute—Official Arbitrators.*]—On the 8th November, 1876, the suppliants filed a petition of right claiming redress against the Dominion Government for damages sustained by them by reason of the partial expropriation of their railway tracks, and incidental injury, owing to the extension of the Intercolonial Railway into the City of Halifax. The Crown demurred to the petition on the grounds that the acts in respect of which the suppliants complained were authorized by 31 Vict. ch. 13 (the Intercolonial Railway Act), and that the suppliants had not shewn good cause for relief against the Crown by petition of right :—

Held, that under the 14th section of 31 Vict. ch. 13, the only remedy suppliants had was by reference to the official arbitrators ; and that, apart from this enactment, inasmuch as the claim was founded in tort, no action could be maintained against the Crown. *Halifax City R. W. Co.* v. *The Queen*, 2 Ex. C. R. 433.

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4. *Municipal Taxes.*

See City of Quebec v. *The Queen*, 2 Ex. C. R. 450 ; *Quirt* v. *The Queen*, 19 S. C. R. 510 ; and *Rural Municipality of Cornwallis* v. *Canadian Pacific R. W. Co.*, 19 S. C. R. 702, *ante* 52.

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5. *Negligence of Officers and Servants.*

Goods Stolen While in Bond in Customs Warehouse — *Crown Not a Bailee—Personal Remedy against Officer through whose Act or Negligence the Loss Happens.*]—The plaintiffs sought to recover from the Crown the sum of $465.74, and interest for the duty paid value of a quantity of glaziers' diamonds, alleged to have been stolen from a box, in which they had been shipped at London, while such box was at the examining warehouse at the port of Montreal. On the 21st February, 1890, it appeared that the box mentioned was in bond at a warehouse for packages used by the Grand Trunk Railway Company, at Point St. Charles, and on that day the plaintiffs made an entry of the goods at the Custom House, and paid the duty thereon ($197.10). On Monday, the 24th, the Customs officer in charge of the warehouse at Point St. Charles delivered the box to the foreman of the Custom House carters, who in turn delivered it to one of his carters, who took it, with other parcels, and delivered it to a checker at the

Customs examining warehouse. The box was then put on a lift and sent up to the third floor of the building, where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen—the theft having been committed by removing the bottom of the box. Although the evidence tending to shew that the theft was committed while the box was at the Customs examining warehouse at Montreal was not conclusive, the Court drew that inference for the purposes of the case:—

Held, that, admitting the diamonds were stolen while in the examining warehouse, the Crown is not liable therefor.

(2) In such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy, except such as the injured person may have against the officers through whose personal act or negligence the loss happens. *Corse* v. *The Queen*, 3 Ex. C. R. 13.

Common Employment—*Law of Quebec.*]—A petition of right was brought by F. to recover damages for the death of his son caused by the negligence of servants of the Crown while engaged in repairing the Lachine Canal:—

Held, affirming the decision of the Exchequer Court, Taschereau, J., dissenting, that the Crown was liable under 50 & 51 Vict. ch. 16, sec. 16 (c); and that it was no answer to the petition to say that the injury was caused by a fellow servant of the deceased, the case being governed by the law of the Province of Quebec, in which the doctrine of common employment has no place. *The Queen* v. *Filion*, 24 S. C. R. 482.

Implied Liability.]—Laches cannot be imputed to the Crown, and, except where a liability has been created by statute, it is not answerable for the negligence of its officers employed in the public service. *Burroughs* v. *The Queen*, 2 Ex. C. R. 293.

Injury to Person by Accident on a Government Railway—*Burden of Proof—Latent Defect in Axle of Car—Undue Speed in Passing Sharp Curve.*]—On the trial of a petition claiming damages for personal injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must shew affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *primâ facie* case of negligence.

The immediate cause of the accident was the breaking of an axle that was defective. It was shewn, however, that great care had been used in its selection and that the defect was latent and not capable of detection by any ordinary means of examination open to the railway officials. The train had immediately before the accident passed a curve which, at its greatest degree of curvature, was one of 6° 52′. It was alleged that the persons in charge of the train were guilty of negligence in passing this curve and a switch near it at too great a rate of speed. On that point the evidence was contradictory, and, having regard to the rule as to the burden of proof stated above, it was:—

Held, that a case of negligence was not made out. *Dubé* v. *The Queen*, 3 Ex. C. R. 147.

Injury to Person on a Public Work—*Brakesman's Duty in Putting Children off Car when Trespassers—Damages.*]—The Crown is liable for an injury to the person received on a public work resulting from negligence of which its officer or servant, while acting within the scope of his duty or employment is guilty. *City of Quebec* v. *The Queen*, 2 Ex. C. R. 252, referred to.

(2) One who forces a child to jump off a railway carriage while it is in motion is guilty of negligence. The fact that the child had no right to be upon such carriage is no defence to an action for an injury resulting from such negligence. *Martin* v. *The Queen*, 2 Ex. C. R. 328. *See* the next case.

Injury to Person on Public Work—*Prescription.*]—Held, reversing the judgment of the Exchequer Court, 2 Ex. C. R. 328, that even assuming 50-51 Vict. ch. 16 gives an action against the Crown for injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the Court expresses no opinion), such Act is not retroactive in its effect and gives no right of action for injuries received prior to the passing of the Act:—

Held, also, that even assuming that under the common law of the Province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable, the injury complained of in this case having been received more than a year before the filing of the petition the right of action was prescribed under Articles 2262 and 2267 C. C.

Per Patterson, J.—The Crown is made liable for damages caused by the negligence of its servants operating Government railways by 44 Vict. ch. 25, R. S. C. ch. 38, but as the petition of right in this case was filed after the passing of 50-51 Vict. ch. 16 (1887), the claimant became subject to the laws relating to prescription in the Province of Quebec, and his action was prescribed. *The Queen* v. *Martin*, 20 S. C. R. 240.

Injury to Property by Government Railway.]—A filly, belonging to the suppliant, was run over and killed by a train upon the Intercolonial Railway. It was shewn on the trial that at the time of the accident the train was being run faster than usual in order to make up time, that it had just passed a station without being slowed and was approaching a crossing on the public highway at full speed. The engineer admitted that he saw something on the track, which he did not recognize as a horse. He, however, paid no attention to it, and made no attempt to stop his train until after it was struck:—

Held, that the engineer, as a servant of the Crown, was guilty of negligence, for which the Crown was liable under R. S. C. ch. 38, sec. 23,.

and 50-51 Vict. ch. 16, sec. 16 (*c*). *City of Quebec* v. *The Queen*, 2 Ex. C. R. 252, referred to. *Gilchrist* v. *The Queen*, 2 Ex. C. R. 300.

Injury to Property from Negligence of Crown's Servants on Public Works.]—On the 19th of September, 1889, a large portion of rock fell from a part of a cliff, alleged to be the property of the Crown, under the citadel at Quebec, blocking up a public thoroughfare in that city known as Champlain street, to such an extent that communication was rendered impossible between the two ends thereof. By their petition of right the suppliants charged that this accident was caused by the execution of works by the Crown which had the effect of breaking the flank side of the cliff, by the daily firing of guns from the citadel, and the fact that no precautions had been taken by the Crown to prevent the occurrence of such an accident. The Crown demurred to the petition on the ground, *inter alia*, that no action will lie to enforce a claim founded on the negligence, carelessness or misconduct of the Crown or its servants or officers :—

Held, (1) There being no allegation in the petition that the property mentioned was a work of defence or other public work, or part of a public work, and it not appearing therein that any officer or servant of the Crown had any duty or employment in connection with the property mentioned, or that the acts complained of were committed by such officers while acting within the scope of their duties or employment, no case was shewn by the suppliants in respect of which the Court had jurisdiction under the Exchequer Court Act, 50-51 Vict. ch. 16, sec. 16 (*c*).

(2) Under section 16 (*c*) of the said Act, the Crown is liable in damages for any death or injury to the person or to property on any public work resulting from the negligence of any officer, or servant of the Crown while acting within the scope of his duties or employment.

(3) The Crown's immunity from liability for personal negligence is in no way altered by section 16 (*c*) of the said Act. *City of Quebec* v. *The Queen*, 2 Ex. C. R. 252. *See* the next two cases.

Injury to Property on a Public Work.]—The Crown is liable for an injury to property on a public work occasioned by the negligence of its officer or servant acting within the scope of his duty. That liability is recognized in The Exchequer Court Act, sec. 16 (c), but had its origin in the earlier statute 33 Vict. ch. 23.

(2.) Prior to 1887, when the Exchequer Court Act was passed, a petition of right would not lie for damages or loss resulting from such an injury, the subject's remedy being limited to a submission of his claim to the official arbitrators, with, in certain cases after 1879, an appeal to the Exchequer Court and thence to the Supreme Court of Canada.

(3.) It is not the duty of an officer of the Crown to repair or add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the same. He must exercise reasonable care to know of the condition in which the public work under his charge is, and he must report any defect or danger that he discovers. It does not follow from the fact that a public officer does not discover a defect in, or a danger that threatens, a public work under his charge, that he is negligent. To make the Crown liable in such a case it must be shewn that he knew of the defect or danger and failed to report it, or that he was negligent in being and remaining in ignorance thereof.

Sanitary Commissioners of Gibraltar v. *Orfila*, 15 App. Cas. 406, referred to.

The injury complained of by the suppliants was caused by the falling of a part of the rock or cliff below the King's Bastion at the citadel in Quebec, in the year 1889. The falling of the rock was caused or hastened by the discharge, into a crevice of the rock, of water from a defective drain, constructed and allowed to become choked up while the citadel and works of defence were under the control of the Imperial authorities, and before they became the property of the Government of Canada. The existence of this drain and of the defect was not known to any officer of the latter Government, and was not discovered until after the accident, when a careful enquiry was made. In the year 1880 an examination of the premises had been made by careful and capable men, one of whom was the city engineer of Quebec, without their discovering its existence or suspecting that there was any discharge of water from it. The surface indications, moreover, were not such as to suggest the existence of a defective drain. The water that came out lost itself in the earth within a distance of four or five feet, and might reasonably have been supposed to be a natural discharge from the cleavages or cracks in the cliff itself :—

Held, that there was no negligence on the part of any officer of the Crown in being and remaining ignorant of the existence of this drain and of the defect in it.

Quære, whether the place where the accident happened was part of the public work ?

Semble, the Crown may be liable although the injury complained of does not actually occur on *i.e.*, within the limits of, a public work. *City of Quebec* v. *The Queen*, 3 Ex. C. R. 164. *See* the next case.

Injury to Property on a Public Work—*Nonfeasance.*]—50-51 Vict. ch. 16, secs. 16 and 58 confers upon the subject a new or enlarged right to maintain a petition of right against the Crown for damages in respect of a tort, Taschereau, J., expressing no opinion on this point.

By 50-51 Vict. ch. 16, sec. 16 (D.), the Exchequer Court is given jurisdiction to hear and determine *inter alia:* (c) Every claim against the Crown arising out of any death or injury to the person, or to the property, on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment; (*d*) Every claim against the Crown arising under any law of Canada. . . . In 1877 the Dominion Government became possessed of the property in the city of Quebec on which the citadel is situated. Many years before that a drain had been constructed through this property by the Imperial authorities, the existence of which was not known to the officers of the Dominion Government, and it was not discovered at an examination of the premises in 1880 by the city engineer of Quebec and others. Before 1877 this drain had become choked up, and the water escaping gradually loosened the earth until in 1889, a large portion of the rock fell

from the cliff into a street of the city below, causing great damage, for which compensation was claimed from the Government:—

Held, per Taschereau, Gwynne and King, JJ., affirming the decision of the Exchequer Court, 3 Ex. C. R. 164, that as the injury to the property of the city did not occur upon a public work, sub-section (*c*) of the above Act did not make the Crown liable, and, moreover, there was no evidence that the injury was caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment:—

Held, per Strong, C.J., and Fournier, J., that while sub-section (*c*) of the Act did not apply to the case, the city was entitled to relief under sub-section (*d*); that the words "any claim against the Crown" in that sub-section, without the additional words, would include a claim for a tort; that the added words "arising under any law of Canada" do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any Province of Canada, and even if the meaning be restricted to the statute law of the Dominion the effect of section 58 of 50-51 Vict. ch. 16, is to reinstate the provision contained in section 6 of the repealed Act, R. S. C. ch. 40, which gives a remedy for injury to property in a case like the present; that this case should be decided according to the law of Quebec, regulating the rights and duties of proprietors of land situated on different levels; and that under such law the Crown, as proprietor of land on the higher level, was bound to keep the drain thereon in good repair and was not relieved from liability for damage caused by neglect to do so by the ignorance of its officers of the existence of the drain:—

Held, also, per Strong, C.J., and Fournier, J., that independently of the enlarged jurisdiction conferred by 50-51 Vict. ch. 10, the Crown would be liable to damages for the injury complained of, not as for a tort but for a breach of its duty as owner of the superior heritage by altering its natural state to the injury of the inferior proprietor. *City of Quebec* v. *The Queen*, 24 S. C. R. 420.

Personal Injuries Received on Public Works.]—The suppliant alleged in his petition that on a certain date he was driving slowly along a road in the Rocky Mountain Park, N.W.T., when his buggy came in contact with a wire stretched across the road, whereby the suppliant was thrown from the buggy to the ground and sustained severe bodily injury. He further alleged that the Rocky Mountain Park was a public road of Canada under the control of the Minister of the Interior and the Governor in Council, who had appointed one S. superintendent thereof; that S. had notice of the obstruction to travel caused by the wire and had negligently failed to remove it, contrary to his duty in that behalf; and that the Crown was liable in damages for the injuries so received by him. The Crown demurred to the petition on the ground that the claim and cause of action were founded in tort, and could not be maintained or enforced:—

Held, that the petition disclosed a claim against the Crown arising out of an injury to the person off a public work resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment, and therefore came within the meaning of 50-51 Vict. ch. 16, sec. 16 (*c*), which provides a remedy in such cases. *Brady* v. *The Queen*, 2 Ex. C. R. 273.

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6. *Orders-in-Council.*

Order-in-Council Pledging the Government to Promote Legislation.]—An order of His Excellency the Governor-General in Council pledging the Government to promote legislation does not constitute a contract for the breach of which the Crown would be liable in damages. *Quebec Skating Club* v. *The Queen*, 3 Ex. C. R. 387.

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7. *Torts.*

Acts Authorized by Statute — *Proper Remedy for Damages Arising Therefrom.*]—The suppliants filed a petition of right claiming redress against the Dominion Government for damages sustained by them by reason of the partial expropriation of their railway tracks, and incidental injury, owing to the extension of the Intercolonial Railway into the city of Halifax. The Crown demurred to the petition on the grounds that the acts in respect of which the suppliants complained were authorized by 31 Vict. ch. 13, the Intercolonial Railway Act, and that the suppliants had not shewn good cause for relief against the Crown by petition of right:—

Held, that under the 14th section of 31 Vict. ch. 13, the only remedy suppliants had was by reference to the official arbitrators; and, that apart from this enactment, inasmuch as the claim was founded in tort, no action could be maintained against the Crown. *Halifax City R. W. Co.* v. *The Queen*, 2 Ex. C. R. 433.

Injury to the Person on a Public Work— *Remedy — Prescription.*]— The suppliant, who was employed as a mason upon the Chambly Canal, a public work, was injured through the negligence of a fellow servant. Subsequent to the accident the Crown retained the suppliant in its employ as a watchman on the canal, and indemnified him for expenses incurred for medical attendance:—

Held, that what was done was referable to the grace and bounty of the Crown and did not constitute such an acknowledgment of a right of action as would, under Article 2227 C. C. L. C., interrupt prescription.

Quære: Does Article 2227 C. C. L. C. apply to claims for wrongs as well as to actions for debt?

Semble: That the Crown's liability for the negligence of its servants rests upon statutes passed prior to The Exchequer Court Act, 50-51 Vict. ch. 16, and that the latter substituted a remedy by petition of right or by a reference to the Court for one formerly existing by a submission of the claim to the official arbitrators, with an appeal to the Exchequer Court and thence to the Supreme Court of Canada. *Martial* v. *The Queen*, 3 Ex. C. R. 118.

See the cases under sub-title 5.

8. Miscellaneous Cases.

Damage to Property from Execution of Works on Government Railway — *Parol Promise by Officer of Crown to Indemnify Owners for Cost of Repairs.*]—The claimants' property having been injuriously affected in the carrying out by the Crown of certain improvements in the yards and tracks of the Intercolonial Railway at and near its station in the city of St. John, N.B., A., the chief engineer of the railway, verbally agreed with the claimants that the works which it was necessary to execute in order to restore their property to its former safe and serviceable condition, should be executed under the direction of M., the claimants' engineer, and that the Crown would pay to the claimants the cost thereof. The exact extent and character of the works to be so executed were never definitely settled. The works executed under M.'s direction exceeded what were necessary to remove the injury done, and to a certain extent added to the permanent value of the claimants' property. M. did not act in bad faith, but erred in judgment. The work, however, was done upon and adjacent to the railway property, where it was open at all times to the inspection of the officers and engineers of the railway, and the necessary excavations were made for M. by men employed and paid on behalf of the Crown. The case was referred to an official referee to ascertain the amount of damages, if any, and he reported in favour of claimants for $2,655.62, less certain deductions. On appeal from this report :—

Held (affirming the report), that while the claimants were entitled to take such steps and to execute such works as were necessary to make their property as good, safe and serviceable as it was before the interference therewith, and to recover from the Crown the expenses thereby incurred, they were not entitled to improve their water system and service at the Crown's expense. They were entitled to be fully indemnified for any injury done, but to nothing more.

(2.) The question of A.'s authority, under the circumstances, to make a contract whereby the Crown's liability would be extended, not being raised :—

Held, that the claimants were entitled, under the contract made with A., to recover the cost of the works executed under M.'s direction. *The Queen* v. *St. John Water Commissioners*, 2 Ex. C. R. 78. *See* the next case.

Damages to Property from Works Executed on Government Railway—*Parol Undertaking to Indemnify Owners for Costs of Repairs by Officer of the Crown.*]—Held, affirming the judgment of the Exchequer Court, 2 Ex. C. R. 78, that where by certain work done by the Government Railway authorities in the city of St. John the pipes for the water supply of the city were interfered with, claimants were entitled to recover for the cost reasonably and properly incurred by their engineer in good faith, to restore their property to its former safe and serviceable condition, under an arrangement made with the chief engineer of the Government railway, and upon his undertaking to indemnify the claimants for the cost of the said work. Strong and Gwynne, JJ., dissenting on the ground that the chief engineer had no authority to bind the Crown to pay damages beyond any injury done. *The Queen* v. *St. John Water Commissioners*, 19 S. C. R. 125.

Ditches.]—The Crown is not under any obligation to maintain drains or back-ditches constructed under 52 Vict. ch. 13, sec. 4 (D.). *Bertrand* v. *The Queen*, 2 Ex. C. R. 285.

Improvements under Mistake of Title—*Compensation—Occupation Rent.*]—The defendants, owners of land adjoining the bank of the Niagara River, built at great expense stairways and elevators and made paths from the top of the bank to the water's edge of the river to enable visitors to descend to see the view, and large sums were received for the use of these facilities. Expensive repairs to the stairways, elevators and paths were from time to time necessary, owing to their exposed position, and the defendants knew that they had no title to the bank, which was vested in the Crown :—

Held, that works of this kind were not lasting improvements within the meaning of section 30 of R.S.O. ch. 100, and that both on this ground and on the ground that they knew they had no title the defendants could not recover compensation.

Semble : The section would not affect the Crown and the title being in the Crown when the improvements were made the Crown's grantee would take the land free from any lien.

In cases coming within the section the amount by which the value of the land has been enhanced is to be allowed and the cost or value of the improvements is not the test :—

Held, also, that the defendants were not chargeable with the profits made by them but only with a fair occupation rent for the land.

Judgment of Street, J., varied. *Commissioners for the Queen Victoria Niagara Falls Park* v. *Coll*, 22 A. R. 1.

Public Work — *Construction of a Government Fish-way in a Private Mill-dam—Damage to Mill Owner.*]—The suppliants complained that the Crown, by its servants, so negligently and unskilfully constructed a fish-way in a mill-dam used to secure a head of water for running certain mills owned by them, that such mills and premises were injuriously affected and greatly depreciated in value :—

Held, that the fish-way was not a public work within the meaning of 50-51 Vict. ch. 16, sec. 16 (c), and that the Crown was not liable. *Brown* v. *The Queen*, 3 Ex. C. R. 79.

Public Work—*Damages from Construction of.*]—Where the Crown, by the construction of a public work, has interfered with a right common to the public, a private owner of real property whose lands, or any right or interest therein, have not been injured by such interference, is not entitled to compensation in the Exchequer Court, although it may happen that the injury sustained by him is greater in degree than that sustained by other subjects of the Crown.

(2.) The injurious affection of property by the construction of a public work will not sustain a claim against the Crown based upon clause (c) of the 16th section of the Exchequer Court Act, 50-51 Vict. ch. 16, which gives the Court jurisdiction in regard to claims arising out of any death or injury to the person or to property on

any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. *Archibald* v. *The Queen*, 3 Ex. C. R. 251. Affirmed by the Supreme Court, 23 S. C. R. 147.

Salaries of License Inspectors—*Approval by Governor General in Council.*]—On a claim brought by the Board of License Commissioners appointed under the Liquor License Act, 1883, for moneys paid out by them to license inspectors with the approval of the Department of Inland Revenue, but which were found to be afterwards in excess of the salaries which two years later were fixed by Order in Council under section 6 of the said Liquor License Act, 1883 :—

Held, affirming the judgment of the Exchequer Court, 2 Ex. C. R. 293, that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor-General in Council. The Liquor License Act, 1883, sec. 6. *Burroughs* v. *The Queen*, 20 S. C. R. 420.

Salvage.]—Right to claim salvage for services rendered to ship belonging to the Dominion Government. *See Couette* v. *The Queen*, 3 Ex. C. R. 82, *post*, INSURANCE, VI.

Timber Licenses—*Crown's Liability.*]—*See* CROWN LANDS, VI.

III. PREROGATIVE.

Deposits in Banks.]—Held, affirming the judgment of the Supreme Court of Canada, 20 S. C. R. 695, that the Provincial Government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada, in respect of public moneys of the Province deposited in the name of Receiver-General of the Province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches. *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437. *See* the next case.

Exercise of by Local Government—*Provincial Rights.*]—The government of each Province of Canada represents The Queen in the exercise of her prerogative as to all matters affecting the rights of the Province.

The Queen v. *Bank of Nova Scotia*, 11 S. C. R. 1, followed. Gwynne, J., dissenting.

Under section 79 of the Bank Act, R. S. C. ch. 120, the note-holders have the first lien on the assets of an insolvent bank in priority to the Crown. Strong and Taschereau, JJ., dissenting.

See, also, the present Bank Act, 53 Vict. ch. 31, sec. 53, passed since this decision. *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, 20 S. C. R. 695.

Interference with Public Right of Navigation since the Union of the Provinces.]—A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament.

(2.) The Provincial Legislatures, since the union of the Provinces, cannot authorize such an interference. *The Queen* v. *Fisher*, 2 Ex. C. R. 365.

IV. MISCELLANEOUS CASES.

Chose in Action.]—Where a chose in action was assigned, *inter alia*, for the general benefit of creditors, all the parties interested being before the Court, and the Crown making no objection, the Court gave effect to such assignment.

Quære.—In the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown? *The Queen* v. *McGurdy*, 2 Ex. C. R. 311.

Estoppel.]—The doctrine of estoppel cannot be invoked against the Crown. *Humphrey* v. *The Queen*, 2 Ex. C. R. 386. Affirmed by the Supreme Court, 20 S. C. R. 591.

Injunction—*Breach of Charter.*]—The defendants were incorporated by letters patent under the Street Railway Act, R. S. O. ch. 171, which authorized them to construct and operate (on all days except Sundays) a street railway :—

Held, Maclennan, J. A., dissenting, that an action would not lie by the Crown to restrain the defendants from operating the road on Sunday, the restriction against their doing so being at most an implied one, and no substantial injury to the public, or any interference with proprietary rights, being shewn.

Judgment of the Common Pleas Division, 19 O. R. 624, affirmed. *Attorney-General* v. *Niagara Falls, Wesley Park and Clifton Tramway Co.*, 18 A. R. 453.

Interpretation Act—*Controverted Elections Act.*]—The Crown is not bound by sections 100 and 122 of The Dominion Elections Act, 1874. The 46th clause of the 7th section of The Interpretation Act, R. S. C. ch. 1, whereby it is provided that no provision or enactment in any Act shall affect in any manner or way whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not limited or qualified by any exception such as that mentioned in *The Magdalen College Case*, 11 Rep. 70*b*, "that the King is impliedly bound by statutes passed for the general good . . . or to prevent fraud, injury, or wrong." *The Queen* v. *Pouliot*, 2 Ex. C. R. 49.

Laches and Estoppel—*Waiver by Acts of Ministers of Crown.*]—While the law is that the Crown is not bound by estoppel, and that no laches can be imputed to it, and that there is no reason why it should suffer by the negligence of its officers, yet it appears to be well settled that forfeitures of certain kinds may be waived by the acts of Ministers and Officers of the Crown.

Attorney-General of Victoria v. *Ettershank*, L. R. 6 P. C. 354, and *Davenport* v. *The Queen*, 3 App. Cas. 115, referred to. *Peterson* v. *The Queen*, 2 Ex. C. R. 67.

Notice of Action—*Government Railway Act.*]—Section 109 of the Government Railway Act of 1881, 44 Vict. ch. 25, provides that "no action shall be brought against any officer, employee, or servant of the department [Railways and Canals] for anything done by virtue of his office, service or employment, except within three months after the act committed, and upon one month's previous notice in writing":—

Held, reversing the judgment of the Court below, Ritchie, C.J., and Gwynne, J., dissenting, that a contractor with the Minister of Railways and Canals, as representing the Crown, for the construction of a branch of the Intercolonial Railway, is not an "employee" of the department within this section:—

Held, per Patterson and Strong, JJ., that the compulsory powers given to the Government of Canada to expropriate lands required for any public work, can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds, and a plan or description filed; if these provisions are not complied with, and there is no order in Council authorizing land to be taken, when an order in Council is necessary, a contractor with the Crown who enters upon the land to construct such public work thereon, is liable to the owner in trespass for such entry. *Kearney* v. *Oakes*, 18 S. C. R. 148.

Parol Agreement.]—Under the provisions of the 7th section of the Petition of Right Act of 1876, the Dominion Government, in enforcing a parol agreement, is entitled to whatever rights any subject of the Crown would have in respect of such an agreement in an action between subject and subject. *Merchants' Bank of Canada* v. *The Queen*, 1 Ex. C. R. 1.

Pension de Retraite—*Commutation—Transfer or Cession.*]—D., a retired employee of the Government of Quebec, in receipt of a pension under Articles 676 and 677 R. S. Q., surrendered said pension for a lump sum to the Government, and subsequently he and his wife brought an action to have it revived and the surrender cancelled. By Articles 690 of R. S. P. Q. the pension or half pension is neither transferable nor subject to seizure, and by Articles 583, the wife of D., on his death, would have been entitled to an allowance equal to one-half of his pension:—

Held, reversing the decision of the Court of Review, Strong, C.J., and Sedgewick, J., dissenting, that D., after his retirement, was not a permanent official of the Government of Quebec, and the transaction was not, therefore, a resignation by him of office, and a return by the Government, under Article 688, of the amount contributed by him to the pension fund; that the policy of the legislation in Articles 685 and 690 is to make the right of a retired official to his pension inalienable, even to the Government; that D.'s wife had a vested interest jointly with him during his life in the pension, and could maintain proceedings to conserve it; and therefore, that the surrender of the pension should be cancelled. *Dionne* v. *The Queen*, 24 S. C. R. 451.

Provincial Government—*Style of Cause.*]—The action was instituted against the Government of the Province of Quebec, but when the case came up for hearing on the appeal to the Supreme Court, the Court ordered that the name of Her Majesty the Queen be substituted for that of the Province of Quebec. *Grant* v. *The Queen*, 20 S. C. R. 297.

Railway Subsidy—*Discretionary Power of Lieutenant-Governor in Council—Petition of Right—Misappropriation of Subsidy Moneys by Order-in Council.*]—Where money is granted by the legislature, and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right. The appellant railway company alleged by petition of right that by virtue of 51 & 52 Vict. ch. 91, the Lieutenant-Governor in Council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway; that by an order in council dated 6th of August, 1888, the land subsidy was converted into a money subsidy, the 9th section of said ch. 91, 51 & 52 Vict., enacting that "it shall be lawful," etc., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and order in council, and built the railway in accordance with the Act 51 & 52 Vict. ch. 91, and the provisions of the Railway Act of Canada, 51 Vict. ch. 29, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded *inter alia*, that the money had been paid by order in council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties, and signed a receipt for the balance of $6,500 due on account of the first subsidy. The petition of right was dismissed:—

Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right; Taschereau and Sedgewick, JJ., dissenting; but assuming it did, the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy. *Hereford R. W. Co.* v. *The Queen*, 24 S. C. R. 1.

Rideau Canal.]—*See Magee* v. *The Queen*, 3 Ex. C. R. 304, *post*, GIFT.

Set-off Against the Crown—*Running Accounts—Practice.*]—An information was filed on behalf of the Crown seeking judgment against the defendants for entering upon certain Dominion lands and cutting thereon, and converting to their own use, a quantity of timber and railway ties, contrary to the provisions of 46 Vict. ch. 17, sec. 60; and also for money owing to

the Crown for dues in respect of the timber and ties so cut by the defendants. The defendants specially denied the allegations of the information, and in their 12th plea substantially alleged that the claims sought to be maintained by the Crown arose out of, and were connected with, certain contracts between them and the Crown, in respect of which the Crown was indebted to them in an amount greater than the sum claimed from them in the information; and in their 13th plea substantially alleged that the Crown was then also indebted to them in an amount of money other than that above mentioned, which last mentioned sum was larger than the amount claimed from defendants; and that, before the information was filed, it was agreed between the Crown and the defendants, that, in consideration of the defendants forbearing to sue the Crown until their claims could be investigated, the Crown would not, before such investigation had been made, demand from the defendants, or sue them for, the claims set out in the information. It was further alleged by the defendants in their 13th plea that the Crown had never caused such investigation to be made, although they had theretofore been, and were then, ready and willing that such investigation should be had; and that the amount thereupon found due to them from the Crown, or a proper proportion thereof, should be applied by way of set-off towards payment and satisfaction of the alleged claims of the Crown. To these pleas the plaintiff demurred on the ground that set-off cannot be pleaded against the Crown:—

Held, (1) That the rule in such a case is not to set aside the plea demurred to unless it is clearly bad.

(2) That inasmuch as the claim against the Crown set out in the defendants' 12th plea arose out of the same contracts between the parties in respect whereof the claims sought to be enforced in the information had arisen, and as the dealings of the parties thereunder were so continuous and inseparable that the claims on one side could not properly be investigated apart from those of the other, the rule against pleading a set-off to a declaration for money due to the Crown did not apply, and the demurrer to said plea should be overruled.

(3) That as there was no allegation to the contrary, it must be presumed that the claim set up in the first part of the 13th plea was one unconnected with, and distinct from, the transaction in respect of which the claims sought to be enforced in the information arose; and that so much of the plea as dealt therewith, being simply a matter of set-off, was bad in law.

(4) That a promise of forbearance to sue, such as that alleged in the concluding portion of defendants' 13th plea, could not be successfully pleaded in bar of an action between subject and subject, nor would such a defence be available against the Crown. *The Queen* v. *Whitehead*, 1 Ex. C. R. 134.

CROWN LANDS.

I. British Columbia.

Right of Pre-emption—*Lands Reserved—Agricultural Settlers.*]—By 46 Vict. ch. 14, subsec. *f*. (B. C.), certain land conveyed to the E. & N. R. W. Co. was, for four years from the date of the Act, thrown open to the actual "settlers for agricultural purposes," coal and timber land excepted. H. & W. respectively claimed a right of pre-emption under this Act:—

Held, affirming the decision of the Court below, that the Act did not confer a right of pre-emption to lands not within the pre-emption laws of the Province; that only "unreserved and unoccupied lands" came within those laws and the lands claimed had long before been reserved for a town site; and that the claimants were not upon the lands as "actual settlers for agricultural purposes," but had entered with express notice that the lands were not open for settlement. *Hoggan* v. *Esquimalt and Nanaimo R. W. Co.*, *Waddington* v. *Esquimalt and Nanaimo R. W. Co.*, 20 S. C. R. 235. Affirmed by the Judicial Committee, [1894] A. C. 429.

II. Dominion Lands Act.

Sale of Dominion Lands—*Reservation of Mines and Minerals.*]—Where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands and there is no stipulation to the contrary express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words. *Canadian Agricultural Coal and Colonization Co.* v. *The Queen*, 3 Ex. C. R. 157. Affirmed by the Supreme Court, 24 S. C. R. 713.

III. Federal and Provincial Rights.

Foreshore of Harbour—*Grant from Local Government.*]—After the British North America Act came into force, the Government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C.B. S. conveyed this

lot, through the C. B. Coal Co. to the S. & L. Coal Co. S. having died, his widow brought an action for dower in said lot, to which the company pleaded that the grant to S. was void, the property being vested in the Dominion Government:—

Held, affirming the judgment of the Court below, Strong and Gwynne, JJ., dissenting, that the company having obtained title to the property from S. they were estopped from saying that the title of S. was defective.

Per Strong and Gwynne, JJ., dissenting. The conveyance by S. to the C. B. Coal Co. was an innocent conveyance by which S. himself would not have been estopped, and, as estoppel must be mutual, his grantees would not. There were no recitals in the deed that would estop them and an estoppel could not be created by the covenants.

After the conveyance to the defendant company an Act was passed by the Legislature of Nova Scotia ratifying and confirming the title of the defendant company to all property of the C. B. Coal Co.:—

Held, that if the Legislature could by statute affect the title to this property which was vested in the Dominion Government it had not done so by this Act in which the Crown is not expressly named. Moreover the statute should have been pleaded by the defendants. *Sydney and Louisburg Coal and R. W. Co.* v. *Sword*, 21 S. C. R. 152.

Ordnance Lands—*Chain Reserve along Niagara River.*]—In an action by the plaintiffs, claiming under a patent from the Ontario Government, and the defendant, claiming under a lease from the Dominion Government, to try the right to a part of the chain reserved along the bank of the Niagara River and the slope between the top of the bank and the water's edge, which had been reserved out of the original survey of the township of Stamford, and was claimed by the defendants to have been reserved or set apart for "Military" or "Ordnance" purposes:—

Held, that the "Chain Reserve" was part of the waste lands of the Crown held for public purposes.

It was a "Government Reserve" originally made for public purposes:—

Held, also, that as there was no evidence that this "Chain Reserve" was set apart for military purposes, or of any user, charge or control of it by the military authorities, that it was not affected by the Ordnance Vesting Act of 1843, 7 Vict. ch. 11, but remained a government reserve, held for public purposes generally, and that the portion in question vested in the Province of Ontario, as successor of the old Province of Canada, until vested in the plaintiffs, who were entitled to succeed:—

Held, also, that assuming the "Chain Reserve" had been so set apart for military purposes, the "slope" formed no part of such reserve, but always remained part of the waste lands of the Province.

History of the "Chain Reserve" along the west bank of the Niagara River from Niagara to Fort Erie traced. *Commissioners for the Queen Victoria Niagara Falls Park* v. *Howard*, 23 O. R. 1. Affirmed in appeal, 23 A. R.

Railway Belt in British Columbia.]—*Semble*, that letters patent for public lands situated within the railway belt in British Columbia should issue under the Great Seal of Canada and not under the Great Seal of British Columbia. *The Queen* v. *Farwell*, 3 Ex. C. R. 271.

Railway Belt in British Columbia.]—Lands that were held under pre-emption right, or Crown grant, at the time the statutory conveyance of the railway belt by the Province of British Columbia to the Dominion of Canada took effect, are exempt from the operation of such statutory conveyance, and upon such pre-emption right being abandoned or cancelled all lands held thereunder become the property of the Crown in the right of the Province and not in the right of the Dominion.

(2.) Unsurveyed lands recorded under the British Columbia Land Acts of 1875 and 1879 are lands held under "pre-emption right" within the meaning of the 11th section of the Terms of the Union between the Province of British Columbia and the Dominion of Canada. *See* Statutes of Canada, 1872, p. XCVII. *The Queen* v. *Demers*, 3 Ex. C. R. 203.

IV. Ordnance Lands.

Lease—*Power of Minister of Interior.*]—The Minister of the Interior cannot lease or authorize the use of ordnance lands without the authority of the Governor in Council. *Quebec Skating Club* v. *The Queen*, 3 Ex. C. R. 387.

Sale of Ordnance Lands in Quebec—*Cancellation.*]—In the year 1876 the suppliant purchased a number of lots at an auction sale of Ordnance land in the city of Quebec. He paid certain instalments and interest thereon amounting in all to a sum of $2,447.92. Being unable to complete the payments for which he was liable, he applied to the Crown, in 1885, to appropriate the money paid by him to the purchase of three particular lots, Nos. 19, 38 and 39. This the Crown consented to do, and upon an adjustment of the account there was found to be a sum of $73.92 due to the suppliant which, by mutual arrangement, was appropriated to the purchase of another lot (No. 100), leaving a balance then due to the Crown of $126.08. When, however, the suppliant came to pay this balance and get his patents for the four lots, he was informed that lot 19 would probably be required for certain military purposes. He then tendered the balance due to the proper officer of the Crown in that behalf, but it was declined. Patents for lots 38, 39 and 100 were subsequently issued to suppliant, and nothing further was done until 1886, when the Crown resumed possession of lot 19, which was followed up by an attempted cancellation of the sale of the lot under 23 Vict. (P. C.) ch. 2, on the ground that as the balance due on the purchase had not been paid the terms and conditions of the sale had not been complied with:—

Held, that the sale was not duly cancelled, that the suppliant had forfeited none of his rights under the sale, and was entitled to damages equal to the value of the lot at the time the Crown resumed possession thereof.

Quære.—Has the Deputy Minister of the Interior the right to exercise the powers of cancella-

tion vested in the Commissioner of Crown Lands by the 20th section of the Act of the Province of Canada, 23 Vict. ch. 2. *Murphy* v. *The Queen*, 3 Ex. C. R. 75.

See Commissioners for the Queen Victoria Niagara Falls Park v. *Howard*, 23 O. R. 1, 23 A. R., *ante* 309.

V. Patents and Location Tickets.

1. *Cancellation and Compliance with Conditions.*

Conditional Sale.]—Suppliant purchased from the Crown a parcel of land, forming part of an Indian Reserve, subject to the condition that unless he erected certain manufacturing works thereon within a given time he would forfeit all rights under the sale. A portion of the purchase money was paid down. Some time after the expiry of the time wherein suppliant was bound to erect the works but had not done so, the Crown, through a duly authorized officer, accepted and received the balance of the purchase money from him,—such officer stating, however, that the sale would not be complete until the condition upon which it was made was complied with. On petition praying for a declaration by the Court that suppliant was entitled to letters patent for said land :—

Held, (1) That the acceptance of the balance of the purchase money, under the circumstances, constituted a waiver of the condition in respect of the time within which it was to be performed, but not of the condition itself; and that inasmuch as the suppliant had not performed such a condition, he was not entitled to the relief prayed for. *Clarke* v. *The Queen*, 1 Ex. C. R. 182; *Canada Central R. W. Co.* v. *The Queen*, 20 Gr. 273, referred to. *Peterson* v. *The Queen* 2 Ex. C. R. 67.

Location Tickets—*Transfer of Purchaser's Rights — Registration.*]—A location ticket of certain lots was granted to G. C. H. in 1863. In 1872 G. C. H. put on record with the Crown Lands Department that by arrangement with the Crown lands agent, he had performed settlement duties on another lot known as the homestead lot. In 1874, G. C. H. transferred his rights to appellant, paid all moneys due with interest on the lots, registered the transfer under 32 Vict. ch. 11, sec. 18, and the Crown accepted the fees for registering the transfer and for the issuing of the patent. In 1878 the commissioners cancelled the location ticket for default to perform settlement duties :—

Held, reversing the judgment of the Court below, that the registration by the commissioners in 1874, of the transfer to respondent was a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected, Taschereau, J., dissenting. *Holland* v. *Ross*, 19 S. C. R. 566.

Manitoba Act—*Improvidence in Granting Patent.*]—T., a half-breed, was on the 15th July, 1870, in actual peaceable possession of a lot of land in the Province of Manitoba, previously purchased by him, and of which he had been for some years in undisturbed occupancy. On the 3rd of August, 1871, he shared in the gratuity given to certain Chippewa and Swampy Cree Indians under a treaty then concluded with them, and in the years 1871, 1872, 1873 and 1874, he participated in the annuities payable thereunder. But before taking any moneys under the treaty he enquired of the commissioner, who acted for Her Majesty in its negotiation, whether by accepting such money he would prejudice his rights to his private property, and was informed that he would not; and when in 1874 he learned for the first time that by reason of his sharing in such annuities he was liable to be accounted an Indian and to lose his rights as a half-breed, he returned the money paid to him in that year. Subsequently his status as a half-breed was recognized by the issue to him in 1876 of half-breed scrip :—

Held, that under the Manitoba Act, and amendments, 33 Vict. ch. 3, sec. 32, sub-sec. 4, and 38 Vict. ch. 52. sec. 1, he was entitled to letters patent for the lot mentioned. *The Queen* v. *Thomas*, 2 Ex. C. R. 246.

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2. *Description.*

Uncertainty of Description.]—A patent of land from the Crown is to be upheld rather than avoided and to be construed most favourably for the grantee.

Where land was granted by a Crown patent describing it as the north part of lot 13, containing sixty acres, and the original plan of the township shewed the lot with centre line running through the concession and shewed the part south of the line as one hundred acres, and the part north of the line as eighty acres, and it appeared that, prior to the grant of the north part, there had been a grant of the southerly part, containing one hundred acres, describing it by metes and bounds, which were evidently intended to include all the land south of the line, although they actually fell short of doing so :—

Held, in a contest between the plaintiff claiming under the patentee of the north part and the defendant claiming under sales for taxes based upon the lands sold being patented lands, that the patent was not void for uncertainty, but that under the words "the north part" the whole of the lot lying to the north of the centre line passed to the grantee and those claiming through him.

Doe Devine v. *Wilson*, 10 Moo. P. C. 502; *Nolan* v. *Fox*, 15 C. P. 565; *Regina* v. *Bishop of Huron*, 8 C. P. 253, specially referred to. *Hyatt* v. *Mills*, 20 O. R. 351. Reversed in appeal on another point, 19 A. R. 329.

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3. *Issue Of.*

Mandatory Remedy Sought by Petition of Right]—A petition of right will not lie to compel the Crown to grant a patent of lands. *Clarke* v. *The Queen*, 1 Ex. C. R. 182.

Rival Applicants.]—*See Boulton* v. *Shea*, 22 S. C. R. 742.

4. *Miscellaneous Cases.*

Crown Grant.]—*See Chisholm v. Robinson*, 24 S. C. R. 704.

Foreshore—*Powers of Canadian Pacific Railway Company to Take and Use Foreshore.*]—By 44 Vict. ch. 1, sec. 18, the Canadian Pacific Railway Company "have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways." By 50 & 51 Vict. ch. 56, sec. 5, the location of the company's line of railway between Port Moody and the city of Westminster, including the foreshore of Burrard Inlet, at the foot of Gore avenue, Vancouver city, was ratified and confirmed. The act of incorporation of the city of Vancouver, 49 Vict. ch. 32, sec. 213 (B.C.), vests in the city all streets, highways, etc., and in 1892 the city began the construction of works extending from the foot of Gore avenue, with the avowed object to cross the railroad track at a level and obtain access to the harbour at deep water. On an application by the railway company for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway :—

Held, affirming the judgment of the Court below, that as the foreshore forms part of the land required by the railway company, as shewn on the plan deposited in the office of the Minister of Railways, the *jus publicum* to get access to and from the water at the foot of Gore avenue is subordinate to the rights given to the railroad company by the statute 44 Vict. ch. 1, sec. 18*a*, on the said foreshore, and therefore the injunction was properly granted. *City of Vancouver* v. *Canadian Pacific R. W. Co.*, 23 S. C. R. 1.

Indian Lands—*Mortgage Before Patent.*]—A patent of Indian lands was obtained by the patentee by virtue of his title under certain assignments from the original locatee registered in the Indian Department, and it appeared that certain prior assignees from the locatee had executed a mortgage on the lands to the plaintiff, of which the patentee had no actual notice, neither the assignment to the mortgagors nor the mortgage having been registered in the department, though the mortgage was registered in the county registry office, and the plaintiff now sought to foreclose his mortgage :—

Held, that the patentee was entitled to priority over the mortgage to the extent of the moneys paid for obtaining the patent, and that the registration of the mortgage in the county registry office was not notice to him. *Re Reed* v. *Wilson*, 23 O. R. 552.

Locatee Receipt — *Fraudulent Locatee.*]—One through whom the plaintiff claimed obtained in 1855 from the commissioner of crown lands a receipt or sale of a certain lot of land. In 1868, B., in whose possession this receipt was, handed it back to the Crown lands office, and by means of fraud procured his own name to be substituted as purchaser in the books of the department; and he and those claiming under him, including the defendant, had remained in possession of the lot ever since. In 1872, the plaintiff, having learned of the imposition, applied to the department for redress. This application was pending and undisposed of by the commissioner till March 14th, 1889, when it was ordered that the patent should issue to the defendant, but three months were allowed to the plaintiff to take proceedings in Court to establish his title; and within that time the plaintiff commenced this action for a declaration as to his right to the land :—

Held, affirming the decision of Ferguson, J., that the plaintiff's right of action was not barred by any Statute of Limitation.

Per Boyd, C.—The case might be likened to a matter litigated in the proper forum wherein no decision is given till after the lapse of years :—

Held, per Ferguson, J., Robertson, J., dissenting, that even if the Statute of Limitations did commence to run against those under whom the plaintiff claimed, it ceased to do so on rescission of the sale and the substitution of B.'s name in 1868, because then all right to bring an action or make an entry on their part ceased. *McLure* v. *Black*, 20 O. R. 70.

Navigation—*Interference With.*]—A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament. The Provincial Legislatures, since the union of the Provinces, cannot authorize such an interference. *The Queen* v. *Fisher*, 2 Ex. C. R. 365.

VI. Timber and Timber Licenses.

Disputed Territory—*Permit to Cut Timber—Implied Warranty of Title.*]—A permit issued under the authority of the Minister of the Interior, under which the purchaser has the right within a year to cut, from the Crown domain, a million feet of lumber, is a contract for the sale of personal chattels, and such a sale ordinarily implies a warranty of title on the part of the vendor; but if it appears from the facts and circumstances that the vendor did not intend to assert ownership, but only to transfer such interest as he had in the thing sold, there is no warranty.

(2.) The Government of Canada by order in council authorized the issue of the usual annual license to the plaintiff company to cut timber upon the Crown domain, upon certain conditions therein mentioned. The company did not comply with such conditions, but before the expiry of the year during which such license might have been taken out, proceedings were commenced by the Government of Ontario against the company under which it was claimed that the title to the lands covered by the license was vested in the Crown for the use of the Province of Ontario, and that contention was ultimately sustained by the Court of last resort :—

Held, that there was a failure of consideration which entitled the company to recover the ground rent paid in advance on the Government's promise to issue such license.

Quære.—Will an action by petition or on reference lie in the Exchequer Court against the Crown for unliquidated damages for breach of warranty implied in a sale of personal chattels? *St. Catharines Milling and Lumber Co.* v. *The Queen*, 2 Ex. C. R. 202.

Disputed Territory—*License to Cut Timber—Implied Warranty of Title.*]—By the 50th section of the Dominion Lands Act, 1883, it is provided that leases of timber berths shall be for a term of one year, and that the lessee shall not be held to have any claim whatsoever to a renewal of his lease unless such renewal is provided for in the order in council authorizing it, or embodied in the conditions of sale or tender. The orders in council in question in this case authorized the issue of leases subject to the terms of the regulations of March 8th, 1883, by which it was provided that under certain conditions (existing in this case) the Minister of the Interior might renew such licenses. From the orders in council and character of the several transactions it appeared to be the intention of the parties that the licenses should be renewable:—

Held, that such renewals were provided for within the meaning of the statute.

(2.) When the Crown agrees to issue a lease or license to cut timber on public lands it agrees to grant a valid lease or license, and a contract for title to such lands is to be implied from such agreement.

(3.) Not only the word "demise" but the word "let," or any equivalent words which constitute a lease, create, it appears, an implied covenant for quiet enjoyment.

Hart v. *Windsor*, 12 M. & W. 85; *Mostyn* v. *West Mostyn Coal and Iron Co.*, 1 C. P. D. 152.

Quære.—If this rule is applicable to a Crown lease? *The Queen* v. *Robertson*, 6 S. C. R. 52, referred to.

(4.) To the general rule as to the measure of damages for the breach of a contract there is an exception as well established as the rule itself, namely, that upon a contract for the sale and purchase of real estate, if the vendor without fraud is incapable of making a good title, the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain.

Bain v. *Fothergill*, L. R. 7 H. L. 158; *Flureau* v. *Thornhill*, 2 Wm. Bl. 1078, referred to.

This exceptional rule is confined to cases of contract for the sale of lands, or an interest therein, and does not apply where the conveyance has been executed and the purchaser has entered into covenants express or implied for good title or for quiet enjoyment.

Williams v. *Burrell*, 1 C. B. 402; *Lock* v. *Furze*, L. R. 1 C. P. 441, referred to.

(5.) The authorities are not agreed, but it is probable that this exceptional rule as to the measure of damages for the breach of a contract of sale of real estate does not apply where the vendor is able to make a good title and refuses or wilfully neglects to do so.

Engel v. *Fitch*, L. R. 3 Q. B. 314; *Robertson* v. *Dumaresq*, 2 Moo. P. C. N. S. 84, 95, referred to.

(6.) An agreement to issue and to renew from year to year at the will of the lessee or licensee a lease or license to take exclusive possession of a tract of land and to cut the merchantable timber thereon is an agreement in respect to an interest in land, and not merely sale of goods.

(7.) The claimant applied to the Government of Canada for license to cut timber on certain timber berths situated in the territory lately in dispute between the Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses, and make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys, and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, and consequently they could not carry out their promises:—

Held, that the claimant was entitled to recover from the Government the moneys paid to them for ground-rents and bonuses but not the losses incurred in making the surveys, enlarging the mill, and other preparations for carrying on his business. *Bulmer* v. *The Queen*, 3 Ex. C. R. 184. *See* the next case.

Disputed Territory—*License to Cut Timber—Implied Warranty of Title.*]—The claimant applied to the Government of Canada for license to cut timber on ten timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses, make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada at the time six leases or licenses were current, and consequently the Government could not renew them. The lease was granted under sections 49 and 50 of 46 Vict. ch. 17, and the regulations made under the Act of 1879 provided that "the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council." In a claim for damages by the licensee:—

Held, (1) Orders in council issued pursuant to 46 Vict. ch. 17, secs. 49 and 50, authorizing the Minister of the Interior to grant licenses to cut timber, did not constitute contracts between the Crown and proposed licensees, such orders in council being revocable by the Crown until acted upon by the granting of licenses under them.

(2.) The right of renewal of the licenses was optional with the Crown and the claimant was entitled to recover from the Government only the moneys paid for ground-rents and bonuses.

The licenses which were granted and actually current in 1884 and 1885 conferred upon the licensee "full right, power and license to take and keep exclusive possession of the said lands except as thereinafter mentioned for and during the period of one year from the 31st of December, 1883, to the 31st December, 1884, and no longer."

Quære.—Though this was in law a lease for one year of the lands comprised in the license was

the Crown bound by any implied covenant to be read into the license for good right and title to make the lease and for quiet enjoyment? *Bulmer* v. *The Queen*, 23 S. C. R. 488.

Locatee—*Right to Sell Pine.*]—A locatee of land whose rights are governed by R. S. O. ch. 25, sec. 10, or a patentee whose rights are governed by sec. 11, though he may really intend to clear a parcel of land, cannot simply point out such parcel to a purchaser before anything was done in the way of clearing it for cultivation, and sell to such purchaser the pine timber standing and growing upon such parcel.

The right or liberty in such cases is only to cut and dispose of trees during the process of actually clearing the land for cultivation, when it appears to be and is requisite that the trees should, for the purposes of such clearing, be removed. *McArthur Bros. Co.* v. *Deans*, 21 O. R. 380.

Patent—*Interference with Rights of Patentee.*]—By section 3 of R. S. O. ch. 25, the Lieutenant-Governor in Council may appropriate any public lands . . . as free grants to actual settlers, etc., and by section 4 such grants or appropriations shall be confined to lands . . . within the tract or territory defined in that section. By section 10 pine trees on land located or sold within the limits of the free grant territory after March 5th, 1880, shall be considered as reserved from the location, and shall be the property of Her Majesty, and section 11 enacts that patents of such lands located or sold shall contain a reservation of all pine trees on the land and that any licensee to cut timber thereon may, during the continuance of his license, enter upon the uncleared portion and cut and remove trees, etc. The L. Co. held a license, issued May 30th, 1888, to cut timber on land within the free grant territory but which had not been appropriated under section 3 of the above Act. A license was first issued to the company in 1873 and had been renewed each year since that time. The license authorized the cutting of timber on lands unlocated and sold at its date; lands sold or located while it was in force; pine trees on lots sold under orders in council of May 27th, 1869, and pine trees, when reserved, on lots sold under order in council of April 3rd, 1880, upon the location described on back of license. Regulations made by order in council of 27th May, 1869, provided that "all pine trees on any public land thereafter to be sold, which at the time of such sale or previously was included in any timber license, shall be considered as reserved from such sale and shall be subject to any timber license covering or including such land in force at the time of such sale, or granted within three years from the date of such sale, etc. All trees remaining on the land at the time the patent issues shall pass to the patentee. A patent for a lot in the free grant territory was issued to S. on 13th March, 1884. On the back of the license was a schedule of lots included in the location with the date of sale or location, and the sale or location of S.'s lot was mentioned. The company claimed the right to cut timber on said lot which had not been appropriated by the L. G. in C.:—

Held, affirming the judgment of the Court of Appeal for Ontario, 17 A. R. 322, that the provisions in sections 10 and 11 of R. S. O. ch. 25, relating to the pine trees in the territory, only apply to such lots as have been specifically appropriated under section 3; that the license of the company, though renewed from year to year, was only an annual license; that the license issued in 1888 did not give the holders a right under the regulations of 27th May, 1869, to the timber on land patented in 1884, and that the company had notice, by their license of 1888, that the lot in question had been patented to S. more than three years previously. *Lakefield Lumber Co.* v. *Sharp*, 19 S. C. R. 657.

Sale of Timber Limits—*Licensee — Plan—Description—Damages.*]—Where the holder of a timber license does not verify the correctness of the official description of the lands to be covered by the license before it issues, and after its issue works on lands and makes improvements on a branch of a river which he believed formed part of his limits, but was subsequently ascertained by survey to form part of adjoining limits, he cannot recover from the Crown for losses sustained by acting on an understanding derived from a plan furnished by the Crown prior to the sale. Fournier, J., dissenting.

Per Patterson, J.—The licensee's remedy would be by action to cancel the license under Article 992 C. C. with a claim for compensation for moneys expended. *Grant* v. *The Queen*, 20 S. C. R. 297.

Trespass.]—The legal right of a licensee of timber limits under a license issued by the Ontario Crown Lands Department ceases (except as to the matters specially excepted by the Act) at the expiration of the license year, and there is no equitable right of renewal capable of being enforced against the Crown or sufficient to uphold a right of action for trespass committed after the expiration of the license and before the issue of a renewal.

The insertion in a license, after its expiration, of a lot omitted by error does not confer upon the licensee such a title as enables him to maintain an action for trespass committed on the omitted lot.

Judgment of the District Court of Muskoka reversed. *Muskoka Mill and Lumber Co.* v. *McDermott*, 21 A. R. 129.

CURATOR.

See Bankruptcy and Insolvency, I.—Bank, IV.

CUSTOMS.

See Revenue.

DAMAGES.

I. Generally.

Assignment of Damages.]—*See Sutherland* v. *Webster*, 21 A. R. 228, *ante* 131; *Laidlaw* v. *O'Connor*, 23 O. R. 696, *ante* 131; and *Ball* v. *Tennant*, 21 A. R. 602, *ante* 67.

Attachment of Damages.]—*See Davidson* v. *Taylor*, 14 P. R. 78, *ante* 58.

Crown's Liability for Damages.] — *See* Crown—Crown Lands.

Expropriation.] — *See* Crown—Municipal Corporations—Public Schools—Railways.

Reference to Assess Damages — *Discretion — Appeal.*] — The right of the trial Judge to refer the question of damages, as a question arising in the action, under section 101 of the Judicature Act, is indisputable, at all events as a matter of discretion and subject to review; and it is for the party objecting to the reference to shew that the discretion has been wrongly exercised.

And where, in an action for damages for injury to the plaintiff's land on the bank of a navigable river and to his business as a boatman, by the acts of the three several defendants, who owned saw mills higher up on the stream, in throwing refuse into it, it appeared that the plaintiff's title to relief and the liability of the defendants had been established in a former action, and the trial Judge heard the case only so far as to satisfy himself that the plaintiff had established a *primâ facie* case on the question of damages, and directed a reference to assess and apportion them among the defendants, reserving further directions and costs:—

Held, that there was no miscarriage, and the discretion of the trial Judge should not be overruled. *Rattè* v. *Booth*, 16 P. R. 185.

Survival of Action.]—An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death *pendente lite*, on entering a suggestion of the death and obtaining an order of revivor, continue the action.

Judgment of the Common Pleas Division affirmed. *Mason* v. *Town of Peterborough*, 20 A. R. 683.

Survival of Action—*Damages—Claim of Widow—Prescription.*]—The husband of respondent was injured while engaged in his duties as appellants' employee and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the lifetime of the husband the widow, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death:—

Held, reversing the judgment of the Courts below, Fournier, J., dissenting: (1.) That the respondent's right of action under Article 1056 C. C. depends not only upon the character of the act from which death ensued, but upon the condition of the decedent's claim at the time of his death, and if the claim was in such a shape that he could not then have enforced it, had death not ensued, the article of the code does not give a right of action, and creates no liability whatever on the person inflicting the injury.

(2.) That as it appeared on the record that the plaintiff had no right of action the Court would grant the defendant's motion for judgment *non obstante veredicto*. Article 433 C. P. C.

(3.) That at the time of the death of the respondent's husband all right of action was prescribed under Article 2262 C. C. and that this prescription is one to which the tribunals are bound to give effect although not pleaded. Articles 2267 and 2188 C. C. *Canadian Pacific R. W. Co.* v. *Robinson*, 19 S. C. R. 292. Reversed by the Judicial Committee, [1892] A. C. 481.

II. Apportionment.

Liquor Supplied by Two Tavern-Keepers —*Joint Liability.*]—Where a person comes to his death while intoxicated and the intoxicating liquor has been supplied to him at two taverns and to excess in each so that an action might have been brought successfully against either of the tavern-keepers under R. S. O. ch. 194, sec. 122, they cannot be sued jointly.

The jury having in such an action in which tavern-keepers had been jointly sued assessed the damages at the trial at different sums against the two defendants, upon application to set aside the verdict on the ground that the statute would not support such a joint action, the plaintiff was put to his election to retain his judgment against either defendant, undertaking to enter a *nolle prosequi* against the other. Meredith, C. J., *hæsitante*. *Crane* v. *Hunt*, 26 O. R. 641.

Pollution of Stream—*Joint Tort-Feasors.*]—In an action against several mill owners for obstructing the River Ottawa by throwing sawdust and refuse into it from their mills a reference was made to the master to ascertain the amount of damages:—

Held, affirming the decision of the Court of Appeal, that the master rightly treated the defendants as joint tort-feasors; that he was not called upon to apportion the damages according to the injury inflicted by each defendant; that he was not obliged to apportion them according to the different grounds of injury claimed by the plaintiff. *Booth* v. *Rattè*, 21 S. C. R. 2[illegible].

Sheep Act.]—The right of action given by R. S. O. ch. 214, sec. 15, to the owner of sheep killed by dogs, is to be prosecuted with the usual procedure of the appropriate forum. If, therefore, an action be properly brought in the County Court it may be tried before a jury, and where it is so tried, they, and not the Judge, should apportion the damages if an apportionment be required.

Judgment of the County Court of Wellington reversed. *Fox* v. *Williamson*, 20 A. R. 610.

See Edmonds v. *Hamilton Provident and Loan Society*, 18 A. R. 347, *post* 322.

III. Increasing and Reducing.

Discretion of Court of First Instance as to Amount.]—The amount of damages awarded by the Judge who tries the case in his discretion in the Court of first instance, should not be interfered with by a Court of Appeal, unless clearly unreasonable and unsupported by the evidence, or there be some error in law or fact, or partiality on the part of the Judge. *Levi* v. *Reed*, 6 S. C. R. 482, and *Gingras* v. *Desilets*, Cassel's Digest 117, followed. *Cossette* v. *Dun*, 18 S. C. R. 222.

Excessive Damages.]—A company owning a steamboat making weekly trips between Boston and Halifax, occupied a wharf in the latter city leased to their agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side, part way down the wharf, and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk, and instead of turning off at the end, there being no lights and the night being dark, they continued straight down the wharf, which narrowed after some distance and formed a jog, on reaching which Y.'s wife tripped, and as her husband tried to catch her they both fell into the water. Forty-four days afterwards Mrs. Y. died. In an action by Y. against the company to recover damages, occasioned by the death of his wife, it appeared that the deceased had not had regular and continual medical treatment after the accident, and the doctors who gave evidence at the trial differed as to whether or not the immersion was the proximate cause of her death. The jury when asked: Would the deceased have recovered, notwithstanding the accident, if she had had regular and continual attendance? replied, "very doubtful." A verdict was found for the plaintiff, with $1,500 damages, which the Supreme Court of Nova Scotia set aside, and ordered a new trial. On appeal from that decision:—

Held, that Y. and his wife were lawfully upon the wharf at the time of the accident; that in view of the established practice they had a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care, and the company was under an obligation . . to see that they were safe:—

Held, further, that it having been proved that the wharf was only rented to the agent because the landlord preferred to deal with him personally, and that it was rented for the use of the company, whose officers had sole control of it, the company was in possession of it at the time of the accident:—

Held, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y.'s death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed. *York* v. *Canada Atlantic Steamship Co.*, 22 S. C. R. 167.

Excessive Damages.]—Where damages were assessed by the trial Judge generally in favour of several plaintiffs, whose rights and interests were distinct, and were apportioned equally between them by the Divisional Court, the Court of Appeal, while holding that one plaintiff only was entitled to recover, reduced the damages apportioned to him, being of opinion that such damages were excessive; it appearing, moreover, that in the general assessment matters had been taken into consideration of which he was entitled to complain.

Corham v. *Kingston*, 17 O. R. 432, considered. Judgment of the Queen's Bench Division, 19 O. R. 677, varied. *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

Excessive Damages.]—The amount of damages allowed by the jury to the plaintiff because of his removal from a train while taking a longer route than that authorized by his ticket was reduced by the Court of Appeal as unwarrantably large. *Dancey* v. *Grand Trunk R. W. Co.*, 19 A. R. 664.

Excessive Damages — *New Trial.*]—*See Robertson* v. *Grand Trunk R. W. Co.*, 21 A. R. 204.

Inadequate Damages — *New Trial.*]—Although it is unusual to interfere with a verdict of a jury in an action of tort on the ground of inadequacy of the damages found, still such verdicts are subject to the supervision of the Court, and if the amount awarded be so small that it is evident the jury must have overlooked some material element of damage in the plaintiff's case, a new trial will be granted.

A practising physician having been badly, if not permanently, injured through the negligence of the defendants, it appearing also that his professional business had suffered to a considerable extent, was awarded $700 by the jury:—

Held, that there must be a new trial on the ground of inadequacy of the damages. *Church* v. *City of Ottawa*, 25 O. R. 298. Affirmed in appeal, 22 A. R. 348.

Nominal Damages in Lieu of New Trial.]—The jury having assessed the damages against a sheriff's officer at a nominal sum, the Court of Appeal, instead of a new trial, directed judgment to be entered against his co-defendant, the sheriff, for a like amount. *Gordon* v. *Rumble*, 19 A. R. 440.

See Taylor v. *Massey*, 20 O. R. 429, *post* 341; and *Coffey* v. *Scane*, 25 O. R. 22, *ante* 40.

IV. Liquidated Damages or Penalty.

Bonus—*Liquidated Damages.*]—In 1874 the county of Halton gave to the Hamilton and

North-Western Railway Company a bonus of $65,000.00 to be used in the construction of the railway, upon the condition that the company should remain "independent" for twenty-one years. In 1888 the Hamilton and North-Western Railway Company became (as was on the facts held) in effect merged in the Grand Trunk Railway Company, and ceased to be an independent line :—

Held, affirming the judgment of the Common Pleas Division and of Robertson, J., at the trial, that there had been a breach of the condition entitling the plaintiffs to recover the whole amount of the bonus as liquidated damages. *County of Halton* v. *Grand Trunk R. W. Co.*, 19 A. R. 252. Affirmed by the Supreme Court, 21 S. C. R. 716.

Building Contract—*Delay.*]—Under a building contract, in writing, the contractor agreed that, subject to any extensions of time by the architect, the building should be finished by a named day, and that in default he would pay $50 a week as liquidated damages. It was also provided that all extras, etc., should form part of the contract if authorized by the architect, who was first to fix the price, and grant such extension of time therefor as he thought necessary, and power was also given him to extend the time for completion in case of a strike.

The building was not completed for over four months after the time fixed, and this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract.

Although some extras were done, and there was evidence as to delay by strikes, the architect was not asked for, and he did not grant, any extension of time :—

Held, that the contract must govern, and that the defendants were entitled to recover, by way of counter-claim, the sum provided by the contract as liquidated damages.

If a claim to liquidated damages by a defendant is pleaded by way of counter-claim, the plaintiff may reply matters arising subsequent to action brought. The plaintiff was allowed to reply that the final payment under the contract had accrued due after action brought.

Aliter, if pleaded by way of set-off. *Toke* v. *Andrews*, 8 Q. B. D. 428, followed. *McNamara* v. *Skain*, 23 O. R. 103.

Building Contract—*Delay.*]—Where a contract provided that upon non-completion by a fixed date a contractor was to pay or "allow" ten dollars a day until completion :—

Held, that this authorized a deduction as liquidated damages of the amount so "allowed" from the contract price, even as against lienholders claiming adversely to the contractor, other than those having liens for wages, where such wages liens were less in the aggregate than ten per cent. of the contract price. *McBean* v. *Kinnear*, 23 O. R. 313.

Contract—*Delay Caused by Contractor.*]—Where a contract provides that an engine shall be built and placed in position by a certain date, with a penalty for each day's delay, the time of commencement is of the essence of the contract, and if, owing to the purchaser's fault, the contractor is materially delayed in commencing the work, the parties are at large so far as the penalty is concerned, the purchaser, if the work be not completed by the time fixed, being entitled only to actual damages.

Holme v. *Guppy*, 3 M. & W. 387, followed.

Judgment of the Queen's Bench Division reversed. *Kerr Engine Company* v. *French River Tug Company*, 21 A. R. 160. Affirmed by the Supreme Court, 24 S. C. R. 703.

V. Measure of Damages.

Agreement to Convey Land—*Loss of Bargain Previously Made.*]—Loss of profit sustained by, and the expenses which a purchaser of lands has been put to, on a resale by him, unknown to his vendor, before such purchaser has entered into a binding contract for purchase, are not damages naturally flowing from the breach of the latter agreement, and cannot be recovered by him against his vendor.

In such a case, if recoverable at all, the true measure of damages would be the increased value of the land, at the time of the breach, over the purchase money. *Loney* v. *Oliver*, 21 O. R. 89.

Book-binding—*Loss of Profits.*]—M. entered into a contract with the Dominion Government to do parliamentary and departmental binding for a period of five years. During the continuance of the contract the Government employed other persons to do portions of the work which M. was entitled to do, and in consequence of this M. (through his trustee in insolvency) brought an action by petition of right, claiming damages against the Government for breach of contract. The breach was admitted by the Crown, and the case was referred by the Court to two referees to ascertain the amount due M. for loss of profits in respect to the work that was withheld from him and given to other persons. The referees found that the work done by persons other than M. amounted to $25,357.79, and that the cost of performing such work amounted to $10,094.74, leaving a balance for contractor's profit of $15,263.05. From this balance the referees made deductions for "superintendence generally, wear and tear of plant, building, etc., rent, insurance, fuel and taxes," amounting in the whole to $3,637.71, and recommended that M. be paid a sum of $11,625.34 as representing the contractor's profit lost to M. by the breach of contract. On appeal from the referees' report :—

Held, that the referees were wrong in making such deductions, and that M. was entitled to be paid the difference between the value of the work done by persons other than himself during the continuance of his contract, and the amount it would have actually cost him, as such contractor, to perform that work. *Boyd* v. *The Queen*, 1 Ex. C. R. 186.

Bonus—*Failure to Comply with Conditions.*]—*See County of Halton* v. *Grand Trunk R. W. Co.*, 19 A. R. 252, 21 S. C. R. 716, *ante* 322; and *Village of Brighton* v. *Auston*, 19 A. R. 305, *ante* 116.

Building Contract—*Reduction of Price for Bad Work.*]—In an action to enforce a mechanics' lien, brought by material men against

the contractor and the registered owner, the contest was as to whether anything was due to the contractor, the registered owner not being liable on the contract :—

Held, that the amount due to the contractor could not be ascertained without the persons liable on the contract being brought before the Court.

The work in question was the building of a church. The last of the work done was the pews, and as they were being put in objection was made by the architect to their material and workmanship :—

Held, that the occupying of the church with the pews objected to in it was not an acceptance of the work :—

Held, also, that a reduction of the contract price by an amount equal to the difference in value between the bad material and that which should have been used was not an adequate measure of the set-off to which the proprietors were entitled. *Wood* v. *Stringer*, 20 O. R. 148.

Building Contract — *Non-completion of Houses by Stipulated Time—Measure of Damages.*]—The defendant agreed with the plaintiff to exchange five houses, then in course of erection, for certain lands of the plaintiff. By the contract, which was dated March 24th, the houses were to be completed by May 30th, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within sixty days, *i.e.*, by May 24th, but as a matter of fact they were executed and exchanged about May 9th. The plaintiff subsequently in the present action claimed damages for non-completion of and defects in the finishing of the houses.

The deed from the defendant contained no covenants covering the matters complained of :—

Held, nevertheless, that the plaintiff was entitled to recover on the original contract.

A contract to perform work or to do things for the other contracting party on a sale of lands at a period after the time fixed by the same contract for the execution and final delivery of the formal conveyance, does not become merged in the conveyance :—

Held, also, that the loss of rents which might have been obtained for the houses if completed at the proper time was a proper measure of damages, the contracting parties having known that the houses were intended to be rented. *Smith* v. *Tennant*, 20 O. R. 180.

Carriers.]—The measure of damages against carriers for non-delivery of trees considered. *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

Carriers—*Knowledge of Special Purpose—Non-delivery of Animals.*]—Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company, including anticipated profits.

Judgment of the County Court of Wentworth reversed. *Kennedy* v. *American Express Co.*, 22 A. R. 278.

Carrying Rails—*Employment of Persons Other Than Contractor to do Work Covered by Contract.*]—On the 9th August, 1875, the suppliant entered into a written contract with the Dominion Government to remove and carry in barges all the steel rails that were then actually landed, or that might thereafter be landed, from seagoing vessels upon the wharves in the harbour of Montreal during the season of navigation in that year, and to deliver them at a place called the Rock Cut on the Lachine Canal. Suppliant duly entered upon the execution of his contract, and no complaint was made on behalf of the Government that his performance of the work was not entirely satisfactory. Sometime in the month of September, and when the suppliant had only carried a small quantity of rails, the Government, without previous notice to the suppliant, cancelled the contract and employed other persons to do the work that he had agreed to perform. Thereupon the suppliant filed a petition of right claiming damages against the Government for breach of contract :—

Held, that suppliant was entitled to damages, the measure thereof being the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. *Kenney* v. *The Queen*, 1 Ex. C. R. 68.

Conversion—*Distress—Measure of Damages.*] —*See Williams* v. *Thomas*, 25 O. R. 536, *ante* 204.

Diversion of Watercourse.]—The defendants built an embankment which entirely cut off the plaintiff's access to the water of a stream by diverting it from his farm :—

Held, that the diversion, not the damage sustained therefrom, gave him his cause of action ; and the proper mode of estimating the damages was to treat the diversion as permanent and to consider its effect upon the value of the farm.

McGillivray v. *Great Western R. W. Co.*, 25 U. C. R. 69, distinguished.

Arthur v. *Grand Trunk R. W. Co.*, 25 O. R. 37. Affirmed in appeal, 22 A. R. 89.

Diversion of Watercourse.]—The plaintiff, having failed to prove actual damage, was allowed nominal damages for the wrong ; and instead of granting a mandatory injunction to compel the restoration of the watercourse, the Court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict. ch. 29, sec. 90, sub-sec. h (D.). *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

Easement.]—The defendants granted to the predecessors in title of the plaintiff, with covenants for title under the Short Forms Act, certain lands with the right and easement of erecting a dam at a certain spot. It was afterwards held that they had no power to grant such a right, but it was shewn that it was not, in any event, practicable to maintain a dam at the spot in question :—

Held, that the defendants were not liable to repay the full purchase money less the actual value of the land without the supposed right, but only the actual practical value of the supposed right, which was nothing.

Judgment of Ferguson, J., affirmed, Osler, J. A., dissenting. *Platt* v. *Grand Trunk R. W. Co.*, 19 A. R. [illegible]

Restraint of Trade.]—In an action for damages for breach of a covenant not to carry on a certain business, it was held that general loss of custom after the commencement of the new business by the defendants could be shewn by the plaintiff as evidence to go to the jury of damages resulting to him from such business.

Ratcliffe v. *Evans*, [1892] 2 Q. B. 524, applied and followed, and that damages were properly assessed up to the date of the judgment.

Stalker v. *Dunwich*, 15 O. R. 342, followed. *Turner* v. *Burns*, 24 O. R. 28.

Right of Way—*Loss of Business.*]—The defendant, the owner of certain water lots upon the lake front, subject to the usual reservation in favour of the Crown of free passage over all navigable waters thereon, refused to allow the plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless the plaintiff paid toll, which he refused to do :—

Held, that the water over the defendant's lot was a highway, and the plaintiff had the right without payment to cross the lot, whether the water upon it was fluid or frozen; and, having a cause of complaint, and a right of action for his personal loss, he was entitled to come to the Court for a declaration of right.

Gooderham v. *City of Toronto*, 21 O. R. 120, 19 A. R. 641, and *City of Toronto* v. *Lorsch*, 24 O. R. 229, followed :—

Held, also, that the defendant was liable for such reasonable damages as flowed directly from the wrong done by his refusal; but, as he had acted without malice and under a *bond fide* mistake as to his rights, and as the plaintiff might have paid the toll under protest, the defendant was not liable for the plaintiff's loss of business consequent on his failure to ship the ice. *Cullerton* v. *Miller*, 26 O. R. 36.

Timber License.—*Failure to make Title.*]—*See St. Catharines Milling and Lumber Co.* v. *The Queen*, 2 Ex. C. R. 202, and *Bulmer* v. *The Queen*, 3 Ex. C. R. 184; 23 S. C. R. 488; *ante* 314.

Trespass to the Person—*Arrest before Indorsement of Warrant—Detention After.*]—A warrant for the arrest of the plaintiff, who had made default in paying a fine on conviction for an infraction of the liquor license law, was sent from an outlying county to the city. Before it was endorsed by a magistrate in the city the plaintiff was arrested there by two of the defendants, the chief constable and a detective, and confined. Some hours after the arrest the warrant was properly indorsed and the detention of the plaintiff was continued until payment of the fine: —

Held, that the only damages recoverable by the plaintiff were for the trespass, up to the time of the backing of the warrant. *Southwick* v. *Hare*, 24 O. R. 528.

VI. Remoteness.

Expulsion from Street Car—*Taking Cold.*]—Where there was some evidence that serious illness from which the plaintiff had suffered had resulted from exposure to cold upon illegal expulsion from a street car an award of damages in respect of that illness was upheld.

Judgment of the Common Pleas Division, 24 O. R. 683, affirmed, Hagarty, C. J. O., dissenting. *Grinsted* v. *Toronto R. W. Co.*, 21 A. R. 578. *See* the next case.

Expulsion from Car—*Exposure to Cold.*]—In an action for damages from being wrongfully ejected from a street car, illness resulting from exposure to cold in consequence of such ejectment, is not too remote a cause for damages; and where the evidence was that the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration from an altercation with the conductor when he left the car and so liable to take cold, the jury were justified in finding that an attack of rheumatism and bronchitis which ensued was the natural and probable result of the ejectment, and in awarding damages therefor. Gwynne, J., dissenting. *Toronto R. W. Co.* v. *Grinsted*, 24 S. C. R. 570.

Impurity of Seed.]—Where seed is delivered by one person to another without any warranty, honestly believing it to be clean, to be grown on the land of the latter, the produce thereof to be returned and paid for at a fixed price per bushel, the transaction is a bailment and not a sale; and damages arising from other injurious seed having been mixed therewith, and of harvesting having become scattered on the ground and coming up the following year on the land, are too remote, and not within the rule laid down in *Hadley* v. *Baxendale*, 9 Ex. 341, and *Cory* v. *Thames Ironworks Company*, L. R. 3 Q. B. 181.

McMullen v. *Free*, 13 O. R. 57, and *Smith* v. *Green*, 1 C. P. D. 92, distinguished.

The plaintiff, having received seed from the defendant to be grown under the circumstances and conditions above mentioned, became aware while it was growing that vetches were coming up with it, but did not inform the defendant of the fact, and permitted them to grow, and delivered the produce mixed to the defendant, and was paid for it :—

Held, that he could not recover damages for an injury which his own conduct was responsible for.

McCollum v. *Davis*, 8 U. C. R. 150, specially referred to. *Stewart* v. *Sculthorp*, 25 O. R. 544.

Obstruction in Highway.]—The plaintiff was driving a horse and sleigh along a highway belonging to a city corporation, when the runner of the sleigh came in contact with a large boulder, whereby both horse and sleigh were overturned. In endeavouring to raise his horse the plaintiff sustained a bodily injury, on account of which he sued the corporation for damages, alleging that his injury was due to their negligence :—

Held, that the damages were not too remote:—

Page v. *Bucksport*, 64 Maine 51; and *Stickney* v. *Maidstone*, 30 Vermont 738, applied and followed. *McKelvin* v. *City of London*, 22 O. R. 70.

VII. Special Matters and Proceedings.

Appeal Bond.]—In winding-up proceedings a property was sold by tender under the power of sale in a mortgage with the consent of the liquidator, and an appeal by an unsuccessful tenderer to a Judge from the report confirming the sale was dismissed, whereupon a further appeal to the Court of Appeal was allowed upon the appellant giving security by bond to the successful tenderer to answer the damages which the latter as purchaser might sustain by being prejudicially affected in his purchase, by the appeal allowed, in case such appeal should fail. Possession was not taken by the purchaser until after the failure of the appeal. The conditions of sale provided that possession would be given upon payment of the balance of the purchase money within a time fixed, but the money was not paid, nor did it appear that it had been set aside for that purpose, nor was any provision made in the conditions as to the payment of interest or taxes: —

Held, that under the bond the purchaser was not entitled to payments made by him for care of the property or taxes, nor was he entitled to interest on the purchase money, or to damages for deterioration of the property. *Re Alger and Sarnia Oil Co.*, 23 O. R. 583.

Banks and Banking — *Special Deposit — Wrongful Refusal to Pay Out.*]—The damages recoverable by a non-trading depositor in the savings bank department of a bank who has made his deposit subject to special terms, on the wrongful refusal of the bank to pay it to him personally, are limited to the interest on the money.

Marzetti v. *Williams*, 1 B. & Ad. 415; and *Rolin* v. *Steward*, 14 C. B. 594, distinguished.

Henderson v. *Bank of Hamilton*,, 25 O. R. 641.

Benefit Insurance.]—The plaintiff, in an action to recover damages from a railway company for the death of her husband, was paid a sum of $250 by a benefit insurance society in connection with the railway, though a distinct organization, of which deceased was a member. The plaintiff gave a receipt stating that the railway company was relieved from all liability. The deceased's certificate did not profess to be an insurance against accidents, and the railway company were no party to the receipt:—

Held, that the receipt formed no bar to the action against the defendants; nor was there any right to deduct the amount received from the benefit society from the sum the plaintiff was entitled to as damages. *Hicks* v. *Newport, etc., R. W. Co.*, 4 B. & S. 403 (*n.*), distinguished. *Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 299.

Bond—*Damages in Lieu of Interest.*]—*See The Queen* v. *Grand Trunk R. W. Co.*, 2 Ex. C. R. 132, *post*, Interest.

Hire of Goods—*Agreement to Return—Contract—Damage Occasioned by Unforeseen Accident.*]—Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforeseen causes the performance has become unexpectedly burdensome or even impossible.

The defendants hired the plaintiff's scow and pile driver, at a named price per day, they to be responsible for damage thereto, except to the engine, and ordinary wear and tear, until returned to the plaintiff. While in the defendants' custody, by reason of a storm of unusual force, the scow and pile driver were driven from their moorings and damaged:—

Held, that the defendants were liable for the damages thus sustained, and for the rent during the period of repair.

Taylor v. *Caldwell*, 3 B. & S. 826, followed.

Harvey v. *Murray*, 136 Mass. 377, approved. *Grant* v. *Armour*, 25 O. R. 7.

Injunction]—The jurisdiction to award an enquiry as to, or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages given, is a discretionary one, to be exercised judicially and not capriciously.

Where, in an action to set aside a sale of goods as fraudulent, a claim for damages by reason of an injunction was set up in the defence, and the trial Judge was, on the evidence, of opinion that no damage was proved occasioned by the injunction as distinct from the detriment arising from the litigation, and no additional evidence having been given, the Divisional Court under the circumstances of this case, where the defendant was given his costs, although his conduct had been such as properly to provoke legal enquiry, refused to award a reference as to damages.

Decision of Rose, J., affirmed. *Gault* v. *Murray*, 21 O. R. 458.

Injunction—*Damages in Lieu of Injunction.*]—*See Arthur* v. *Grand Trunk R. W. Co.*, 22 A. R. 89.

Interest—*Damages in Lieu of—Interest Post Diem.*]—*See The Queen* v. *Grand Trunk R. W. Co.*, 2 Ex. C. R. 132, *post*, Interest; *McCullough* v. *Clemow*, 26 O. R. 467, *post*, Interest.

Libel—*Damages in the Way of Trade.*]—*See Blachford* v. *Green*, 14 P. R. 424, *post* 345; and *Acme Silver Co.* v. *Stacey Hardware Co.*, 21 O. R. 261, *post* 352.

Libel—*Mitigation of Damages.*]—The defendant may plead in mitigation of damages that the article complained of was published in good faith in the usual course of business.

Judgment of Robertson, J., reversed. *Beaton* v. *Intelligencer Printing and Publishing Co.*, 22 A. R. 97.

Libel—*Special Damages—Loss of Custom.*]—By section 11 of the Libel Act of Manitoba, 50 Viet. ch. 22, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed:—

Held, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per Strong, J.—Where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom the names of the customers must be given or otherwise evidence of the special damage is inadmis-

sible. *Ashdown* v. *Manitoba Free Press Co.*, 20 S. C. R. 43.

See Blachford v. *Green*, 14 P. R. 424, *post* 345.

Replevin.]—The plaintiff, a solicitor, claiming on defendant's papers a lien for costs, settled with him, taking a note therefor payable on demand. He then went to the United States, leaving the note and papers with another solicitor as his agent. The defendant, stating that he required the papers, or some of them, for use in his business, brought replevin proceedings in the Division Court, giving a bond to prosecute the suit with effect and without delay, or to return the property replevied and to pay the damages sustained by the issuing of the writ, and there was a breach of the bond in not prosecuting the suit with effect. Under the replevin the defendant only procured some of the papers and which were tendered back to the plaintiff and refused, the defendant stating that they were of no value, the agent having retained the valuable ones. In an action on the bond by plaintiff to recover the amount of the note as damages he had sustained by the replevin :—

Held, per Boyd, C., that even if any lien existed, which was questionable, by reason of the taking of the note and departure from the country, it was not displaced by the replevin suit ; but, in any event, the plaintiff had failed to prove any actual damage ; and though there might be judgment for nominal damages and costs, there would be a set-off of the defendant's costs of trial ; and the action was dismissed without costs.

Under the Division Courts Act, R. S. O. ch. 51, sec. 266, the whole matter could have been litigated in the Division Court.

Quære, as to the amount of damages recoverable.

The fact of the conditions of the bond being in the alternative instead of the conjunctive remarked on.

On appeal to the Divisional Court the judgment was affirmed. *Kennin* v. *Macdonald*, 22 O. R. 484.

Sewers—*Damages—Act of God.*]—Where a sewer, built and maintained by a municipal corporation, is free from structural defect and is of sufficient capacity to answer all ordinary needs, the corporation is not liable for damages caused, as a result of an extraordinary rain-fall, by water backing into the cellar of a person compelled by by-law to use the sewer for drainage purposes.

An extraordinary rain-fall may properly be treated as an act of God, in the technical meaning of that term, though it is not of unprecedented severity, if there is nothing in previous experience to point to a probability of recurrence.

Judgment of the Queen's Bench Division reversed. *Garfield* v. *City of Toronto*, 22 A. R. 128.

Slander—*Finding of No Damage.*]—*See Bush McCormack*, 20 O. R. 497, *post* 340.

Trespass to Land—*Mortgagee.*]—An action of trespass to vacant lands will lie by the mortgagee thereof.

In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by a railway company for the purposes of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

Wages—*Agreement to Remunerate by Legacy—Damages for Failure to do so.*]—*See Smith* v. *McGugan*, 21 A. R. 542, 21 S. C. R. 263, *ante* 201 ; and *Murdoch* v. *West*, 24 S. C. R. 305, *ante* 202.

DECLARATION OF RIGHT.

See ICE—JUDGMENT, III.

DEDICATION.

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DEED.

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II. CONSTRUCTION.

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2. *Description*, 334.
3. *Estate Created*, 337.
4. *Option to Purchase*, 337.

III. REFORMATION, 338.

I. CONDITIONS.

Revocation by Grantor.]—By deed between B. grantor of the first part, certain named persons, trustees of the second part, and P. grantee of the third part, B. conveyed his property to the trustees, the trusts declared being that if P. survived B. and performed certain conditions intended for the support or advantage and security of B. which by the deed he covenanted to perform, the trustees should convey the property to P., and it should be reconveyed to B. in case he survived. No trust was declared in the event of P. surviving and failing to perform the conditions or of failure in the lifetime of both parties. In an action by B. to have this deed set aside the trial Judge held that B. when he executed it was ignorant of its nature and effect and set it aside on that ground. The full Court, on appeal, dissented from this finding of fact, and varied the judgment by directing that the trustees should reconvey the property to B. on the ground that

P. had failed to perform the conditions he had agreed to by the deed. On appeal to the Supreme Court :—

Held, affirming the decision of the Court below, that the conditions to be performed by P. were conditions precedent to his right to a conveyance of the property ; that by failure to perform them the trust in his favour lapsed, and B., the grantor, being the only person to be benefited by the trust, could revoke it at any time and demand a reconveyance of the property. *Poirier* v. *Brulé*, 20 S. C. R. 97.

II. Construction.

1. *Conditions, Reservations and Exceptions.*

Right of Way—*Construction of Grant.*]—A deed of conveyance of land under the Short Forms Act from the plaintiff to the defendants recited that the latter had determined to construct waterworks in their municipality, and for that required the land for buildings and other purposes connected with the waterworks, and the plaintiff had agreed to sell them such land for such purposes for the consideration and subject to the conditions set forth. The consideration was a valuable one. The grant was to the defendants and their assigns for ever, for the purposes mentioned in the recital, of the land described, with full right of ingress and egress to and from the said lands for the defendants, their employees and others doing business on and about the said waterworks with teams and otherwise, from a certain street, etc., along a certain road, etc.; *habendum* to the defendants, their successors and assigns, for the purposes aforesaid to and for their sole and only use for ever, subject, nevertheless, to the following conditions. The first condition was that the defendants should fence and keep fenced at their own expense the land conveyed to them, and place an entrance and gate on the right of way at the north and south limits of the land conveyed, for the use of the plaintiff, his heirs and assigns, and all persons claiming under him or them, whenever he or they might require the same. The second condition was, that the defendants should put and maintain the right of way in a reasonable state of repair until the happening of a certain event, and thereafter that the plaintiff and defendants should each bear a proportionate part of the repairs necessary according to their respective requirements. Certain other conditions were also made. There was a covenant for quiet possession for the purposes aforesaid, and subject to the conditions aforesaid. The plaintiff released to the defendants all his claim upon the land save as aforesaid, and for the purposes aforesaid. The conveyance contained no provision that the lands should not be put to any other use, and no condition making the grant void upon the happening of any event subsequent to the grant :—

Held, that under the terms of the conveyance, the defendants acquired an absolute estate in fee simple, free from any condition of defeasance, and unincumbered by any trust restricting the use to which they should put it ; and that under section 29 of the Municipal Waterworks Act, R. S. O. ch. 192, they had the right to dispose of the land when no longer required for waterworks purposes.

2. That the grant of the right of way gave to the defendants and their employees footway, carriageway, and way for horses, but conferred no right of way upon persons to whom the defendants might sell or lease the land. *McLean* v. *City of St. Thomas*, 23 O. R. 114.

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2. *Description.*

Foundaries.]—The owners of a block of land in Toronto, bounded on the north by Wellesley street and west by Sumach street, entered into an agreement with B. whereby the latter agreed to purchase a part of said block, which was vacant wild land not divided into lots, and containing neither buildings nor streets, though a by-law had been passed for the construction of a street immediately south of it to be called Amelia street. The agreement contained certain restrictions as to buildings to be erected on the property purchased which fronted on the two streets north and west of it respectively, and the vendors agreed to make similar stipulations in any sale of land on the south side of Wellesley street produced. A deed was afterwards executed of said land pursuant to the agreement which contained the following covenant :—"And the grantors . . . . covenant with the grantees . . . that in case they make sale of any lots fronting on Wellesley street or Sumach street on that part of lot 1, in the city of Toronto, situate on the south side of Wellesley street and east of Sumach street, now owned by them, that they will convey the same subject to the same building agreements or conditions" (as in the agreement). The vendors afterwards sold a portion of the remaining land fronting on Amelia street, and one hundred feet east of Sumach street, and the purchaser being about to erect thereon a building forbidden by the restrictive covenant in the deed, B. brought an action against his vendors for breach of said covenant, claiming that it extended to the whole block :—

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the covenant included all the property south of Wellesley street ; that the land, not being divided into lots any part of it was a portion of a lot of land fronting on Wellesley and Sumach streets, and so within the purview of the deed ; and that the vendors could not by dividing the property as they saw fit narrow the operation and benefit of their own deed :—

Held, per Gwynne, J.—The piece of land in question did not front nor abut on either Wellesley or Sumach streets, but on Amelia street alone, and was not, therefore, literally within the covenant of the vendors. *Dumoulin* v. *Burfoot*, 22 S. C. R. 120.

Boundaries.]—Where there is a dispute as to the boundary line between two lots granted by patents from the Crown, and it has been found impossible to identify the original line, but two certain points have been recorded in the Crown Lands Department, the proper course is to run a straight line between the two certain points. R. S. Q. Article 4155. *Bell's Asbestos Co.* v. *Johnson's Co.*, 23 S. C. R. 225.

Boundaries.]—The description of a lot prepared for and used by the Crown Lands Depart-

ment in framing the patent, which grants the lot by number or letter only, is admissible evidence to explain the metes and bounds of that lot.

Judgment of the Common Pleas Division reversed. *Kenny* v. *Caldwell*, 21 A. R. 110. Affirmed by the Supreme Court, 24 S. C. R. 699.

Terminal Point — *Number of Rods.*]—A specific lot of land was conveyed by deed and also: "A strip of land twenty-five links wide, running from the eastern side of the aforesaid lot along the northern side of the railway station about twelve rods unto the western end of the railway station ground, the said lot and strip together containing one acre, more or less";—

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that the strip conveyed was not limited to twelve rods in length, but extended to the western end of the station, which was more than twelve rods from the starting point. *Doyle* v. *McPhee*, 24 S. C. R. 65.

Uncertain Description—*Falsa Demonstratio.*]—The deed to the plaintiff, in an ejectment action, purported to convey "part of lot forty-three," described as "commencing in the southerly limit of said lot forty-three, at a distance of twenty feet from the water's edge of the Detroit river, thence northerly, parallel to the water's edge 208 feet, thence westerly parallel to the said southerly limit 600 feet, more or less, to the channel bank of the Detroit river, thence southerly, following the channel bank 208 feet, thence easterly 600 feet, more or less, to the place of beginning, together with the fishery privileges appurtenant to the premises hereby conveyed":—

Held, that the patent of lot forty-three might be looked at to ascertain the point of commencement; that as that lot was described as running to the water's edge of a navigable river, the point of commencement must be taken to be twenty feet landwards, and that the plaintiff was entitled to claim the strip of twenty feet along the water's edge.

Judgment of the Queen's Bench Division reversed. *Scotten* v. *Barthel*, 21 A. R. 569. *See* the next case.

Uncertain Description—*Evidence of Intention—Verba Fortius Accipiuntur Contra Proferentem.*]—A grant of land bounded by the bank of a navigable river, or an international waterway, does not extend *ad medium filum* as in the case of a non-navigable river.

If, in a conveyance of land, the description is not certain enough to identify the locus, it is to be construed according to the language of the instrument, though it may result in the grantor assuming to convey more than his title warranted.

The intention of the parties to a deed is paramount, and must govern regardless of consequences. *Res magis valeat quam pereat* is only a rule to aid in arriving at the intention, and does not authorize the Court to override it.

A general description of land as being part of a specified lot, must give way to a particular description by boundaries, and, if necessary, the general description will be rejected as *falsa demonstratio*.

Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence, the maxim *verba fortius accipiuntur contra proferentem* cannot be applied in favour of either party.

Where a description is such that the point of commencement cannot be ascertained, it cannot be determined at the election of the grantee. *Barthel* v. *Scotten*, 24 S. C. R. 367.

Uncertain Description.]—A patent of land from the Crown is to be upheld rather than avoided, and to be construed most favourably for the grantee.

Where land was granted by a Crown patent describing it as the north part of lot 13, containing sixty acres, and the original plan of the township shewed the lot with centre line running through the concession, and shewed the part south of the line as one hundred acres, and the part north of the line as eighty acres, and it appeared that, prior to the grant of the north part, there had been a grant of the southerly part, containing one hundred acres, describing it by metes and bounds, which were evidently intended to include all the land south of the line, although they actually fell short of doing so:—

Held, in a contest between the plaintiff, claiming under the patentee of the north part, and the defendant, claiming under sales for taxes based upon the lands sold being patented lands, that the patent was not void for uncertainty, but that under the words "the north part" the whole of the lot lying to the north of the centre line passed to the grantee and those claiming through him.

Doe Devine v. *Wilson*, 10 Moo. P. C. 502; *Nolan* v. *Fox*, 15 C. P. 565; *Regina* v. *Bishop of Huron*, 8 C. P. 253, specially referred to. *Hyatt* v. *Mills*, 20 O. R. 351. *See* the next case.

Uncertain Description.]—A parcel of land was described in the patent and in the books of the county treasurer as "the north part of lot number thirteen . . . containing sixty acres of land, be the same more or less." The parcel contained in fact eighty-two acres. In 1868 there were sold for taxes fifty acres described thus: "Commencing at the north-east angle of said north part at the limit between said north part of lot number thirteen and lot number fourteen, thence along said limit, taking a proportion of the width corresponding in quantity with the proportion of the said north part of lot number thirteen, in regard to its length and breadth sufficient to make fifty acres of land." Then in 1871 there was sold for taxes a parcel described thus:—"The whole of said southerly part of the north half of said lot number thirteen . . . containing ten acres, and being part not sold for taxes in 18868";—

Held, that the sale of 1871 could not be limited to ten acres to be located by the Court "in such manner as is best for the owner," but was, the taxes being properly chargeable against the whole of the unsold portion, a sale of the whole of that unsold portion, and could not, in consequence of the provisions of R. S. O. ch. 193, sec. 191, be attacked by the plaintiff, a purchaser from the owner after the time of the tax sale, who then had a mere right of entry.

Application and effect of this section considered.

Decision of the Queen's Bench Division, 20 O. R. 351, reversed. *Hyatt* v. *Mills*, 19 A. R. 329.

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3. *Estate Created.*

Limitations—*Grant to A. and his Heirs for ever, habendum to A. and his wife for life, and after the death of both over.*]—Under a grant to A. and his heirs for ever, habendum to A. and his wife "for and during their natural life and the life of the survivor of them;" and "from and after the death of both, to have and to hold unto their lawful heirs and assigns for ever," or from and after the death of both, to have and to hold unto their lawful heirs, their heirs and assigns for ever," A. takes a fee simple absolute. *Langlois* v. *Lesperance*, 22 O. R. 682.

Maintenance—*Gift of Board and Lodging—Right of Occupation.*]—A father conveyed to one of his sons certain farm lands, subject to his own life estate therein, and subject also to the use by another son, the plaintiff, of a bed, bedroom and bedding, in the dwelling house on the farm, and to his board so long as the plaintiff should remain a resident on the farm:—

Held, that the plaintiff took no estate under the deed, but merely the use, after the termination of the father's life estate, and while resident on the land, of the bed-room and board, which was a charge thereon; that no period was fixed for such occupation, which might be either permanent or temporary, and therefore no forfeiture was created by non-occupation. *Wilkinson* v. *Wilson*, 26 O. R. 213.

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4. *Option to Purchase.*

Sale of Phosphate Mining Rights—*Option to Purchase other Minerals found while Working.*]—M. by deed sold to W. the phosphate mining rights of certain land, the deed containing a provision that "in case the said purchaser in working the said mines should find other minerals of any kind he shall have the privilege of buying the same from the said vendor or representative by paying the price set upon the same by two arbitrators appointed by the parties." W. worked the phosphate mine for five years and then discontinued it. Two years later he sold his mining rights in the land and by various conveyances they were finally transferred to B., each assignment purporting to convey "all mines, minerals and mining rights already found or which may hereafter be found" on said land. A year after the transfer to B. the original vendor, M., granted the exclusive right to work mines and veins of mica on said land to W. & Co. who proceeded to develop the mica. B. then claimed an option to purchase the mica mines under the original agreement and demanded an arbitration to fix the price, which was refused, and she brought an action to compel M. to appoint an arbitrator and for damages:—

Held, affirming the decision of the Court of Queen's Bench, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica as to which B. claimed the option. *Baker* v. *McLelland*, 24 S. C. R. 416.

III. Reformation.

Absolute Transfer—*Commencement of Proof by Writing—Oral Evidence.*]—Verbal evidence is inadmissible to contradict an absolute notarial transfer even where there is a commencement of proof by writing. Article 1234 C. C. *Bury* v. *Murray*, 24 S. C. R. 77.

Deed Absolute in Form Intended to Operate as Mortgage—*Intention.*]—To induce a Court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only the evidence of such intention must be of the clearest, most conclusive and unquestionable character. *McMicken* v. *Ontario Bank*, 20 S. C. R. 548.

Mortgage—*Dower—Omission to Bar.*]—A voluntary deed will not be reformed against the grantor.

And where the defendant's husband, having appropriated moneys of a client in his hands for investment, secretly executed in the client's favour, a statutory mortgage not containing a bar of dower, the defendant being a party to and executing the mortgage, and subsequently after her husband's death paying, with knowledge of the facts, an instalment of interest due under it, an action to reform the mortgage by inserting a proper bar of dower was dismissed, there being no consideration to support a contract by the defendant with the plaintiffs to bar her dower. *Bellamy* v. *Badgerow*, 24 O. R. 278.

Omission of Property by Mistake—*Rectification—Subsequent Purchase.*]—M. & B., owners of certain village lots of land, were in possession of an adjoining water lot in a lake, the title to which was in the Crown and to which, according to the practice of the Crown Lands Department, they had a right of preemption. On this water lot they erected a mill on cribwork built on the bottom of the lake. A mortgage given to B. of the village lots and certain other lands was intended to comprise the water lot and mill, but the latter were omitted by mistake of the solicitor who prepared the instrument. M. & B. afterwards executed separate instruments in the form of a chattel mortgage purporting to mortgage certain chattel property and the said mill to two other persons. M. & B. having become insolvent assigned all their property for the benefit of their creditors, and the assignee sold at auction all their property, including the mill. The sale was made subject to certain printed conditions, one of which was that as all the information relating to the titles of the property was set out in the schedules, stock list and inventory, the vendor would not warrant the correctness of the same and that no other claims existed, "but the purchaser must take subject to all claims thereon, and whether herein mentioned or not, and subject to all exemptions in law." These conditions were signed by the purchasers to whom the assignee executed a conveyance of all the property so sold. Before the sale the assignee had procured the two last

above mentioned mortgages executed by M. & B. to be paid off by a person who advanced the money and he took an assignment to himself after the sale, paying the amount out of the purchase money. The conveyance to the purchasers at the sale purported to be made in pursuance of all powers contained in these mortgages. R., the mortgagee of the village lots, brought an action to have his mortgage rectified, so as to include the water lot and mill property, omitted by mistake. The purchasers at the auction sale set up the defence of purchase for valuable consideration without notice :—

Held, affirming the decision of the Court of Appeal, Gwynne and Patterson, JJ., dissenting, that there being ample evidence to establish, and the trial Judge having found, that the mortgage was intended to cover the water lot and mill, and that the purchasers had notice of R.'s equity before paying the purchase money and taking a conveyance, these facts must be taken to be established and the findings deemed final on this appeal and they established R.'s right to have his mortgage reformed :—

Held, per Strong, J.—1. The water lot and mill thereon were capable of being mortgaged as real estate and might, in equity, be dealt with by an instrument in form of a chattel mortgage if sufficiently described, and the description "mill property" in the mortgages in question would pass the land covered with water on which the mill was erected. 2. In the case of charges upon equitable property where the legal estate is outstanding the defence of purchase for valuable consideration without notice is, in general, inapplicable, the rule being that all such chargees take rank according to priority in point of time, but R. not having an actual charge, but merely an equitable claim for rectification, such defence was not precluded. 3. The purchasers at the sale could not set up want of notice in themselves and their immediate grantors without shewing that the original mortgagees, in whose shoes they stood, were also purchasers for valuable consideration with notice. 4. By the condition of sale which they signed the purchasers incapacitated themselves from setting up this defence. *Utterson Lumber Co.* v. *Rennie*, 21 S. C. R. 218.

Partnership—*Registered Declaration.*]—An action was brought by W. McL. and F. W. R. to recover the amount of an accident policy insuring the members of the firm of McL. Bros. & Co., alleging that J. S. McL., one of the partners, had been accidentally drowned. After the policy was issued the plaintiffs signed and registered a declaration to the effect that the partnership of McL. Bros. & Co. had been dissolved by mutual consent, and they also signed and registered a declaration of a new partnership under the same name, comprising the plaintiffs only. At the trial the plaintiffs tendered oral evidence to prove that these declarations were incorrect, and that J. S. McL. was a member of the partnership at the time of his death :—

Held, affirming the judgment of the Court below, that such evidence was inadmissible. Article 1835 C. C. and chapter 65 C. S. L. C. *Caldwell* v. *Accident Ins. Co. of North America*, 24 S. C. R. 263.

Sale—*Contre Lettre.*]—A sale of property was controlled by a writing in the nature of a *contre lettre*, by which it was agreed as follows: "The vendor in consideration of the sum of $2,940 makes and executes this day a clear and valid deed in favour of the purchaser of certain property (therein described), and the purchaser for the term of three years is to let the vendor have control of the said deeded property, to manage as well, safely and properly as he would if the said property was his own, and bargain and sell the said property for the best price that can be had for the same, and pay the rent, interest and purchase money when sold, and all the avails of the said property to the purchaser to the amount of $2,940, and interest at the rate of eight per cent. per annum from the date of these presents, and then the said purchaser shall re-deed to the vendor any part of the said property that may remain unsold after receiving the aforesaid amount and interest." The vendor was at the time indebted to the purchaser in the sum of $2,941. The two documents were registered. The vendor had other properties and gave the purchaser a power of attorney to convey all his real estate in the same locality. The term of three years mentioned in the *contre lettre* was continued by mutual consent. The vendor subsequently paid amounts on account of his general indebtedness to the purchaser. It was only after the purchaser's death that the vendor claimed from the heirs of the purchaser the balance, above mentioned, of $1,470 as owing to him for the management of his properties :—

Held, reversing the judgment of the Court of Queen's Bench, and restoring the judgment of the Superior Court, that the proper construction of the contract was to be gathered from both documents and dealings of the parties, and that the property having been deeded merely as security it was not an absolute sale and that plaintiff was not M. S.'s agent in respect of this property :—

Held, also, that the only action plaintiff had was the *actio mandati contraria* with a tender of his *raddition de compte*. *Hunt* v. *Taplin*, 24 S. C. R. 36.

DEFAMATION.

I. Damages.

Finding by Jury of no Damages—*No Finding as to the Slander.*]—In an action for

slander the jury returned a finding of no damage; but said they could not agree as to whether their verdict should be for the plaintiff or defendant; upon which the trial Judge directed judgment to be entered for the defendant, dismissing the action:—

Held, that the finding of no damage did not dispose of the action, but that there should have been a finding on the charge of guilt; and a new trial was directed.

Wills v. *Carman*, 14 A. R. 656, considered. *Bush* v. *McCormack*, 20 O. R. 497.

Pleading—*Evidence*—*Damages.*]—Facts intended to be relied on in mitigation of damages in a libel action must be set out in the statement of defence, and unless this is done they can not be given in evidence.

Consolidated Rule 399 is inconsistent with Consol. Rule 573, and governs.

The defendant may plead in mitigation of damages that the article complained of was published in good faith in the usual course of business.

Judgment of Robertson, J., reversed. *Beaton* v. *Intelligencer Printing Co.*, 22 A. R. 97.

See also *Taylor* v. *Massey*, 20 O. R. 429, *post* 341; *Ashdown* v. *Manitoba Free Press Co.*, 20 S. C. R. 43, *post* 344; *Blackford* v. *Green*, 14 P. R. 424, *post* 345; *Catton* v. *Gleason*, 14 P. R. 222, *post* 347.

II. Evidence.

Libel—*Letter Published in Newspapers*—*Privilege.*]—The plaintiff, who was employed by a manufacturing company of which the defendant was president, brought an action for the seduction of his daughter against the superintendent of the company. Particulars in regard to the alleged seduction having appeared in public newspapers, a meeting of some of the members and servants of the company was held, at which the defendant presided, and a resolution was passed expressing confidence in the innocence of the superintendent of the alleged seduction. A letter was then or immediately afterwards drawn up and signed by a number of the persons present, including the defendant, handed to a reporter for publication, and was published in several newspapers, without any objection on the defendant's part.

The letter was addressed to the superintendent, referring to the charges against him which had appeared in the newspapers, declared the belief of the signers in his innocence, and concluded, "We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man, and we pledge ourselves to stand by you until your innocence shall have been clearly established or until—which we are confident will never be—you are shewn to be the monster depicted in the public press." The plaintiff was not named in the letter.

The plaintiff sued the defendant for libel in consequence of the publication of this letter. The innuendo was that the plaintiff was guilty of the offence of conspiring and agreeing with his daughter to defame and slander or otherwise injure the reputation and character of the superintendent. The whole question of libel or no libel was left to the jury, who found for the plaintiff with $1,500 damages:—

Held, that it was not necessary to decide whether the letter could be construed as supporting the innuendo of a criminal conspiracy; the question really was whether the defendant had libelled the plaintiff; and this question had been determined by the jury.

2. That the surrounding circumstances were admissible in evidence for the purpose of shewing that persons conversant with those circumstances might naturally conclude that the plaintiff was the person aimed at by the letter; and it was enough that the circumstances and the libel taken together pointed to some one, and that the jury found the plaintiff to have been the person intended.

3. That the verdict of the jury could not be interfered with on the ground that the damages were excessive.

4. That the evidence of what took place at the meeting was admissible as proof that the plaintiff was the person intended by the resolution passed at it, the defendant having been present; and that a witness who was present at the meeting and took notes, which were afterwards printed, could refer to the printed copy, after the destruction of the original notes, to shew exactly what did take place.

5. That the occasion was not one of privilege or qualified privilege. *Taylor* v. *Massey*, 20 O. R. 429.

Libel—*Personal Attack on Attorney-General*—*Pleading*—*Rejection of Evidence*—*Fair Comment*—*General Verdict*—*New Trial.*]—In an action for a libel contained in a newspaper article respecting certain legislation the innuendo alleged by the plaintiff, the Attorney-General of the Province when such legislation was enacted, was that the article charged him with personal dishonesty. Defendants pleaded "not guilty," and that the article was a fair comment on a public matter. On the trial the defendants put in evidence, plaintiff's counsel objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by plaintiff and rejected. Certain question were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendants, and in answer to the trial Judge, who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial:—

Held, that defendants not having pleaded the truth of the charge in justification the evidence given to establish it should not have been received, but it having been received evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty. For these reasons a new trial was properly granted. *Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518.

Libel—*Publication*—*Defendant Claiming Privilege*—*Tendency to Criminate*—*Misdirection.*]—In an action for libel it was claimed that the

defendant had, as a correspondent at T. of a newspaper, furnished several items which included one reflecting on the plaintiff. In his examination for discovery defendant, while admitting he was a correspondent at T., could not say whether he was the only one; and alleged that he did not remember sending any of the items; but might possibly have sent some of them; but he did not think he had sent the one complained of; that he had had since the publication an interview with the editor with reference thereto, but he refused to answer whether he had discussed the item complained of, for fear, as he said, of incriminating himself. At the trial he stated he had since ascertained that there were other correspondents at T., and on being pressed as to the item complained of, after some hesitation, said he did not furnish it. No other evidence was given connecting the defendant with the publication:—

Held, that this did not constitute any evidence of publication to go to the jury.

The trial Judge in his charge, after referring to the defendant's refusal to answer on his examination for discovery, and to his reason for refusing, told the jury that they might draw the inference as to what the true answer would have been:—

Held, misdirection, and that no inference adverse to the defendant should have been drawn from his refusal to answer. *Nunn* v. *Brandon*, 24 O. R. 375.

III. Fair Comment.

Libel—*General Verdict—New Trial.*]—In an action for a libel contained in a newspaper article respecting certain legislation the innuendo alleged by the plaintiff, the Attorney-General of the Province when such legislation was enacted, was that the article charged him with personal dishonesty. Defendant pleaded "not guilty," and that the article was a fair comment on a public matter. On the trial the defendants put in evidence, plaintiff's counsel objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendants and in answer to the trial Judge who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial:—

Held, that defendants not having pleaded the truth of the charge in justification the evidence given to establish it should not have been received; but it having been received, evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty. For these reasons a new trial was properly granted. *Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518.

Libel—*Justification—Fair Comment.*]—Under a defence of "fair comment" in a libel action, evidence of the existence of a certain state of facts on which it is alleged the comment was fairly made, is admissible, but not evidence of the truth of the statement complained of as a libel.

Wills v. *Carman*, 17 O. R. 223, discussed.

Judgment of the Chancery Division, 23 O. R. 222, reversed. *Brown* v. *Moyer*, 20 A. R. 509.

IV. Newspapers.

Libel—*Special Damages—Loss of Custom.*]—By section 13 of 50 Vict. ch. 22 (Man.), "The Libel Act," no person is entitled to the benefit thereof unless he has complied with the provisions of 50 Vict. ch. 23, "An Act respecting newspapers and other like publications." By section 1 of the latter Act, no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter as the act directs, has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published; by section 2 such affidavit or affirmation shall set forth the real and true names, etc., of the printer or publisher of the newspaper and of all the proprietors; by section 6, if the number of publishers does not exceed four the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them; and section 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench:—

Held, 1. That 50 Vict. ch. 23, contemplates, and its provisions apply to, the case of a corporation being the sole publisher and proprietor of a newspaper.

2. That section 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. Gwynne, J., dissenting.

3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.

4. That in every proceeding under section 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples.

5. That if the affidavit or affirmation purports to have been taken before a commissioner his authority will be presumed until the contrary is shewn.

By section 11 of the Libel Act, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed:—

Held, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand:—

Held, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per Strong, J.—Where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom, the

names of the customers must be given, or otherwise evidence of the special damage is inadmissible. *Ashdown* v. *Manitoba Free Press Co.*, 20 S. C. R. 43.

Libel—*Notice of Action—Statement of Claim.*]—In an action for libel contained in a public newspaper, the statement of claim must be confined to the statements complained of and specified in the notice required by R. S. O. ch. 57, sec. 5, sub-sec. 2, to be given by the plaintiff before action; and where the plaintiff in such notice specified parts of an article published by the defendant, and in her statement of claim set out the whole article, the portions not specified in the notice were struck out. *Obernier* v. *Robertson*, 14 P. R. 553.

V. Practice.

1. *Discovery.*

Libel—*Damages in Way of Trade.*]—In an action for damages for libelling the plaintiffs in the way of their trade, the plaintiffs did not allege special damage, but alleged generally that their business and commercial reputation had suffered. Upon the examination of the plaintiffs for discovery they refused to answer as to what business they had lost by reason of the alleged libels:—

Held, that no evidence of special damage would be admissible at the trial, but that the plaintiffs would have the right to place figures before the jury to shew a general diminution of profits since the publication of the alleged libels; and if the plaintiffs proposed to give this class of evidence at the trial, the defendants were entitled on the examination for discovery to know how such diminution was made out and the figures by which it was proposed to support it, but not to seek information as to the loss of any particular custom; but if the plaintiffs did not propose to give such evidence, the defendants were not entitled to the discovery.

It was, therefore, ordered that the plaintiffs should give particulars of any damage intended to be claimed for diminution of profits; and if particulars given, that the examination should be continued and discovery afforded; but if particulars were not given, that evidence of diminution of profits should not be given at the trial. *Blachford* v. *Green*, 14 P. R. 424.

Libel—*Examination of Officer of Newspaper Publishing Company—Editorial Writer.*]—In an action against a newspaper publishing company for a libel contained in an article written by a member of the newspaper staff, who procured special information therefor, under the supervision of the managing editor, and in which action the defendants pleaded justification:—

Held, that the writer was not in the position of a sub-editor, nor could he be called an officer of the company, and he was not examinable for discovery under Rule 457:—

Held, also, that no sufficient foundation was otherwise laid for his examination; for it did not appear that he could give information of any facts, but merely that he could indicate where he procured evidence of the facts in dispute upon the plea of justification. *Murray* v. *Mail Printing Co.*, 14 P. R. 405.

Libel—*Publication—Tendency to Criminate—Refusal to Answer on Examination for Discovery.*]—*See Nunn* v. *Brandon*, 24 O. R. 375, *ante* 342.

Libel—*Examination of Plaintiff before Delivery of Defence.*]—Rule 566 does not apply to examinations for discovery.

Fisken v. *Chamberlain*, 9 P. R. 283, and cases following it, overruled.

But were that Rule applicable, it was not "necessary for the purposes of justice," in the circumstances of this case, an action for libel, to make an order allowing the defendants to examine the plaintiff for discovery before delivering their statement of defence.

Decision of the Common Pleas Division, 15 P. R. 473, reversed.

Tate v. *Globe Printing Co.*, 11 P. R. 251, and cases following it, specially referred to.

Gourley v. *Plimsoll*, L. R. 8 C. P. 362, and *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183, followed. *Beaton* v. *Globe Printing Co.*, 16 P. R. 281.

Slander—*Examination of Defendant Before Statement of Claim.*]—In actions of slander when the Court is satisfied of the *bona fides* of the plaintiff, and is convinced that he cannot state fully and with sufficient particularity his various grounds of complaint, and when the knowledge required is within the possession and control of the defendant, an examination for discovery before statement of claim will be ordered under Rule 566; but in such case a further examination after pleading will not be allowed except upon special grounds.

Fisken v. *Chamberlain*, 9 P. R. 283; *Gordon* v. *Phillips*, 11 P. R. 540; *McLean* v. *Barber*, 13 P. R. 500, followed. *Campbell* v. *Scott*, 14 P. R. 203. *See* the preceding case.

Slander—*Examination of Defendant—Privilege—Criminating Answers.*]—In an action of libel and slander, the plaintiff complained that the defendant had communicated to several persons the contents of a letter received from another person in which the plaintiff was accused of larceny, etc. Upon an examination of the defendant for discovery, he refused to say whether he had received any letter from the person named, or to answer any questions in relation to such letter or its contents, giving as a reason that it might criminate him to do so:—

Held, that the reason given was sufficient to privilege the defendant from answering; and, although it was not the receipt of the letter, but the publication, that would make the offence, he was entitled to object to the line of inquiry at the outset.

Semble, that section 5 of the Dominion Statute of 1893 respecting witnesses and evidence will, when it comes into force, supersede the privilege now existing in cases of this kind. *Weiser* v. *Heintzman*, 15 P. R. 258. *See* the next case.

Slander—*Examination of Defendant—Privilege—Criminating Answers.*]—The Ontario Statute as to evidence, R. S. O. ch. 61, sec. 5,

limits the scope of all preliminary examinations for discovery or otherwise in civil actions.

Jones v. *Gallon*, 9 P. R. 296, followed.

It has not been affected by section 5 of the Dominion Statute 56 Vict. ch. 31, which, by necessary constitutional limitations, as well as by express declaration (section 2), applies only to proceedings respecting which the Parliament of Canada has jurisdiction.

The language used in a previous decision in this case, 15 P. R. 258, at p. 260, is too broadly expressed, in the absence of concurrent Ontario legislation.

And therefore, a defendant, upon his examination for discovery in an action for defamation, cannot, even since the coming into force of 56 Vict. ch. 31, (D.) be compelled to answer questions which may tend to criminate him. *Weiser* v. *Heintzman*, 15 P. R. 407.

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2. *Particulars.*

Slander.]– In an action of slander, the statement of claim, after various specific allegations, charged that at divers times during the years 1888, 1889, and 1890, and to many people in and about the city of T., the defendant falsely and maliciously repeated the said slanders and words of like effect, and spoke of the plaintiff words conveying the meaning the said slanders and the said words conveyed :—

Held, that this was embarrassing and should be stricken out unless the plaintiff elected to amend, by giving details, upon payment of costs. *Paterson* v. *Dunn*, 14 P. R. 40.

Slander—*Names, Times, and Places.*]—In an action for slander the statement of claim alleged that the defendant, on a specified day, spoke to C. and others the slanderous words alleged. In answer to a demand for particulars, the plaintiff's solicitor wrote to the defendant's solicitor stating that he had given all the information the plaintiff had, the names of the others to whom the words were spoken not being known to him, and the plaintiff, when a motion for particulars was made, deposed on affidavit to the same facts.

An order of a Master requiring the plaintiff to furnish particulars of all the persons within his knowledge to whom, the places where, and the times when the words were spoken, was affirmed by a Judge in Chambers, but reversed by a Divisional Court :—

Held, that the plaintiff having given all the information in his possession, and the defendant not having sworn that she could not plead without further particulars, or that she was ignorant of what occasion was complained of, it was useless and unnecessary to order the particulars.

Thornton v. *Capstock*, 9 P. R. 535, approved. *Winnett* v. *Appelbe et ux.*, 16 P. R. 57.

Slander—*Particulars of Damages.*]—*Blackford* v. *Green*, 14 P. R. 424, *ante* 345.

Slander of Title to Goods — *Damping Auction Sale.*]—In an action for slander of title to goods the statement of special damage was that by reason of the utterances of the defendant to a crowd of persons assembled at an auction sale which he had advertised, a large number of them withdrew from it, and the goods which were sold at it brought less money than they would otherwise have done :—

Held, that the plaintiff should not be required to give particulars of the names of the persons who would have given for each article in respect of which damage was claimed a larger price than was realized at the sale ; all that he could reasonably be required to particularize was the amount by which his sale had been damped. *Cutton* v. *Gleason*, 14 P. R. 222.

VI. Privilege.

Slander—*Duty—Belief—Malice.*]—The plaintiff, the wife of a postmaster, complained of slander by the defendant, an assistant post office inspector, to the effect that she had taken money from letters and had given him a written confession of her guilt :—

Held, that as to statements made in the discharge of the defendant's official duty, to the plaintiff's husband as postmaster, and to two other persons as sureties for him, the occasions were privileged ; but not so as to statements made to a partner of one of the sureties, who used the post office, and to whose business premises the defendant contemplated removing it ; for the defendant and the partner had no such common interest in the matter as justified the communication, nor was there any public or moral or social duty resting on the defendant which justified him in making it. Even had the evidence shewn that the defendant honestly believed that such a duty rested upon him or that there was such a common interest, if such belief were unfounded, the occasion would not have been privileged.

2. Where the occasion is privileged, the plaintiff's case fails, unless there is evidence of malice in fact, and the burden of proving this is on the plaintiff, who must adduce evidence upon which a jury might say that the defendant abused the occasion either by wilfully stating as true that which he knew to be untrue, or stating it in reckless disregard of whether it was true or false.

And where the plaintiff in her evidence denied that she had made a confession to the defendant, but admitted in a qualified way that after her denial the defendant continued to assert to her, and appeared to believe, that she had made one :—

Held, that, in the absence of a clear admission by the plaintiff, there was evidence of malice in fact to go to the jury.

3. The defendant was not entitled to notice of action as a public officer ; the statutes requiring such notice applying only to actions brought for acts done.

Royal Aquarium Society v. *Parkinson*, [1892] 1 Q. B. 431, followed.

Murray v. *McSwiney*, I. R. 9 C. L. 545, distinguished.

Semble, also, that the statutes requiring notice of action cannot be invoked where the words spoken are defamatory and have been uttered with express malice. *Hanes* v. *Burnham*, 26 O. R. 528. Affirmed in appeal, 23 A. R. 90.

Slander — *Honest Belief.*] — The plaintiff claimed damages for slander in respect of words

spoken to him by the defendant, in the presence of others, to the effect that he had sold certain seed given to him by the defendant to plant in order to raise seed for sale. The jury found that the words were not spoken in good faith in the usual course of business affairs for the protection of his own interests:—

Held, that there was no evidence to sustain such a finding; that the evidence shewed that the defendant honestly and justifiably believed that the plaintiff had defrauded him; that the occasion was privileged, and the plaintiff had failed to shew actual malice; and therefore he could not recover. *Stewart* v. *Sculthorp*, 25 O. R. 544.

Slander—*Justification.*]—Pleading justification in an action of slander, where no attempt is made to prove the plea, is not in itself evidence of malice entitling the plaintiff to have the case submitted to the jury, the words in question having been spoken on a privileged occasion.

Judgment of the Common Pleas Division affirmed. *Corridan* v. *Wilkinson*, 20 A. R. 184.

Slander—*Qualified Privilege.*]—The defendant, who was the superintendent of a public asylum, said to a person who had formerly been a servant at the asylum, and who was engaged to be married to the plaintiff, that the latter, a maid-servant at the asylum, was "a contemptible thief," for which she brought an action of slander. Justification was not pleaded. The evidence shewed that the defendant honestly believed in the truth of the words spoken, and that he had reasonable grounds for his belief:—

Held, that the occasion on which the words were spoken was one of qualified privilege, in that the person addressed had an interest in receiving the communication, and that the plaintiff could not recover without proof of actual malice:—

Held, also, that the use of the qualifying adjective "contemptible" was not evidence of actual malice.

Coxhead v. *Richards*, 2 C. B. 569; *Whitely* v. *Adams*, 15 C. B. N. S. 392; and *Stuart* v. *Bell*, [1891] 2 Q. B. 341, followed.

Semble, per Falconbridge, J., that evidence of the falsity of the slander given on the plaintiff's examination-in-chief should not have been received. *Ross* v. *Bucke*, 21 O. R. 692.

VII. Security for Costs.

Libel — *Newspaper — Candidate for Public Office.*]—The plaintiff was a candidate at an election of a member of the Legislative Assembly of Ontario, and brought this action in respect of several libels alleged to have been published by the defendant in his newspaper, some of them before the date of the writ for the election, and some after that date but before the election:—

Held, that the plaintiff was not a candidate for a public office in this Province within the meaning of R. S. O. ch. 57, sec. 5, sub-sec. (2) (*a*), before the date of the writ for the election; and that as to the libels alleged to have been published before that date, a notice before action under the statute was necessary; but the paragraphs of the statement of claim charging these libels could not, on the ground that the notice was not given, be struck out under Rule 387, nor the action as to them summarily dismissed; and as to the libels alleged to have been published after that date, security for costs could not be ordered under the statute, because the plaintiff was then a candidate for a public office within the meaning of section 5, sub-section (2) (*a*), and the statute did not apply, there having been no retraction. *Conmee* v. *Weidman*, 15 P. R. 239.

Libel — *Newspaper — Criminal Charge — "Blackmail" — "Trivial or Frivolous."*]—Upon an application under R. S. O. ch. 57, sec. 9, for security for costs in an action for libel, in which the words complained of, published in the defendants' newspaper, accused the plaintiff of attempted "blackmail":—

Held, that the words might bear such a meaning as to charge the indictable offence defined by section 406 of the Criminal Code, and the question whether they did so, when read with the context, was for the jury, and one which should not be determined upon this application; and the Master in Chambers having held that they "involved a criminal charge," his decision should not be interfered with.

An action cannot be considered "trivial or frivolous" within the meaning of section 9 merely because the existence of a good defence on the merits is shewn by the defendant's affidavit, and not contravened by an affidavit of the plaintiff. The latter may properly consider that upon an application for security for costs a denial on oath of the truth of the charges against him is unnecessary. *Macdonald* v. *World Newspaper Co. of Toronto*, 16 P. R. 324.

Libel — *Newspaper — Criminal Charge — Incorporated Company.*]—The words "involves a criminal charge" in R. S. O. ch. 57, sec. 9, sub-sec. (1) (*a*), mean "involves a charge that the plaintiff has been guilty of the commission of a criminal offence."

And where the words published by the defendants in their newspaper of which the plaintiffs, an incorporated company, complained in an action of libel, alleged that the plaintiffs had tried to bribe aldermen by issuing to them paid-up stock in the company:—

Held, upon an application for security for costs under the above section, that the words did not involve a criminal charge for a corporation cannot be charged criminally with a crime involving malice or the intention of the offender.

Mayor of Manchester v. *Williams*, [1891] 1 Q. B. 94, followed.

Journal Printing Co. v. *MacLean*, 25 O. R. 509, distinguished.

And where the defendants by affidavit shewed publication in good faith and other circumstances sufficient under the above section to entitle them to security for costs, and the case made was not displaced by the cross-examination of the deponent on his affidavit, an order was made for such security. *Georgian Bay Ship Canal and Power Aqueduct Co.* v. *World Newspaper Co.*, 16 P. R. 320.

Libel—*Newspaper—Criminal Charge.*]—The legislation in R. S. O. ch. 57, sec. 9, as to secur-

ity for costs in actions for libel contained in newspapers, is unique, and the intention is to protect newspapers reasonably well conducted, with a view to the information of the public.

In a newspaper article published by the defendants the plaintiff was referred to as an "unmitigated scoundrel," and it was stated that he had endeavoured to ruin his wife by inciting another person to commit adultery with her :—

Held, that this did not involve a criminal charge within the meaning of section 9 (*a*).

The defendants did not contend that the grounds of action were trivial or frivolous ; and it was conceded by the plaintiff that he had not sufficient property to answer the costs of the action.

The manager of the defendants swore to a belief in the substantial truth of what was published, and that it was so published in good faith and without malice or ill-will towards the plaintiffs :—

Held, that, under these circumstances, an appeal from the discretion of a Judge in Chambers in reversing a referee's decision and ordering security for costs, should not prevail. *Bennett* v. *Empire Printing and Publishing Co.*, 16 P. R. 63.

Libel — *Newspaper — Frivolous Action.*]— Where an action of libel was brought by one Græme complaining of statements published in a newspaper imputing a crime to one Graham, and it appeared that it was stated in the article complained of that no one would believe the charge against Graham, and that in an article published in the same newspaper, after the commencement of the action, it was stated that the person referred to in the former article was not the plaintiff, and there were other facts shewing that the plaintiff was not the person referred to :—

Held, that the action was frivolous, and the defendants were entitled to security for costs under R. S. O. ch. 57, sec. 9. *Græme* v. *Globe Printing Co.*, 14 P. R. 72.

Libel—*Newspaper—Privilege.*]—On an application under R. S. O. ch. 57, sec. 9, for security for costs in an action of libel, the Judge is not to try the merits of the action ; if it appears on the affidavits filed by the defendant that there is a *primâ facie* case of justification or privilege, and that the plaintiff is not possessed of property sufficient to answer costs, the statute is satisfied, and security should be ordered ; it is not for the Judge to pass upon disputed facts disclosed in conflicting affidavits filed against the application. *Swain* v. *Mail Printing Co.*, 16 P. R. 132.

Libel — *Newspaper — Good Faith.*] — In an action of libel against the publishers and editor of a newspaper, the defence suggested by affidavits filed upon an application under R. S. O. ch. 57, sec. 9, for security for costs, was that the statements complained of as defamatory did not refer to the plaintiff.

The Judge who heard an appeal from an order made by a Master for security being of opinion that, upon the fair reading of the statements complained of, they did refer to the plaintiff :—

Held, that it did not appear that the defendants had a good defence on the merits, and that the statements complained of were published in good faith, and therefore the order should be set aside.

Swain v. *Mail Printing Co.*, 16 P. R. 132, distinguished. *Lennox* v. *Star Printing and Publishing Co.*, 16 P. R. 488.

Slander—*Disclosing Defence.*]—In an action for slander brought under 52 Vict. ch. 14 (O.), the defamatory words complained of, imputing want of chastity to the plaintiff, an unmarried female, and also for an assault, the defendant moved under sub-section 3 of section 1 of the Act, for security for costs, upon an affidavit which stated, among other things, that the defendant had a good defence on the merits, but did not disclose such defence :—

Held, that the affidavit was not sufficient, for a *primâ facie* defence must be shewn ; but the cross-examination of the defendant upon her affidavit might be read in aid of the affidavit itself ; and counter affidavits could not be received :—

Held, also, that the stay of proceedings in the order made for security for costs should not apply to the count for assault. *Lancaster* v. *Ryckman*, 15 P. R. 199.

Slander—*Property Sufficient to Answer Costs.*] —Upon an application under 52 Vict. ch. 14, sec. 1, sub-sec. 3 (O.), for security for costs of an action for slander imputing unchastity to a female, the onus is on the defendant to shew that the plaintiff has not sufficient property to answer the costs of the action ; and to defeat such an application it is not necessary that the plaintiff should have property to the amount of $800 over and above debts, incumbrances, and exemptions.

And where it was shewn that the plaintiff had property of the value of $500 at least, and it was not shewn that she had not property of much greater value, the application was refused.

Brealy v. *Robertson*, 14 P. R. 7, considered. *Feaster* v. *Cooney*, 15 P. R. 290.

VIII. Special Cases.

False and Malicious Publication as to Goods Manufactured by Plaintiffs—*Allegations of Special Damage—Demurrer.*]—In an action of libel the plaintiffs' statement of claim alleged that the defendants falsely and maliciously published of and concerning the plaintiffs' goods ". . . . We do not keep Acme or common plate" and also alleged special damage :—

Held, on demurrer, that as the allegation was that the defendants "falsely and maliciously" published of and concerning the plaintiffs, etc., and as special damage was alleged in direct terms, following *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218, if the plaintiffs were able to prove that allegation, they would be entitled to judgment, and the demurrer was overruled. *Acme Silver Co.* v. *Stacey Hardware Co.*, 21 O. R. 261.

Incorporated Company — *Impugning the Validity of Election of Directors.*]—The defendant published of the directors of the plaintiff, an incorporated building society, in a newspaper,

a notice stating, amongst other matters, that "certain persons representing themselves to be directors of the society had been self-appointed by the most despicable, foul, and fraudulent means, and in consequence, all business transacted by them . . . is wholly and entirely contrary to rules and regulations and law":—

Held, that the paragraph was capable of the meaning attributed to it, namely, that the business of the society was being illegally transacted, and as such it was defamatory of the plaintiffs. *Owen Sound Building and Savings Society* v. *Meir*, 24 O. R. 109.

Incorporated Company—*Charge of Corruption—Injury to Business—Special Damage.*]—A company incorporated for the purpose of publishing a newspaper can maintain an action of libel in respect of a charge of corruption in the conduct of their paper, without alleging special damage.

Metropolitan Saloon Omnibus Co. v. *Hawkins*, 4 H. & N. 87, commented on and distinguished.

South Hetton Coal Co. v. *North-Eastern News Association*, [1894] 1 Q. B. 133, followed.

Journal Printing Co. v. *MacLean*, 25 O. R. 509. *See* this case in appeal from judgment at second trial, 23 A. R.

Mercantile Agency—*False Information.*]—Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when by culpable negligence, imprudence or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor. *Cossette* v. *Dun*, 18 S. C. R. 222.

Partners—*Slander of Firm.*]—The two plaintiffs were the members composing a firm, which firm had sold out the business to a company composed of the plaintiffs and another, the old firm continuing in existence for the purpose of being wound up. In an action of slander, the innuendo charging insolvency to the company, the jury found that the imputation of insolvency had no reference to the company but to the plaintiffs as members of the firm:—

Held, that on a record properly framed, the two plaintiffs might recover for any damage accruing either to them as individuals or to the firm, without proof of special damage, and also as members of the company, for any special damage suffered by the company by reason of the slander of two members thereof, but on the record as framed here the plaintiffs must fail; and as no amendment was asked for at the trial, and no reason given for allowing one on appeal to the Divisional Court, it was refused. *Bricker* v. *Campbell*, 21 O. R. 204.

Poster Advertising Account For Sale—*Justification.*]—Two of the defendants, merchants, placed in the hands of the other defendant, a collector of debts, an account against the female plaintiff, wife of the other plaintiff, for collection, well knowing the method of collection adopted by the collector, who, after a threatening letter to the female plaintiff, which did not evoke payment, caused to be posted up conspicuously in several parts of the city where the plaintiffs lived, a yellow poster advertising a number of accounts for sale, among them being one against "Mrs. J. Green (the female plaintiff), Princess Street, dry goods bill, $59.35." The evidence shewed that she owed $24.33 only:—

Held, that the publication was libellous and could only be justified by shewing its truth, and, as the defendants had failed to shew that she was indebted in the sum mentioned in the poster, they were liable in damages. *Green* v. *Minnes*, 22 O. R. 177.

Slander—*Words of Abuse Imputing Crime—Understanding of Bystanders—Undisclosed Intention.*]—In an action of slander for saying of the plaintiff on a public street in the presence of a number of people "you are a perjured villain and I can put you behind the bars, you are a forger and I can prove it," the trial Judge left it to the jury to say whether in their opinion the defendant was really charging the plaintiff with having committed the crimes mentioned:—

Held, misdirection, and a new trial was ordered.

What should have been left to the jury was whether or not the circumstances were such that all the bystanders would understand that the defendant did not mean to charge the plaintiff with the commission of the crime according to what he actually said, the undisclosed intention of the defendant in this respect having nothing to do with the question and being wholly immaterial. *Johnston* v. *Ewart*, 24 O. R. 116.

DEFECT IN WAY.

See WAY, III.

DEMURRAGE.

See SHIP, I.

DEMURRER.

See PLEADING.

DEPOSIT.

See BANKS, IV.—BUILDING SOCIETIES.

DESCRIPTION.

See BILLS OF SALE—DEED.

DEVIATION.

See RAILWAYS, X.

DEVOLUTION OF ESTATES ACT.

Administrator ad Litem.]—*See Re Williams and McKinnon*, 14 P. R. 338, *post*, EXECUTORS, II.

Assignment for the Benefit of Creditors —*Debt by Assignor to Executors—Security.*]—*See Tilt'e* v. *Springer*, 21 O. R. 585, *ante* 81.

Dower—*Right of Election.*]—Section 4 of the Devolution of Estates Act, R. S. O. ch. 108, which gives the widow a right of election between her dower and a distributive share in her deceased husband's lands, does not apply where by marriage settlement she has accepted an equivalent in lieu of dower. In such case she has no right to any share in the lands. *Toronto General Trusts Co.* v. *Quin*, 25 O. R. 250.

Lease—*Covenant to Renew—Power of Executor of Lessor to Execute Renewal of Lease.*]—Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew. *Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205.

Mortgage by Devisee Within Twelve Months from Death—*Absence of Caution.*]—The devisee of real estate under the will of a testator, subject to the Devolution of Estates Act and amendments, has a transmissible interest in the lands during the twelve months after the death of the testator, pending which time they are vested by the Act in the legal personal representatives.

And where real estate devised by a will so subject, of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered, was, during such period, mortgaged by the devisee in good faith :—

Held, that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to the land and against the personal representatives when the year expired, in the absence of any warning that it was needed for their purposes. *Re McMillan, McMillan* v. *McMillan*, 24 O. R. 181.

Mortgage Action—*Heirs-at-law of Deceased Mortgagor.*]—Since the Judicature Act the proceeding by demurrer for misjoinder of parties is no longer available.

Werderman v. *Société Générale D'Electricité*, 19 Ch. D. 246, followed.

In an action upon a mortgage for foreclosure, immediate payment, and immediate possession, the plaintiff joined as defendants the heirs-at-law of the deceased mortgagor (who died after the Devolution of Estates Act) with the administrator of the real and personal estate. One of the heirs-at-law demurred to the statement of claim, on the grounds that the administrator represented the estate in all regards, that the heirs-at-law were not bound by any covenants of the deceased, and that no relief was claimed or could be granted against them :—

Held, that the demurrer was in effect one for misjoinder of parties, and that the proper remedy was a motion under Rule 324 (*a*) to strike out the name of the demurring defendant. *Carter* v. *Clarkson*, 15 P. R. 379.

Mortgage Action—*Personal Representative of Deceased Mortgagor—Infants.*]—In a mortgage action for foreclosure, although it may be that since the Devolution of Estates Act, as a matter of title, the record is complete with the general administrator of the deceased owner of the equity of redemption as the sole defendant; yet, as a matter of procedure, the infant children of the deceased are proper parties, and as such should appear as original defendants, unless some good reason exists for excluding them.

Rules 309 and 1005 considered. *Keen* v. *Cold*, 14 P. R. 182.

Mortgage Action—*Personal Representative of Deceased Mortgagor.*]—A mortgage action against the surviving husband and infant children of the mortgagor, who died intestate in February, 1892, was begun before the lapse of a year from the death :—

Held, that the plaintiff was entitled, after the lapse of a year, to judgment for the enforcement of her mortgage, without having a personal representative of the mortgagor before the Court, no administrator having been appointed, and no caution registered under 54 Vict. ch. 18, sec. 1, amending the Devolution of Estates Act. *Ramus* v. *Dow*, 15 P. R. 219.

Nephews and Nieces—*Rights of Children of Predeceased Sister of Intestate.*]—On the death of a person, intestate, leaving no issue, the children of a predeceased sister or brother are not entitled under section 6 of the Devolution of Estates Act, R. S. O. ch. 108, to share in competition with a surviving father, mother, brother or sister of the intestate. *Re Colquhoun*, 26 O. R. 104.

Powers of Administrator—*Conveyance of Land by Administrator—Debts.*]—Land was conveyed in 1874 to a husband and wife who were married in 1864 :—

Held, that they took like strangers, not by entireties, but as tenants in common :—

Held, also, that the husband could by virtue of the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole of the land, although there were no debts of the wife to pay.

Martin v. *Magee*, 19 O. R. 705, distinguished.

Re Wilson and Toronto Incandescent Electric Light Co., 20 O. R. 397.

Powers of Executor—*Exchange of Lands.*]—An executor or administrator cannot, having regard to R. S. O. ch. 108, sec. 9, and 54 Vict. ch. 18, sec. 2 (O.), make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own.

The Court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted. *Tenute* v. *Walsh*, 24 O. R. 309.

Power of Sale—*Surviving Executors.*]—Where executors are given express power to sell lands, whether coupled with an interest or not, such power can be exercised by a surviving executor.

The Devolution of Estates Act and amendments do not interfere with an express power of sale given by a will to executors extending beyond the periods of vesting prescribed by th se Acts. *In re Koch and Wideman*, 25 O. R. 262.

Registration of Caution.]—The provisions of 56 Vict. ch. 20 (O.), as to registration of caution apply to a case in which probate has not been taken out or letters of administration obtained till more than a year after the death of the owner. By virtue of section 2, the effect of such subsequent registration would be only to withdraw to or vest in the executor administrator so much of the land as is prop available for the purpose of administration.

The provisions of 56 Vict. ch. 20 (O.), are so engrafted on 54 Vict. ch. 18 as to make both Acts apply to all persons dying after 1st July, 1886.

In re Baird, 13 C. L. T. 277, reconsidered. *In re Martin*, 26 O. R. 465.

Sale of Infants' Lands—*Consent of Official Guardian—Liability of Personal Representatives for Neglect to Sell.*]—Under 54 Vict. ch. 18, sec. 2 (O.), the approval of the official guardian to a sale of land by executors or administrators is now required only where the sale is for the purpose of distributi n simply, and then only where there are infants interested, or heirs or devisees who do not concur.

Where administrators in contracting to sell lands under circumstances not requiring the consent of the official guardian, nevertheless made the contract of sale subject to his approval, and, as was alleged, lost the sale by having through negligence and delay failed to obtain such approval within the time required by the contract, but had acted throughout with good faith and to the l est of their judgment :—

Held, that they were not liable to make good to the estate the deficiency resulting from a resale.

Under the above Acts, executors and administrators are n t, in all respects, in the same position as a trustee for sale of lands. Upon the latter is cast a duty to sell, upon the former a mere discretion to be exercised only for certain purposes and in certain events.

Semble, where the approval of the official guardian is not required, notice need not be given to him under Rule 1005. *In re Fletcher's Estate*, 26 O. R 499.

Title.]—Under the Devolution of Estates Act, the legal estate in the deceased's land vests in his legal personal representative; and the beneficial owner, whether the debts of the deceased are paid or not, cannot make a good title without a conveyance from the legal personal representative.

Judgment of the Chancery Division, 19 O. R. 705, reversed. *Martin* v. *Magee*, 18 A. R. 384.

Will—*Construction—Specific Devise of Incumbered Land—Exoneration from Incumbrance—Distribution of Estate.*]—The testatrix, who died in 1891, specifically devised to her grandson a part of her land, which was incumbered. To the plaintiff she gave a legacy of $5,000. The remainder of her estate, consisting of personalty and other lands, she did not dispose of or in any way refer to in her will, except in this clause: "I hereby charge my estate with payment of all incumbrances upon the said lands at the time of my death":—

Held, that the residue of the estate was charged with the mortgage debts to the exclusion of the land specifically devised.

Such residue was to be treated as one fund and as if it were all personalty, under section 4 of the Devolution of Estates Act, R. S. O. ch. 108; and out of it the debts, including the mortgage debts upon the land specifically devised, were first to be paid, and then the legacy; the balance, if any, to go to the heirs-at-law and next of kin. *Scott* v. *Supple*, 23 O. R. 393.

DISCOVERY.

See EVIDENCE.

DISTRESS.

Bailiff—*Constable.*]—Plaintiff, who was acting as a bailiff under a landlord's warrant to distrain for rent, attempted to remove some grain which had been previously seized by a sheriff under an execution, and while in the act was arrested by the sheriff's officer who was also a county constable. He was committed for trial and was tried but acquitted.

In an action for false arrest and malicious prosecution :—

Held, that the grain was properly under lawful seizure and in the custody of the law and that by R. S. C. ch. 164, sec. 50, anyone taking it away without lawful authority was guilty of larceny, and that by R. S. C. ch. 174, sec. 25, anyone found committing such an offence might be apprehended without a warrant and forthwith taken before a justice of the peace, and that the finding of the jury that the defendant acted as a sheriff's bailiff and not as a constable was immaterial, as it was incumbent on any bystander to do as he did; and the action was dismissed with costs. *Beatty* v. *Rumble*, 21 O. R. 184. *See* next case.

Bailiff—*Damages.*]—A sheriff is identified in interest with his bailiff and liable for whatever the latter does under colour of the writ.

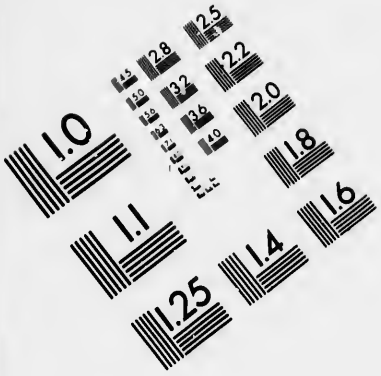
The plaintiff, assisting a person acting as bailiff under a landlord's distress warrant, attempted to remove some grain which was at the time under seizure by the defendant as sheriff's officer, and was arrested by the defendant :—

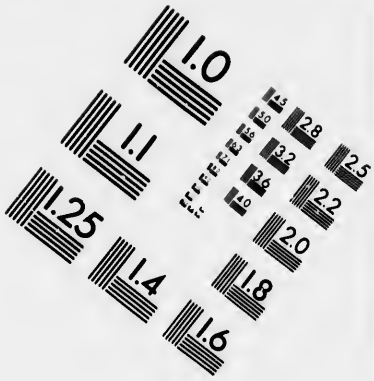
Held, reversing the judgment of the Queen's Bench Division, that the sheriff was liable for the act of his officer.

Beatty v. *Rumble*, 21 O. R. 184, distinguished.

The jury having assessed the damages against the officer at a nominal sum the Court instead of a new trial directed judgment to be entered against his co-defendant, the sheriff, for a like amount. *Gordon* v. *Rumble*, 19 A. R. 440.

Cattle—*Cattle Straying from One Enclosure into Another—Running at Large.*]—The effect of sections 2, 3, 6, 20 and 21 of the Act respecting pounds, R. S. O. ch. 215, is to give a right to impound cattle trespassing and doing damage,





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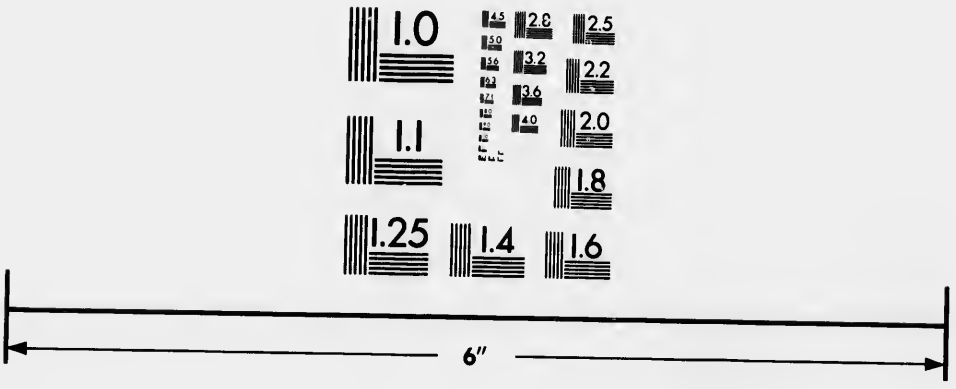

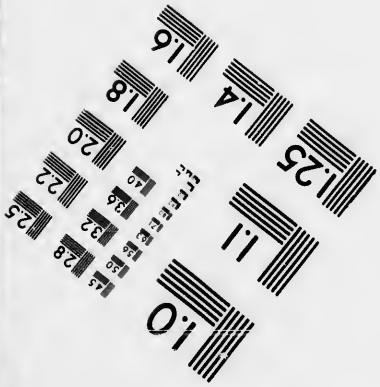

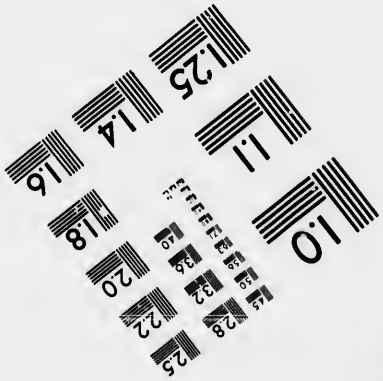

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but with a condition that if it be found that the fence broken is not a lawful fence, then no damages can be obtained by the impounding, whatever may be done in an action of trespass.

Cattle feeding in the owner's enclosure, or shut up in his stables, cannot be held to be running at large when they may happen to escape from such stable or enclosure into the neighbouring grounds.

Ives v. *Hitchcock*, Drap. R. 247, commented on. *McSloy* v. *Smith*, 26 O. R. 508.

Clandestine Removal of Goods—*Distraining Goods Not on the Demised Premises.*]—A tenant is not liable to prosecution under 11 Geo. II. ch. 19, for the fraudulent and clandestine removal of goods from the demised premises, unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises. *Martin* v. *Hutchinson*, 21 O. R. 388.

Rent—*Conversion—Double Value—Jus Tertii—Damages.*]—In an action for wrongful distress for rent before it was due, there was no allegation in the statement of claim that the action was brought upon 2 W. & M., sess. 1, ch. 5, sec. 5, nor that the goods distrained were "sold," but merely an allegation that the defendant "sold and carried away the same and converted and disposed thereof to his own use;" nor was a claim made for double the value of the goods distrained and sold, within the terms of the statute :—

Held, reversing the decision of Ferguson, J., that the action was the ordinary action for conversion, and that the value, and not the double value, of the goods distrained was recoverable :—

Held, also, reversing the decision of Ferguson, J., that a wrong-doer taking goods out of the possession of another, cannot set up *jus tertii*, but the person out of whose possession the goods are taken, may shew it, and in such case the wrong-doer may take advantage of it; and the plaintiff, having shewn a chattel mortgage subsisting upon a portion of the goods distrained, could not be allowed to recover the value of such portion without protecting the defendant against another action at the suit of the mortgagee :—

Held, also, per Ferguson J., that the plaintiff was not entitled to recover from the defendant the amount received by him from the sale of the plaintiff's goods in addition to the value thereof; nor was the defendant obliged to deduct the amount so received by him from the rent which afterwards fell due.

Hoare v. *Lee*, 5 C. B. 754, followed.

Judgment being given in favour of the plaintiff upon his claim, and in favour of the defendant upon his counterclaim :-

Held, reversing the decision of Ferguson, J., that the amounts should be set off. *Williams* v. *Thomas*, 25 O. R. 536.

Rent—*Goods of Third Person—Resort First to Goods of Tenant.*]—Where a landlord has distrained for arrears of rent goods upon the demised premises liable to such distress, belonging in part to the tenant and in part to a third person, such third person has no right to compel, or to ask the Court to compel, the landlord to sell the part belonging to the tenant before selling the part belonging to such third person. *Pegg* v. *Starr*, 23 O. R. 83.

Taxes—*Distress for Taxes.*]—*See Christie* v. *City of Toronto*, 25 O. R. 425, and 25 O. R. 606; and *Norris* v. *City of Toronto*, 24 O. R. 297, *ante* 50.

DISTRIBUTION OF ESTATES.

Feme Coverte—*Husband's Right to Residuum—Next of Kin.*]—The Legislature of New Brunswick, by 26 Geo. III. ch. 11, sub-secs. 14 and 17, re-enacted the Imperial Act 22 & 23 Car. II. ch. 10, Statute of Distributions, as explained by sec. 25 of 29 Car. II. ch. 3, Statute of Frauds, which provided that nothing in the former Act should be construed to extend to estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal estate as theretofore. When the statutes of New Brunswick were revised in 1854, the Act 26 Geo. III. ch. 11, was reenacted, but sec 17, corresponding to sec. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme coverte* her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission :—

Held, that the personal property passed to the husband and not to the next of kin of the wife.

Per Strong, J.—The repeal by the Revised Statutes of 26 Geo. III. ch. 11, which was passed in affirmance of the Imperial Acts, operated to restore section 25 of the Statute of Frauds as part of the common law of New Brunswick.

Per Gwynne, J.—When a colonial legislature re-enacts an Imperial Act, it enacts it as interpreted by the Imperial Courts, and *a fortiori* by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. III. ch. 11. (N.B.), it was not necessary to enact the interpretation section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole Act :—

Held, per Ritchie, C.J., Fournier, Gwynne, and Patterson, JJ.—That the Married Woman's Property Act of New Brunswick, C. S. N. B. ch. 72, which exempts the separate property of a married woman from liability for her husband's debts, and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed. *Lamb* v. *Cleveland*, 19 S. C. R. 78.

See DEVOLUTION OF ESTATES.

DISTRICT COURT.

Order of Master for Trial of Action Therein—*Subsequent Judgment of High Court Judge.*]—In an action brought for damages to the plaintiff's house, situated in a provisional judicial district, an order was made by the Master in Chambers, assuming to act under the Unor-

ganized Territory Act, R. S. O. ch. 91, directing that the issues of fact be referred to the District Judge, reserving further directions and questions of law arising at the trial for the disposal of a judge in single court. Notice of trial was given for the District Court, and the case was heard by the District Judge, who made certain findings of fact, assessed the damages, and directed judgment to be entered for the plaintiff. The plaintiff moved for judgment on such findings before a judge in single court, the defendant at the same time appealing from the judgment or report, whereupon the Judge disposed of both motions, directing judgment to be entered for the plaintiff for the amount found by the District Judge.

On appeal to the Divisional Court:—

Held, that apart from the question of the jurisdiction of the Master to make the order, as the parties had treated it as valid, and the subsequent order of the judge in single court remained unreversed and not appealed from, the Court would not interfere; that if the question of the jurisdiction of the Master were involved the appeal should have been to the Court of Appeal. *Fraser* v. *Buchannan*, 25 O. R. 1.

DITCHES.

See MUNICIPAL CORPORATIONS — WATER AND WATER COURSES.

DIVERSION.

See WATER AND WATERCOURSES, II.

DIVISION COURT.

I. ATTACHMENT OF DEBTS.

Assignment by Primary Debtor—*Priorities.*]—An assignment for the benefit of creditors by a primary debtor after a garnishing summons has been duly served upon him and the garnishee, and judgment has been obtained thereon against the debtor, does not intercept or take precedence of the attachment of the debt, and the primary creditor may obtain judgment against and enforce payment thereof by the garnishee.

Judgment of the First Division Court of York reversed. *Wood* v. *Joselin*, 18 A. R. 59.

Assignment of Debt Attached—*Trial of Question of Validity of Assignment—Assignee not Called Upon as Claimant.*]—Each of the three primary creditors began an action in a Division Court against the primary debtor for the recovery of an amount within the jurisdiction of the Court, and also attached in the hands of garnishees the amount of the debt in each case; the sum of $500 having been admittedly due by the garnishees to the primary debtor, who, however, asserted that before the actions were commenced he had assigned the debt for valuable consideration.

Upon the court day, the primary creditors, the primary debtor and the assignee of the debt appeared before the Judge in the Division Court, counsel also appearing for the garnishees. Judgment was first given in favour of the primary creditors against the primary debtor in each case, and then the question of the validity of the assignment was entered upon and evidence given upon it, the assignee producing his books and giving his evidence. Judgment was then given declaring the assignment void as against the primary creditors as a fraud upon them. From this judgment the assignee gave notice of appeal, which he afterwards abandoned, and in the style of cause he named himself as "claimant."

Upon motion by the assignee for prohibition:—

Held, that he had submitted himself to the jurisdiction of the Court, and could not be heard to say that he was there merely as a witness; and that the Judge, having all parties before him, was justified under section 197 of the Division Courts Act, R. S. O. ch. 51, in trying their rights without going through the formality of calling them before him:—

Held, also, that the Division Court had jurisdiction to try the right of the primary creditors to garnish portions of the $500 sufficient to satisfy their claims; and, under section 197, to determine whether or not the $500 was at the time of the attachment the property of the debtor. *Re Perras* v. *Keefer*, *Re Barry* v. *Keefer*, *Re Andrews* v. *Keefer*, 22 O. R. 672.

Damages.]—The judgment of the Judge who tries the cause, with a jury or without one, is now an effective judgment from the day on which it is pronounced; and where damages are awarded thereby, they are attachable as a debt without the formal entry of judgment.

Hoithy v. *Hodgson*, 24 Q. B. D. 103, followed. *Davidson* v. *Taylor*, 14 P. R. 78.

Insurance Moneys.]—A claim under an insurance policy for a loss, the amount of which has been settled and adjusted, is not a debt which can be attached under section 178 of R. S. O. ch. 51; and Con. Rule 935 does not apply to Division Courts.

Semble, even if it did, that such a claim could not be attached so long as the insurance company's right to have the money applied in rebuilding was open. *Simpson* v. *Chase*, 14 P. R. 280.

Judgment Summons—*Defendant.*]—A garnishee is not a defendant within the meaning of sections 235 *et seq.* of the Division Courts Act, R. S. O. ch. 51, and is not examinable under after-judgment summons.

Judgment of the Queen's Bench Division, 23 O. R. 493, affirmed. *In re Hanna* v. *Coulson*, 21 A. R. 692.

Motion for New Trial after Fourteen Days.]—The time limit for applying for a new trial in ordinary litigation in the Division Court does not apply to garnishment trials, and so long as the money remains unpaid after judgment against a garnishee, he may apply for relief either by paying into Court, or for a new trial, in the event of a new claim being made known to him.

McLean v. *McLeod*, 5 P. R. 467, followed.

Prohibition refused. *Hobson* v. *Shannon*, 26 O. R. 554, affirmed by the Divisional Court, 27 O. R. 115.

Service—*Notice of Defence.*]—Service of a Division Court after-judgment garnishee summons upon the local agent of a foreign insurance company, whose powers were limited to receiving and transmitting applications :—

Held, effective, having regard to the provisions of sections 182 and 185, sub-section 3, of R. S. O. ch. 51.

Where the defence of the garnishee is put in after the expiration of the eight days from service of the summons allowed by section 188, sub-section 2, of R. S. O. ch. 51, so long as it is put in in sufficient time to enable the creditor to give notice rejecting it, and for the clerk to transmit such notice to the garnishee, the latter is not bound to attend the trial if such last mentioned notice is not given, and the creditor cannot proceed to the trial of the action until that is done. *Simpson* v. *Chase*, 14 P. R. 280.

Setting Aside Attachment.]—Power over the process of his own Court is inherent in the Judge of a Division Court as well as of other Courts ; and, notwithstanding the provisions of section 262 of the Division Courts Act, R. S. O. ch. 51, a Judge may set aside an attachment which has been improperly issued. *Re Mitchell* v. *Scribner*, 20 O. R. 17.

Solicitor's Lien.]—Where solicitors claimed a lien for costs upon a judgment recovered, the amount of which was the subject of a garnishee suit in a Division Court :—

Held, that the Judge in the Division Court had power under section 197 of the Division Courts Act, R. S. O. ch. 51, to decide upon the proper sum to be allowed in respect of such lien, and was not bound to refer it elsewhere. *Davidson* v. *Taylor*, 14 P. R. 78.

II. JURISDICTION.

Ascertained Amount—*Claim for Rent.*]—The defendant covenanted in a lease to pay the plaintiff $210 on a certain date as rent reserved. A payment of $34 having been made, leaving the sum of $180.40 due for principal and interest, the plaintiff brought his action in the Division Court for that sum, and prohibition was applied for upon the ground that the claim was not within the jurisdiction of the Division Court :—

Held, that the original amount of the claim was ascertained by the signature of the defendant under sub-sec. (c) of sec. 7, R. S. O. ch. 51, and that the Division Court had jurisdiction.

McDermid v. *McDermid*, 15 A. R. 287, and *Robb* v. *Murray*, 16 A. R. 503, specially referred to and considered. *In re Wallace* v. *Virtue*, 24 O. R. 558.

Ascertained Amount—*Claim for $200 on Contract Signed by Defendant—Evidence of Performance of Conditions on Plaintiff's Part.*]—A Division Court has no jurisdiction to entertain a claim for $200 on a contract signed by defendant where to entitle plaintiff to recover evidence *aliunde* must be given to shew that conditions of the contract on the plaintiff's part have been complied with. *Re Shepherd and Cooper*, 25 O. R. 274.

Breach of Covenant—*Landlord and Tenant—Title to Land—Custom.*]—In an action brought in the High Court by a landlord against a tenant for damages for breach of the latter's covenants in a farm lease, the statement of claim alleged that the plaintiff by deed let to the defendant the land described for a term of years, and that the defendant thereby covenanted as set forth, and assigned as breaches of the covenants that the defendant did not cultivate the farm in a good, husbandlike, and proper manner. By the statement of defence the defendant denied all the allegations of the statement of claim, and further alleged that the defendant had used the premises in a tenantlike and proper manner, "according to the custom of the country where the same was situate." The plaintiff recovered a verdict of $100, the action being tried with a jury. The title to the land was not brought into question at the trial, but it was contended that it came in question on the pleadings :—

Held, not so ; for the defendant was, on the face of the record, estopped from pleading *non demisit*, and his denial could only be read as a traverse of the actual execution of the lease.

Tanner v. *Bradburne*, 7 P. R. 18, commented on.

Held, also, that the "custom" pleaded was not the "custom" meant by section 69, sub-section 4, of the Division Courts Act, R. S. O. ch. 51, which refers to some legal custom by which the right or title to property is acquired, or on which it depends.

Legh v. *Hewitt*, 4 East 154, followed.

Held, therefore, that the action was within the competence of the Division Court, and that the costs should follow the event in accordance with Rules 1170, 1172. *Talbot* v. *Poole*, 15 P. R. 99.

Incorporeal Hereditament.] — The bare assertion of the defendant in a Division Court action that the right or title to any corporeal or incorporeal hereditament comes in question under R. S. O. ch. 51, sec. 69, sub-sec. 4, is not sufficient to oust the jurisdiction of that Court. The Judge has authority to enquire into so much of the case as is necessary to satisfy himself on the point, and if there are disputed facts or a question as to the proper inference from undisputed facts, that is enough to raise the question of title. If the facts can lead to only one conclusion, and that against the defendant, then there is no such *bonâ fide* dispute as to title as will oust the jurisdiction of the Court.

In an action in a Division Court for rent on a covenant in a lease, in which it was contended that the lease had been surrendered, prohibition was refused, Meredith, J., dissenting, on

the ground that a *bond fide* defence against the plaintiff's right to any rent due under the lease was raised.

Decision of Armour, C.J., affirmed. *Re Moberly* v. *Town of Collingwood*, 25 O. R. 625.

Judgment of High Court—"*Final Judgment*"—*Abandoning Excess.*]—Division Courts have jurisdiction to entertain an action brought upon a judgment of the High Court, where the judgment of that Court is a final judgment.

Re Eberts v. *Brooke*, 10 P. R. 257, 11 P. R. 296, referred to and followed.

In an action for alimony, the plaintiff recovered judgment against the defendant for $211.39 taxed costs, and in the usual form for alimony, at the rate of $226 per year, payable in equal quarterly instalments at specified times:—

Held, that the judgment, so far as it related to the costs, was a final judgment, whatever might be the case with regard to the payments of alimony, and that a Division Court had jurisdiction under R. S. O. ch. 51, sec. 70 (*b*), to entertain a suit by the plaintiff for $100 in respect to the costs, as being a claim for a debt owing to the plaintiff by the defendant, she expressly abandoning the balance of the taxed costs awarded. *Aldrich* v. *Aldrich*, 23 O. R. 374. Affirmed by the Divisional Court, 24 O. R. 124.

Liquors.]—The words "liquors drunk in a tavern or alehouse" in sub-section 2, and "such liquors" in sub-section 3 of section 69 of the Division Court Act, mean liquors drunk in the tavern or alehouse of the vendor. *Re McGolrick* v. *Ryall*, 26 O. R. 435.

Mechanics' Lien—*Mortgage*—*Account.*]—Section 23 of R. S. O. ch. 126, which allows proceedings to recover the amount of a mechanic's lien, to be taken under certain circumstances in the County Court and Division Court, applies only to actions in which the party seeking to enforce his lien is suing in the ordinary way to obtain judgment and execution. Those Courts cannot entertain an action in the nature of an action of account by a lienholder against a mortgagee who has sold the land in question under a mortgage prior to the lien, though there may be wider powers by way of summary application.

Judgment of the County Court of York affirmed, Maclennan, J.A., dissenting. *Hutson* v. *Valliers*, 19 A. R. 154.

Order of High Court for Payment of Costs—*Judgment.*]—Prohibition granted to restrain the enforcement of a judgment in a Division Court in an action brought upon an order of a Judge in an action in the High Court ordering the defendant in the Division Court action to pay certain costs arising out of his default as a witness.

Notwithstanding the broad provisions of Rule 934, an order of the Court or of a Judge is not for all purposes, and to all intents, a judgment; and no debt exists by virtue of such an order as was sued on here.

Rule 866 means that an order may be enforced in the action or matter in which it is, as a judgment may be enforced, and does not extend to the sustaining of an independent action upon the order. *Re Kerr* v. *Smith*, 24 O. R. 473.

Replevin—*Damages.*]—The plaintiff, a solicitor, claiming on defendant's papers a lien for costs, settled with him, taking a note therefor payable on demand. He then went to the United States, leaving the note and papers with another solicitor as his agent. The defendant, stating that he required the papers, or some of them, for use in his business, brought replevin proceedings in the Division Court, giving a bond to prosecute the suit with effect, and without delay, or to return the property replevied and to pay the damages sustained by the issuing of the writ, and there was a breach of the bond in not prosecuting the suit with effect. Under the replevin the defendant only procured some of the papers and which were tendered back to the plaintiff and refused, the defendant stating that they were of no value, the agent having retained the valuable ones. In an action on the bond by plaintiff to recover the amount of the note as damages he had sustained by the replevin:—

Held, per Boyd, C., that even if any lien existed, which was questionable, by reason of the taking of the note and departure from the country, it was not displaced by the replevin suit; but, in any event, the plaintiff had failed to prove any actual damage; and though there might be judgment for nominal damages and costs, there would be a set-off of the defendant's costs of trial; and the action was dismissed without costs.

Under the Division Court Act, R. S. O. ch. 51, sec. 266, the whole matter could have been litigated in the Division Court.

Quære, as to the amount of damages recoverable.

On appeal to the Divisional Court the judgment was affirmed. *Kennin* v. *Macdonald*, 22 O. R. 484.

Title to Land.]—In settlement of an action on a promissory note for $383, given for the price of liquors sold to him by plaintiff, a liquor dealer, defendant, a tavern keeper, agreed in writing to give, and gave security upon certain terms, by a conveyance of land, and a new note for the amount sued for, which was subsequently divided into three notes of $125 each:—

Held, (1.) That each note was a separate cause of action and could be sued in the Division Court.

(2.) That the title to land did not come in question. *Re McGolrick* v. *Ryall*, 26 O. R. 435.

See also the cases under sub-title IV. *post* 368; and under COSTS, III. *ante* 213.

III. PRACTICE AND PROCEDURE.

Appeal—*Subsequent Interest.*]—The "sum in dispute" upon an appeal from a Division Court, under R. S. O. ch. 51, sec. 148, is the sum for which judgment has been given in the Division Court.

Where judgment was given for $100:—

Held, that subsequently accrued interest did not make the sum in dispute exceed $100. *Foster* v. *Emory*, 14 P. R. 1.

Appeal to Court of Appeal — *Time for Giving Security.*]—Security upon a Division

Court appeal may be given by deposit after the ten days' delay allowed by section 149 of the Division Courts Act, R. S. O. ch. 51. *Simpson* v. *Chase*, 14 P. R. 280.

Appeal.]—The right of appeal from the Division Court is not lost because the Judge omits in an appealable case to take down the evidence at the trial in writing.

The security to be given on a Division Court appeal is now regulated by 53 Vict. ch. 19 (O.), and is to be either by a bond in the sum of $100, or a cash deposit of $50. *Sullivan* v. *Francis*, 18 A. R. 121.

Costs.]—A plaintiff who is entitled only to Division Court costs of an action can tax as part of such costs his travelling expenses from abroad to attend the trial, if he is a necessary and material witness. *Talbot* v. *Poole*, 15 P. R. 274.

Judgment Summons—*Garnishee — Defendant—R. S. O. ch. 51, sec. 235.*]—A garnishee is not a defendant within the meaning of sections 235 *et seq.* of the Division Courts Act, R. S. O. ch. 51, and is not examinable under after judgment summons.

Judgment of the Queen's Bench Division, 23 O. R. 493, affirmed. *In re Hanna* v. *Coulson*, 21 A. R. 692.

Judgment Summons — *Judgment Against Firm in Partnership Name—Non-Service on Partner.*]—An order for committal under the judgment summons provisions of the Division Court Act is not process of contempt, but is in the nature of execution or limited or qualified execution.

A member of a partnership, against which a judgment has been recovered in a Division Court in the firm name, who has not been personally served with the summons, and has not admitted himself to be or been adjudged a partner, cannot be proceeded against by an order for committal for non-attendance on a judgment summons.

Judgment of Boyd, C., 25 O. R. 573, reversed on this point and prohibition granted. *In re Reid* v. *Graham Bros.*, 26 O. R. 126.

Jury—*Action of Tort.*]—A claim by an insurance company, as indorsed on a Division Court summons, to recover back from the insured the sum of $30 loss under an insurance effected by him, payment of which is alleged to have been procured by his false and fraudulent representations, is a claim arising *ex delicto*, and can be required to be tried by a jury under R. S. O. ch. 51, sec. 154. *Re London Mutual Fire Insurance Co.* v. *McFarlane*, 26 O. R. 15.

Jury—*Res Judicata.*]—When an issue arises on the plea *res judicata* the identity of the facts in the former case with those in the existing case is matter for the jury when the trial is by a jury in a Division Court. In a case in a Division Court where the defence of *res judicata* had been raised, and in which a jury notice had been given, the Judge determined the case himself, and refused to allow it to be tried by a jury :—

Held, that he had no jurisdiction to do so, and that a mandatory order must go to compel him to try the case in accordance with the practice of the Court. *In re Cowan* v. *Affie*, 21 O. R. 358.

Mechanics' Liens.] — Held, that notwithstanding the apparently unlimited provisions of section 1 of 53 Vict. ch. 37 (O.), entitled an "Act to Simplify the Procedure for Enforcing Mechanics' Liens," the intention of the Act is to simplify such procedure in the High Court only, leaving the procedure provided for in County Courts and Division Courts unaffected by the passing of the Act. *Secord* v. *Trumm*, 20 O. R. 174.

Promissory Note.] — The non-filing of a bond of indemnity for a lost note is a matter of practice, and is not a ground for prohibition.

Prohibition to a Division Court refused. *Re McGolrick* v. *Ryall*, 26 O. R. 435.

Transcript — *County Court.*] — Under the Division Courts Act, R. S. O. ch. 51, and Rules now in force, the issue of execution and return of *nulla bona* in a foreign Division Court, to which a transcript has previously been sent, is a sufficient foundation for a transcript from the home Court to the Court under section 223 *et seq.* of that Act ; MacLennan, J. A., dissenting. *Burgess* v. *Tully*, 24 C. P. 549, distinguished.

A transcript to a County Court is not a proceeding within the purview of section 24 of 52 Vict. ch. 12 (O.), providing that no further proceedings shall be had in a Division Court after a transcript to another Division County Court without an order or affidavit ; Maclennan, J. A., dissenting. *Jones* v. *Paxton*, 19 A. R. 163.

Transcript—*County Court—Judgment Summons.*]—A transcript may be validly issued from a Division Court to the County Court notwithstanding the pendency in the Division Court of proceedings by way of judgment summons, but as soon as the transcript is issued and filed the judgment becomes a judgment of the County Court and the judgment summons proceedings cannot be continued.

The form of a transcript considered.

Judgment of the County Court of York reversed. *Ryan* v. *McCartney*, 19 A. R. 423.

See, also, the cases under the next sub-title.

IV. Prohibition.

Appeal to Division Court from Magistrates' Order under 51 Vict. ch. 23 (O.)—*Notice of Appeal—"Cause or Matter"—Amendment.*]—By section 15 of R. S. O. ch. 139, which by section 11 of 51 Vict. ch. 23 (O.), is to regulate appeals to Division Courts from magistrates' orders for payment of maintenance money by husbands to wives, it is provided that the appellant shall give to the opposite party a notice in writing of his appeal, and of the cause or matter thereof, eight days at least before the holding of the Court at which the appeal is to be heard.

Where a notice of appeal was given in time, but did not state any "cause or matter" of the appeal :—

Held, on a motion for prohibition, that the Judge presiding at the Division Court had no

power to allow the notice to be amended. *Re Coe* v. *Coe*, 21 O. R. 409.

Erroneous Interpretation of Statute—*Husband and Wife — Magistrate's Order for Payment of Maintenance Money.*]—Where new rights are given by a statute with specific remedies for their enforcement, the remedy is confined to those specifically given.

And where a wife obtained a magistrate's order under 51 Vict. ch. 23, sec. 2 (O.), for payment by her husband of a weekly sum for her support:—

Held, that her remedies were limited to those given by the statute, and that an action in the Division Court for arrears of payments under the order could not be maintained against the husband.

The facts not being in dispute, prohibition to the Division Court was granted on the ground that the Judge in that Court had given an erroneous interpretation to the Act referred to in holding that the magistrate's order was equivalent to the final judgment of a Court and that an action upon it would lie. *Re Sims* v. *Kelly*, 20 O. R. 291.

Error in Law.]—Prohibition will not lie to a Division Court merely because the Judge has erred in his construction of a statute where he does not by this error in construction give himself jurisdiction he does not in law possess.

Judgment of the Queen's Bench Division, 19 O. R. 487, reversed. *In re Long Point Co.* v. *Anderson*, 18 A. R. 401.

Excess—*Prohibition Quousque—Interest.*]—Where a Division Court has jurisdiction at the time of the institution of an action, but, by the addition of interest accruing during its pendency, judgment is given for an amount beyond the jurisdiction of the Court, prohibition will be granted until the Judge amends the judgment by striking out the excess; or a partial prohibition will be issued to prevent the enforcement of judgment for the excess. *Re Elliott* v. *Biette*, 21 O. R. 595.

Excess—*Prohibition for Excess.*]—Judgment was recovered in a Division Court for $108.63, being $100 balance due and $8.63 interest on a document signed by defendants, namely: "To G. T., we hereby undertake to pay the executors of the late J. D. K., the sum of $375 on a mortgage they hold against the Royal Hotel property, Streetsville, thereby reducing the amount to $2,000":—

Held, that the document, even if a note, under section 82 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), which was doubtful, only enured to the benefit of the executors and not to G. T.; and therefore the action being merely for breach of contract, the judgment was in excess of the jurisdiction which is limited to $100, but that prohibition would only go for the excess. *Trimble* v. *Miller*, 22 O. R. 500.

Excess—*Right of Judge to Amend by Striking Off Excess.*]—Where a claim for an account beyond the jurisdiction of the Division Court is brought in that Court, the Judge at the trial has no power to strike out the excess so as to bring the amount within the jurisdiction. *Cleveland Press* v. *Fleming*, 24 O. R. 335.

Judge Reserving Judgment Without Naming Time—*Garnishee Summons.*]—Section 144 of the Division Courts Act, R. S. O. ch. 51, which provides that when a Judge reserves judgment he shall name a subsequent day and hour for the delivery thereof, applies as well to the Judge's decision upon the hearing of a garnishee summons as to his decision in any other case, and must be strictly complied with.

Where a Division Court Judge reserved judgment, endorsing the summons "judgment reserved till," but did not name a subsequent day and hour for the delivery thereof, nor adjourn the trial, prohibition was granted to restrain further proceedings, no acquiescence being shewn on the part of the applicants. *Re Tipling* v. *Cole*, 21 O. R. 276.

Judge Reserving Judgment Without Naming Time—*Waiver.*]—Where a Division Court Judge reserved judgment, but did not adjourn the trial, but endorsed on the summons "judgment in a week," not naming any hour, and on the day named delivered judgment, which was brought to the defendant's knowledge, whereupon he moved on the merits for a new trial, or to set aside the judgment, which was refused, otherwise acquiescing in the judgment, prohibition was refused. *Re McPherson* v. *McPhee*, 21 O. R. 280, (*note*). Affirmed by the Divisional Court, 21 O. R. 411.

Judge Reserving Judgment Without Naming Time—*Absence of Prejudice.*]—The fact that a Division Court Judge has reserved judgment without fixing a day and time for the delivery thereof, is only ground for prohibition when the party applying has been prejudiced thereby, and has not consented to the course adopted, and has not subsequently waived the objection. *Re Bank of Ottawa* v. *Wade*, 21 O. R. 486.

Judge Reserving Judgment Without Naming Time.]—Prohibition will lie to re-proceedings under a judgment delivered without the notice required by section 144 of the Division Courts Act, R. S. O. ch. 51.

In re Tipling v. *Cole*, 21 O. R. 276, approved.

Judgment of the Queen's Bench Division, 22 O. R. 568, affirmed, Maclennan, J.A., dissenting. *In re Forbes* v. *Michigan Central R. W. Co.*, *In re Murphy* v. *Michigan Central R. W. Co.*, 20 A. R. 584.

Judgment Reserved Till a Day Named—*Judgment Not Given Till a Later Day—Acquiescence.*]—Where a Judge in an action in a Division Court has pronounced a judgment otherwise than in accordance with the directions of section 144 of the Division Courts Act, R. S. O. ch. 51, such judgment can, upon motion for prohibition, only be sustained upon clear and satisfactory evidence that the party complaining has agreed in advance to the adoption of the course which the Judge has actually adopted in delivering his judgment, or that he has subsequently acted in such a manner as to waive his right to complain.

And where at the trial of an action in a Division Court judgment was postponed till a named day, but was not then given, and two subsequent days were successfully named by the Judge, but judgment was not actually given till

three days later than the latest day named; and, upon motion for prohibition, it was not shewn that the party moving had ever agreed that the judgment might be given without previously naming a day for its delivery, and had not acted so as to waive his right to complain, an order was made prohibiting the enforcement of the judgment. *Re Wilson* v. *Hutton*, 23 O. R. 29.

Judgment Summons—*Garnishee*—"*Defendant.*"]—The word "defendant," as used in section 235 *et seq.* of the Division Courts Act, R.S.O. ch. 51, means the person sued in the action, and does not include a garnishee.

Prohibition to a Division Court granted, where the primary creditors, having obtained judgment against the garnishee, issued an after-judgment summons against him. *Re Hanna* v. *Coulson*, 23 O. R. 493. Affirmed in appeal, 21 A. R. 692.

Money Handed by Prisoner to Constable—*Attachment—Question of Fact.*]—The defendant was arrested, and when taken to the police station handed over the money in his possession to a constable. Creditors of the defendant sought to garnish this money by Division Court suits. The Judge in the Division Court found that the money was handed over voluntarily and held that it could be garnished:—

Held, that the question whether the garnishee was indebted to the defendant was a question of fact within the jurisdiction of the inferior Court, and that prohibition would not lie. *Re Field* v. *Rice*; *Re Ford* v. *Rice*, 20 O. R. 309.

Refusal of Evidence.]—The refusal of evidence is not ground for prohibition.

An order having been made in a Division Court upon judgment summons committing a defendant under section 240, sub-sec. 4 (c), of R. S. O. ch. 51 for having made away with his property, it is not ground for prohibition that the Judge has refused to allow the defendant under examination to make explanations as to his dealings with money lent by and repaid to him after judgment. *Re Reid* v. *Graham Brothers*, 25 O. R. 573. Reversed on another point, 26 O. R. 126.

Splitting Cause of Action—*Money Payable by Instalments with Interest.*]—Under an agreement for sale of land, the balance of the purchase money was payable by instalments with interest at a named rate half-yearly; and at a time when three of the instalments of principal, and interest amounting to $70, and three years' taxes, were overdue, an action was commenced in a Division Court for the arrears of interest and two years' taxes, $95.30:—

Held, reversing the decision of Boyd, C., 25 O. R. 253, who had refused prohibition, that the plaintiffs could have recovered all the purchase money and interest due when the action was begun under one count in a Superior Court; and therefore there was a dividing of their cause of action within the meaning of section 77 of the Division Courts Act, R. S. O. ch. 51.

Re Gordon v. *O'Brien*, 11 P. R. 287, approved and followed.

Public School Trustees of Nottawasaga v. *Township of Nottawasaga*, 15 A. R. 310, distinguished. *Re Clark* v. *Barber*, 26 O. R. 47.

Splitting Cause of Action—*Mortgage—Obligation to Indemnify.*]—The plaintiff conveyed land to the defendant subject to a mortgage, and after the maturity thereof paid the mortgagee two gales of interest since accrued, which he sought to recover from the defendant by action in a Division Court:—

Held, that there was no splitting of the cause of action within section 77 of the Division Courts Act, R. S. O. ch. 51.

Decision of Armour, C.J., 26 O. R. 123, reversed. *Re Ball* v. *Bell*, 26 O. R. 601.

Splitting Cause of Action—*Promissory Notes—Title to Land—Sale of Liquor—Lost Note.*]—In settlement of an action on a promissory note for $383 given for the price of liquors sold to him by plaintiff, a liquor dealer, defendant, a tavern-keeper, agreed in writing to give, and gave security upon certain terms, by a conveyance of land, and a new note for the amount sued for, which was subsequently divided into three notes of $125 each:—

Held, (1.) That each note was a separate cause of action and could be sued in the Division Court.

(2.) That the title to land did not come in question.

(3.) That the words "liquors drunk in a tavern or alehouse" in sub-section 2 and "such liquors" in sub-section 3 of section 69 of the Division Court Act mean liquors drunk in the tavern or alehouse of the vendor.

(4.) The non-filing of a bond of indemnity for a lost note is a matter of practice, and is not a ground for prohibition.

Prohibition to a Division Court refused. *Re McGolrick* v. *Ryall*, 26 O. R. 435.

Territorial Jurisdiction — *Application to Transfer Cause—Trial of Question Raised by Notice Disputing Jurisdiction—Refusal of Judge to Try.*]—Where the Judge presiding at the trial of an action in a Division Court declines to try the question of the jurisdiction of that Court raised by a notice disputing the jurisdiction he may be prohibited.

Such question may be tried at the time and place of the trial of the action; and the defendant is in no way bound by anything contained in R. S. O. ch. 51, sec. 87, as amended by 52 Viet. ch. 12, sec. 5, to apply for an order transferring the action to a Division Court having jurisdiction over it, or to apply to the Judge at any other time or place for the trial of the question so raised.

In re Watson v. *Woolverton*, 9 C. L. T. 480, distinguished.

Per Falconbridge, J., dissenting.—The defendant, before coming to the High Court for prohibition, is bound to apply to the County Judge somewhere, either at or before the trial, to transfer the cause; and in this case he did not so apply. *Re Thompson* v. *Hay*, 22 O. R. 583. *See* the next case.

Territorial Jurisdiction — *Transfer.*] — Under R. S. O. ch. 51, sec. 87, as amended by 52 Viet. ch. 12, sec. 5 (O.), either party in a Division Court action may, after notice disputing the jurisdiction has been duly given, apply to have the action transferred to another Court. If no application be made, and if in fact there be jurisdiction, prohibition will not lie merely because

the Judge has assumed that as no application for a transfer had been made he had jurisdiction, *i.e.*, has not tried the question of jurisdiction. But if, in fact, there be no jurisdiction the objection still holds good, and prohibition will be granted.

Judgment of the Queen's Bench Division, 22 O. R. 583, affirmed. *In re Thompson* v. *Hay*, 20 A. R. 379.

Waiver — *New Trial—Jurisdiction—Action on Promissory Note Dated at one Place but Made at Another.*]—The defendant in an action in the first Division Court in the County of York, brought upon a promissory note dated "Toronto," but actually made at Wiarton, filed a notice disputing the jurisdiction. Judgment, however, was given in the action against him in his absence, and he moved for and obtained a new trial, paying the money into Court as a condition, and afterwards applied for an order of transference, which was refused. Before the new trial he applied for a prohibition:—

Held, that by moving for a new trial and paying the money into Court, the defendant had not waived his right, and the want of jurisdiction being clear, prohibition should be granted.

If the right to prohibition exists, it is optional with the defendant to apply at the outset of the Division Court proceedings, or he may wait till the latest stage of appeal so long as there is anything to prohibit.

Judgment of Meredith, J., reversed. *In re Brazill* v. *Johns*, 24 O. R. 209.

See, also, the cases under sub-title II. *ante* 363.

DIVISIONAL COURT.

See JUDGMENT.

DOG.

Mischievous Animal — *Scienter.*] — W. brought an action for injuries to her daughter committed by a dog owned or harboured by the defendant V. The defence was that V. did not own the dog, and had no knowledge that he was vicious. On the trial it was shewn that the dog was formerly owned by a man in V.'s employ, who lived and kept the dog at V.'s house. When this man went away from the place he left the dog behind with V.'s son, to be kept until sent for, and afterwards the dog lived at the house, going every day to V.'s place of business with him, or his son, who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial. The trial Judge ordered a nonsuit which was set aside by the full Court and a new trial ordered:—

Held, affirming the judgment of the Court below, that there was ample evidence for the jury that V. harboured the dog with knowledge of its vicious propensities and the nonsuit was rightly set aside. *Vaughan* v. *Wood*, 18 S. C. R. 703.

Sheep Act—*Apportionment of Damages.*]—*See Fox* v. *Williamson*, 20 A. R. 610, *ante* 320.

DOMICIL.

See FOREIGN LAW.

DOMINION LANDS ACT.

See CROWN LANDS, II.

DOMINION PARLIAMENT.

See CONSTITUTIONAL LAW — PARLIAMENTARY ELECTIONS.

DONATIS MORTIS CAUSA.

See GIFT.

DOWER.

Assignment of—"*Peculiar Circumstances*"—*Dwelling-house Partly on Dowable Land.*]—Where dower was claimed in land upon a portion of which stood two-thirds of a dwelling-house, the remaining third being upon the adjoining land which was not dowable:—

Held, that this was not a case within sub-section 3 of section 12 of the Dower Procedure Act, R. S. O. ch. 56, in which the commissioners had power to assess a yearly sum in lieu of assigning dower by metes and bounds.

The commissioners were not bound necessarily to assign a portion of the building upon the property, but might give an equivalent. They were bound, however, to assign one-third of the whole property, having regard to value as well as to quantity. *McIntyre* v. *Crocker*, 23 O. R. 369.

Assignment of—*Action to Establish Will—Decree Establishing "Subject to Dower."*]—In an action by a devisee to establish a destroyed will devising real estate, to which the plaintiff, the widow of the testator, was a defendant, she, although she pleaded to the action, did not claim to be entitled to or to recover her dower in the land of which the action also sought to deprive her, and a decree was made declaring that the devisee, one of the defendants hereto, was entitled to the land in fee simple, subject to the dower of the plaintiff herein:—

Held, not such a judgment as entitled the dowress to sue out a writ of assignment of dower under section 7 of R. S. O. ch. 56.:—

Held, also, that the decree did not prevent the running of section 25 of "The Real Property Limitation Act," R. S. O. ch. 111, so as to bar the remedy of the plaintiff. *Cope* v. *Cope*, 26 O. R. 441.

Election.]—A testator having by his will blended his real and personal estate into a fund from which payments of income were to be made to his wife and other devisees, postponed the division of the *corpus* until after the death of his wife:—

Held, that the wife was not bound to elect between her dower and the testamentary bestowments.

Re Quimby, Quimby v. *Quimby*, 5 O. R. 744, distinguished.

The testator also gave a house for the residence of his wife during her life, and also another house for the use of certain nephews and nieces until the youngest attained twenty-one, or until they married :—

Held, that this right of personal occupation of the nephews and nieces was, while it lasted, inconsistent with a claim of the widow to have one third of the house set apart for her use as dowress, but that the deprivation of dower for a time in part of the real estate was not sufficient to put her to her election as to the residue of the estate.

Cowan v. *Besserer*, 5 O. R. 624, followed.

The widow was held put to her election as to both houses.

The judgment in *Amsden* v. *Kyle*, 9 O. R., at p. 441, corrected. *Leys* v. *Toronto General Trusts Co.*, 22 O. R. 603.

Election—*Administration Action.*]—A testator bequeathed his personal estate to his widow absolutely, and devised his real estate to his executors to be by them sold, and four per cent. of the proceeds paid to his widow, and the balance invested, and the income paid to his widow during her life, and afterwards the proceeds to be divided as directed ; and he gave the rents, until the real estate was sold, to his widow :—

Held, that the widow was put to her election, and that she could not claim dower and to be tenant of the freehold at the same time.

Decision of Robertson, J., reversed. *Marriott* v. *McKay*, 22 O. R. 320.

Election—*Legacy to Widow in Lieu of Dower—Right to Annual Specific Sum.*]—A testator by his will bequeathed to his wife $150 a year, payable half-yearly out of the rent of his farm until the sale thereof, when she was to be paid the interest on $2,500 at 6 per cent., or the $150. On the sale, $2,500 was to be left on mortgage or invested by the executors at interest payable half-yearly to the widow during her lifetime or widowhood, and such provision was to be in lieu of dower. Legacies were given to each of testator's twelve children (one of whom was dead at the date of the will), to be paid out of the proceeds of the sale of the real estate. The residue of the deceased daughter's legacy was directed to be placed at interest and divided equally between her surviving children on their attaining twenty-one years, and in case any of testator's children died before receiving their full shares and leaving issue, the deceased's child's share was to be equally divided between his or her children ; if such deceased child died without issue his or her share was to be divided equally between his or her surviving brothers and sisters. All the residue of the estate, not thereinbefore disposed of, he gave to his children "and their issue as aforesaid provided for" to be divided equally between them from time to time as the money should become payable. The estate proved insufficient to provide for the annuity and payment of the legacies in full, and the annual interest obtainable on the $2,500 was less than $150 :—

Held that there was a gift to the widow of $150 a year, and not merely of the annual interest derivable from the investment of the $2,500, and that she was entitled to have it paid out of the residue in priority to the other legatees. *Koch* v. *Heisey*, 26 O. R. 87.

Election — "*Nearest of Kin.*"] — In the absence of any controlling context, the persons entitled under the description "nearest of kin" in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale.

And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, and provided that in the event of the latter dying without issue "then in that case" it should be equally divided between his "nearest of kin" ; and the daughter died while still an infant and unmarried :—

Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance, she was nevertheless entitled as one of the "nearest of kin" ; and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common.

Bullock v. *Downes*, 9 H. L. C. 1 ; *Mortimore* v. *Mortimore*, 4 App. Cas. 448 ; and *Re Ford, Patten* v. *Sparks*, 72 L. T. N. S. 5, followed.

The word "then," introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression "in that case," which followed it, and did not affect the construction of the will.

The widow remained in possession after the death of the testator, with her infant daughter, whom she supported out of the rents, until an order was made under R. S. O. ch. 137, permitting her to lease the farm, to retain one-third of the rents for herself as dowress, and to apply the remaining two-thirds in supporting the infant :—

Held, that she was put to her election by the terms of the will, but that she had not elected to take under it, and was therefore entitled to dower out of the farm in addition to the one-third in fee simple. *Brabant* v. *Lalonde*, 26 O. R. 379.

Election—*Release by Marriage Settlement—Devolution of Estates Act.*]—Section 4 of the Devolution of Estates Act, R. S. O. ch. 108, which gives the widow a right of election between her dower and a distributive share in her deceased husband's lands, does not apply where by marriage settlement she has accepted an equivalent in lieu of dower. In such case she has no right to any share in the lands. *Toronto General Trusts Co.* v. *Quin*, 25 O. R. 250.

Election.]—*See*, also, *McMylor* v. *Lynch*, 24 O. R. 632, *post*, WILLS, IV.

Mortgage—*Bar of Dower—Non-registration—Priority of Subsequent Mortgage.*]—Certain land was devised to the testator's sons charged with an annuity to his widow who also had her dower therein. The devisees mortgaged the land to C. in March, 1879, and the mortgage was not registered until January, 1880. In November, 1879, a seceond mortgage was given

to M. and registered the same month. In this mortgage the widow joined barring her dower and releasing her annuity for the benefit of M. She had had knowledge of the prior mortgage when it was made and had refused to join in it. The second mortgagee, not being aware, when his mortgage was executed, of the prior incumbrance, gained priority, and the land was sold to satisfy his mortgage: the proceeds of the sale being more than sufficient for that purpose the surplus was claimed by both the widow and by C.:—

Held, reversing the judgment of the Court of Appeal for Ontario, 16 A. R. 224, *sub nom.*, *Maclennan* v. *Gray*, Gwynne and Patterson, JJ., dissenting, that the security for which the dower had been barred and the annuity released having been satisfied, the widow was entitled to the fund in the Court as representing her interest in the land in priority to C. *Gray* v. *Coughlin*, 18 S. C. R. 553.

Mortgage—*Bar of Dower—Conveyance of Equity of Redemption by Husband Alone.*]—Under sections 5 and 6 of the Dower Act, R. S. O. ch. 133, a wife who joins to bar dower in a mortgage of land made by her husband to secure part of the purchase money is entitled to dower notwithstanding a conveyance by him of the equity of redemption without her concurrence. The wife so joining in the mortgage is not merely a surety for her husband; and she is entitled to dower out of the surplus only of the land or money left after satisfying the mortgage debt.

Re Hogue, 14 O. R. 660; *Re Croskery*, 16 O. R. 207; and opinion of Patterson, J.A., in *Martindale* v. *Clarkson*, 6 A. R. 1, dissented from.

Judgment of Armour, C.J., reversed. *Pratt* v. *Bunnell*, 21 O. R. 1.

Mortgage For Money Borrowed—*Bar of Dower—Sale of Mortgaged Land—Right to Dower in Surplus.*]—Where lands mortgaged to secure a loan have been sold by the mortgagee, the wife of the mortgagor, who has joined in the mortgage to bar her dower, is entitled to dower out of the surplus, computed on what would be the full value of the land, if unencumbered.

Pratt v. *Bunnell*, 21 O. R. 1, not followed so far as the reasoning and *dicta* therein are opposed to the above decision. *Gemmill* v. *Nelligan*, 26 O. R. 307.

Mortgage—*Omission to Bar.*]—A voluntary deed will not be reformed against the grantor.

And where the defendant's husband, having appropriated moneys of a client in his hands for investment, secretly executed in the client's favour, a statutory mortgage not containing a bar of dower, the defendant being a party to and executing the mortgage, and subsequently after her husband's death paying, with knowledge of the facts, an instalment of interest due under it, an action to reform the mortgage by inserting a proper bar of dower was dismissed, there being no consideration to support a contract by the defendant with the plaintiffs to bar her dower. *Bellamy* v. *Badgerow*, 24 O. R. 278.

Mortgage Actions—*Joining Wife of Mortgagor as Party.*]—*See Ayerst* v. *McClean*, 14 P. R. 15; and *Blong* v. *Fitzgerald*, 15 P. R. 467, *post*, HUSBAND AND WIFE, VII.

DRAINAGE.

See MUNICIPAL CORPORATIONS, X.

DRAINAGE REFEREE.

See MUNICIPAL CORPORATIONS, X.

DRAINAGE TRIALS ACT, 1891.

See MUNICIPAL CORPORATIONS, X.

DURESS.

Bond—*Illegality.*]—A bond to secure the payment of the cost of maintaining at an industrial school a boy under fourteen years of age, convicted of larceny, and who otherwise came within the requirements of section 7 of the Act respecting Industrial Schools, given in consequence of the Judge's statement that in default the boy would be sent to the reformatory, is void, this being in law duress.

Per Osler, J.A.:—The bond was also illegal and void on the ground that not being required by law, it was given in order that the law might be put in force, which ought to have been put in force and acted upon without it.

Judgment of the County Court of Elgin reversed, Hagarty, C.J.O., dissenting. *City of St. Thomas* v. *Yearsley*, 22 A. R. 340.

DUTIES.

See REVENUE.

EASEMENT.

Artificial Stream—*Dominant Tenement—Servient Tenement.*]—The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement: and the fact that the burthen has been imposed for over forty years does not alter the character of the easement and convert the dominant into a servient tenement.

The owner of a servient tenement taking water under such circumstances is not "a person claiming right thereto" within R. S. O. ch. 111, sec. 35.

Ennor v. *Barwell*, 2 Giff. 410, distinguished. *Oliver* v. *Lockie*, 26 O. R. 28.

Damages.]—*See Platt* v. *Grand Trunk R. W. Co.*, 19 A. R. 403, *ante* 326.

Notice — *Equitable Interest.*]—A municipal council with the oral consent of the owner, build a sewer through land, acquire an equitable right to compel a conveyance of so much of the land as is occupied by the sewer, but a purchaser of the land without notice of the consent or of the existence of the sewer is protected by the Registry Act.

Judgment of Armour, C. J., affirmed. *Jarvis* v. *City of Toronto*, 21 A. R. 395. Affirmed by the Supreme Court, 25 S. C. R. 237.

Notice—*Severance of Tenement by Conveyance—Rights of Drainage and Aqueduct—Registry Laws.*]—Where the owner of two adjoining lots of land conveys one of them, he impliedly grants all those continuous and apparent easements, including rights of drainage and aqueduct, over the other lot which are necessary for the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted.

The grant of such an easement, if implied, is not within the provisions of the Registry Act, and prevails over a subsequent purchaser, without notice, of the adjoining lot; if express, its due registration on the lot conveyed is notice thereof to a subsequent purchaser of the adjacent lot without registration thereon.

Dicta of Patterson, J. A., in *Carter* v. *Grasett*, 14 A. R., at pp. 709, 710, dissented from. *Israel* v. *Leith*, 20 O. R. 361.

Prescription.]—The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner.

Judgment of the Chancery Division reversed. *Innes* v. *Ferguson*, 21 A. R. 323. Affirmed by the Supreme Court, 24 S. C. R. 703.

Prescription—*Enjoyment for Twenty Years—Interruption after Twenty Years—Extinguishing Easement—Registry Laws—Notice.*]—The plaintiff claimed through the defendant's predecessor in title the right to use two springs, C and E, under conveyances in 1841 and 1843 of lands north of the springs. One conveyance granted the sole and perpetual right to spring C, together with the right to use a road from the southern boundary of the land granted to the spring; the other granted the sole and perpetual use of and right to the water of spring E, without indicating the manner in which the water was to be approached or its enjoyment had. The defendant was the owner of the land to the south upon which the springs were situated. The water had been carried from the springs by means of pipes through the defendant's land to the plaintiff's land, from 1861 to 1882 or 1883, when the defendant tore up the pipes, insisting that the then owner of the plaintiff's land had no right to maintain them, and thereupon an arrangement was made under which the pipes were again put down with the addition of certain troughs for the convenience of the defendant's cattle :—

Held, that under the conveyances the plaintiff had a right of access to spring C by the road mentioned, and to spring E by a convenient road to be laid out, but had no right to the easement of conveying the water by pipes through the defendant's land.

The result of the interruption in 1882 or 1883 and the arrangement then made was that since that time the plaintiff must be taken to have maintained the pipes, not as a matter of right, but by the license of the defendant; under sections 35 and 37 of the R. S. O. ch. 111, the fact that twenty years had expired before the interruption was immaterial; and, therefore, the plaintiff had not acquired a prescriptive right to the easement.

The fact that for nearly the first half of the period from 1861 to 1881 or 1883, the land over which the easement was claimed was unoccupied, and its owners out of the country, constituted another objection to the acquisition of a prescriptive right under section 35.

The license of the defendant under which the pipes were maintained since 1882 or 1883, being by parol, was determinable at any time by the defendant; and the defendant in subsequently taking up the pipes, which led to the bringing of this action, was acting within his strict legal right of revoking the license; and the plaintiff was not entitled to damages for their removal, or for disturbing the ground in which they lay whereby the water was rendered impure.

The possession by the defendant of the land through which access to the springs was to be had, for upwards of ten years, did not extinguish the plaintiff's right of access.

Mykel v. *Doyle*, 45 U. C. R. 65, followed.

Before the conveyances of 1841 and 1843, G., the then owner of all the lands now in question, conveyed them to M. by a deed absolute in form, but really intended as a mortgage, and in 1857, in a redemption suit brought by persons who had acquired the equity of redemption from G., after the registration of the conveyances of 1841 and 1843, it was declared that this conveyance was a mortgage only, and in 1858 a conveyance was made by the representatives of G., pursuant to the decree, reciting the payment of the mortgage moneys and conveying the lands to the plaintiffs in the redemption suit. The defendant claimed the land upon which the springs were situated under the grantees in the conveyance of 1858 :—

Held, that the defendant was affected under the Registry Acts with notice that M. was a mortgagee only, and that those who redeemed him did so as owners of the equity; and the defendant could not set up the estate of the mortgagee, which, upon payment of the mortgage, was a bare legal estate, carrying with it no rights as against the beneficial owners of the land. *McKay* v. *Bruce*, 20 O. R. 709.

Watercourse — *Diversion of, by Railway Company—Equitable Easement—Registered Deed—Actual Notice—Prescriptive Right.*]—Where the defendants in 1871, without authority, diverted a watercourse on certain land and afterwards made compensation therefor to the then owner of the land, the plaintiff's predecessor in title :—

Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a *bona fide* purchaser for value without actual notice; the defendants having shewn no prescriptive right to divert the watercourse; and

the diversion being wrongful as against the plaintiff.

Knapp v. *Great Western R. W. Co.*, 6 C. P. 187; *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173; *Wallace* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 551; and *Partridge* v. *Great Western R. W. Co.*, 8 C. P. 97, distinguished. *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

Way of Necessity—*License—Prescription—Agreement For Right of Way.*]—In an action for obstructing a right of way the plaintiff claimed the use of such right both by prescription and agreement, and also claimed that by the agreement the way was wholly over defendant's land. The evidence on the trial shewed that plaintiff had acquired the land from his father who retained the adjoining land which was eventually conveyed to the defendant, and that after so acquiring it the plaintiff continued to use a track or trail over the adjoining land, and mostly through bush land, to reach the concession line, and his claim to the use of way by prescription depended on whether or not his user was of a well-defined road, or merely of an irregular track and by license and courtesy of the adjoining owner. Finally an agreement was entered into between the plaintiff and his brother, who had acquired the adjoining lot which he afterwards conveyed to defendant, by which in consideration of certain privileges granted to him, the brother covenanted to permit plaintiff to have a right of way along a lane to which the way formerly used led, and extending forty rods east from the centre of the lot, so as to allow plaintiff free communication from defendant's lot along said lane to the concession line. The issue raised on the construction of this agreement was, whether the right of way granted thereby should be wholly or in part on plaintiff's land or wholly on that of defendant:—

Held, reversing the judgment of the Court of Appeal, 16 A. R. 3, and restoring that of the Divisional Court, 15 O. R. 699, Ritchie, C. J., dissenting, that plaintiff had no title to the right of way by prescription, the evidence clearly shewing that the user was not of a well-defined road but only of a path through bush land and that he only enjoyed it by license from his father, the adjoining owner, which license was revoked by his father's death; but:—

Held, affirming the judgment of the Court of Appeal, that under the agreement the right of way granted to the plaintiff was wholly over defendant's land, the agreement, not being explicit as to the direction of such right of way, requiring a construction in favour of the plaintiff and against the grantor. *Rogers* v. *Duncan*, 18 S. C. R. 710.

Way—*Read or Apparent Servitude—Registration.*]—By deed of sale dated 2nd April, 1860, the vendor of cadastral lot No. 369 in the parish of Ste. Marguerite de Blairfindie, district of Iberville, reserved for himself, as owner of lot 370, a carriage road to be kept open and in order by the vendee. The respondent Ferdais as assignee of the owner of lot 370 continued to enjoy the use of the said carriage road, which was sufficiently indicated by an open road, until 1887 when he was prevented by appellant Cully from using the said road. C. had purchased the lot 369 from McD., intervenant, without any mention of any servitude and the original title deed creating the servitude was not registered within the delay prescribed by 44 & 45 Vict. (P.Q.) ch. 16, secs. 5 and 6. In an action *confessoire* brought by F. against C., the latter filed a dilatory exception to enable him to call McD. in warranty and McD. having intervened pleaded to the action. C. never pleaded to the merits of the action. The Judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada:—

Held, affirming the judgment of the Court below, that the deed created an apparent servitude (which need not be registered), and that there was sufficient evidence of an open road having been used by F. and his predecessors in title as owners of lot No. 370 to maintain his action *confessoire*:—

Held, also, that though it would appear by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment, yet as McD. had pleaded to the merits of the action and had taken up *fait et cause* for C. with his knowledge, and both Courts had held them jointly liable, this Court would not interfere in such a matter of practice and procedure. *Macdonald* v. *Ferdais*, 22 S. C. R. 260.

ECCLESIASTICAL CORPORATIONS.

See CHURCH.

EJECTMENT.

Lease—*Forfeiture—Distress after Ejectment Brought.*]—A notice of forfeiture of a lease under R. S. O. ch. 143, sec. 11, sub-sec. 1, given in the words "You have broken the covenants as to cutting timber, etc.," without more particularly specifying the breach and claiming compensation, is sufficient.

After an action of ejectment was commenced for the forfeiture of the lease the landlord distrained for and received rent subsequently accruing due:—

Held, that such course did not *per se* set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year. *McMullen* v. *Vannatto*, 24 O. R. 625.

Mesne Profits — *Occupation Rent.*] — *See Elliott* v. *Elliott*, 20 O. R. 134.

Revivor.]—An action of ejectment was brought in 1867 and was entered for trial in that year, but the trial was postponed. The original plaintiff died in 1871, having several years before conveyed the lands to a person who in 1888 conveyed to one M. In 1892 an *ex parte* order of revivor was obtained in the name of M. as plaintiff:—

Held, affirming the judgment of Galt, C. J., 22 O. R. 316, discharging the order of revivor, that the action was governed by C. S. U. C. ch. 27, and that it came to an end as soon as the

conveyance to the present plaintiff's predecessor in title was made except perhaps as to costs, for which the original plaintiff might probably have proceeded. *Lemesurier* v. *Macaulay*, 20 A. R. 421. *See* the next case.

Revivor.]—Rules 383, 384, and 385, Ontario Judicature Act, 1881, Con. Rules 620, 621, and 622, which relate to the transmission of interest *pendente lite*, and permit the continuance of an action by or against the person to or upon whom the estate or title has come or devolved, are applicable to an action of ejectment begun before the Act, when the conveyance of the land by the original plaintiff did not take place until after its passing. *Irvine* v. *Macaulay*, 16 P. R. 181.

Tenants in Common.]—A tenant in common, in an action for the possession of land against a person without any title, can recover judgment only for the possession of his share; and the Ontario Judicature Act has made no difference in this respect. *Barnier* v. *Barnier*, 23 O. R. 280.

Venue.]—The indorsement on a writ of summons, issued in the district of Thunder Bay after the passing of 57 Vict. ch. 32 (O.), shewed that the claim was for cancellation of a lease of a mining location in the district of Rainy River, for possession of the location, and for an injunction restraining the defendant from entering thereon:—

Held, that the action was not one of ejectment within the meaning of Rule 653, and therefore the venue was not local, and it was not necessary that the writ should be issued by the local Registrar at Rat Portage under section 3 of the Act. *Kendell* v. *Ernst*, 16 P. R. 167.

ELECTION.

ELECTION OF REMEDIES.]—*See* ACTION, II.—PARTNERSHIP, III.

MUNICIPAL ELECTIONS.]—*See* MUNICIPAL CORPORATIONS.

PARLIAMENTARY ELECTIONS.]—*See* PARLIAMENTARY ELECTIONS.

WIDOW'S ELECTION.]—*See* DOWER.

EMBLEMENTS.

See CROPS.

EMINENT DOMAIN.

See CROWN — MUNICIPAL CORPORATIONS — RAILWAYS.

ESCROW.

See Buck v. *Knowlton*, 21 S. C. R. 371, *ante* 6.

ESTATE.

Board and Lodging — *Charge on Land — Right of Occupation.*]—A father conveyed to one of his sons certain farm lands, subject to his own life estate therein, and subject also to the use by another son, the plaintiff, of a bed, bed-room and bedding, in the dwelling house on the farm, and to his board so long as the plaintiff should remain a resident on the farm:—

Held, that the plaintiff took no estate under the deed, but merely the use, after the termination of the father's life estate, and while resident on the land, of the bed-room and board, which was a charge thereon; that no period was fixed for such occupation, which might be either permanent or temporary, and therefore no forfeiture was created by non-occupation. *Wilkinson* v. *Wilson*, 26 O. R. 213.

Conditional Fee.]—A devise to two persons of separate lots of land with a proviso that if either devisee should die without lawful issue the part and portion of the deceased should revert to the surviving devisee, and with the further proviso that in case both devisees should die without issue the devised lands should be divided by certain named persons as they should deem right and equitable among the relatives of the testatrix, confers upon each devisee only a defeasible fee simple.

Judgment of Street, J., 22 O. R. 542, affirmed. *Nason* v. *Armstrong*, *McClelland* v. *Armstrong*, *Wright* v. *Armstrong*, 21 A. R. 183.

Reversed by the Supreme Court, on another point, 25 S. C. R. 263.

Conditional Fee — *Executory Devise.*]—A testator by his will devised as follows:—"I give and bequeath to my son F. . . lot No. . . at the age of twenty-one years, giving the executors power to lift the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of twenty-one years. * * * "At the death of any one of my sons or daughters having no issue their property to be divided equally among the survivors."

F. attained twenty-one and died unmarried and without issue:—

Held, a conditional fee, with an executory devise over.

Decision of Ferguson, J., reversed.

Little v. *Billings*, 27 Gr. 353, distinguished. *Crawford* v. *Broddy*, 25 O. R. 635.

Reversed in appeal on another ground, 22 A. R. 307.

Estate in Fee Simple—*Devise to Sons without Words of Limitation—"Die without Lawful Issue"—"Survivor"—Estate Tail.*]—The testator died in 1845, and by his will devised a farm to his two sons, without words of limitation, to be equally divided between them, adding: "And in case either of my sons should die without lawful issue of their bodies, then his share to go to the remaining survivor":—

Held, that the gift in the earlier part of the devise, though without words of limitation, was sufficient to carry the fee to the sons, unless a lesser estate appeared to be intended on the face of the will.

Both sons outlived the father; one died in 1874 leaving issue; the other died without issue in 1890:—

Held, that the son who first died had an estate in fee simple absolute in one-half of the land; and, as the other left no survivor, he was not within the words of the will, and nothing had happened to divest him of the estate in fee given by the earlier part of the will, and therefore he also died seized in fee simple of one-half of the land.

The word "survivor" is to be read as meaning "longest liver," not "other."

The words "die without issue" do not mean an indefinite failure of issue which would give rise to an estate tail. *Ashbridge* v. *Ashbridge*, 22 O. R. 146.

Estate in Fee — "*Absolutely*" — "*In the Event of Her Death.*]—A testator, who died on the 9th April, 1891, seized in fee, by his will devised and bequeathed all his real and personal estate to his wife absolutely, and in the event of her death to be equally divided among her children :—

Held, that the will was to be construed as if the words "in my life-time" followed the words "in the event of her death," and that the widow took an estate in fee simple in the lands.

Construction of section 20 of the Wills Act, R. S. O. ch. 109. *Re Walker and Drew*, 22 O. R. 332.

Estate Tail—*Remainder Expectant Thereon —Barring of Estate Tail.*]—A testator by his will devised to his son and "to the heirs of his body" a part of his real estate, and to his daughter and "to the heirs of her body" the remainder of the property, and if "either . . . should die without leaving heirs of their body," the share of the deceased to the survivor, and "to the heirs of their body," . . . and should both die "without leaving living issue" then over in fee simple. The daughter died in the lifetime of her brother, without issue. The son married and had living issue, and conveyed in fee :—

Held, that an estate tail vested in the son, and that there was nothing in the will to give the words "die without leaving living issue," the meaning of "an indefinite failure of issue," and that the ultimate remainder in fee simple expectant on the estate tail, could be barred by the son. *Re Fraser and Bell*, 21 O. R. 455.

Estate Tail—*Separate Estate—Tenant by the Curtesy — Power of Appointment.*] — A father conveyed lands to his daughter by deed with *habendum* "To have and to hold the same unto . . . and the heirs of her body lawfully begotten to and for their sole and only use for ever . . . to and for the sole and separate use and benefit of (grantee) for and during the term of her natural life, and after her death then to the heirs of her body lawfully begotten for ever. Provided always, however, that it shall and may be lawful for (grantee) to direct and appoint either by deed or her last will and testament which or in what manner her said heirs shall have the lands and premises hereby granted should circumstances at any time render it necessary, of which circumstances she shall and may be sole judge." She died leaving her husband and several children surviving her, and by her will devised and appointed the lands to her eldest son with instructions to dispose of the same between her husband and children in the proportions mentioned in her will :—

Held, that the daughter took an estate in fee tail general, and that her husband was tenant by the curtesy :—

Held, also, that the provisions of the will were not a valid exercise of the power. *Archer* v. *Urquhart*, 23 O. R. 214.

Infants — *Estate Tail.*]—On an application for a ruling as to whether the estate of an infant being an estate tail in possession could be sold under R. S. O. ch. 137 :—

Held, that the Act applies to an estate tail. *In re Gray*, 26 O. R. 355.

Maintenance—*Adverse Possession.*]—In 1841 land was granted by King's College to G., who in 1849 conveyed it to a married woman, who, with her husband, was in possession at the time of the grant to G. The conveyance to the married woman was executed by her husband. The husband and wife lived together on the land till her death, in 1864, and the husband till 1870, he dying in January, 1889.

In an action of ejectment begun in October, 1889, by the heirs-at-law of the wife against persons claiming through the husband :—

Held, reversing the judgment of Rose, J., that the possession of the husband was not adverse at the time of the conveyance to G., and the conveyance to G. and the subsequent conveyance to the wife were operative, notwithstanding the statute 32 H. VIII. ch. 9, then in force. *Marsh* v. *Webb*, 21 O. R. 281. Affirmed, 19 A. R. 564; 22 S. C. R. 437.

Primogeniture—*Change in Law after Will Made.*]—A testator, by his will, made on the 14th of August, 1850, devised certain land to his widow for life, and after her death, to two nephews, and in the case of the death of them, or either of them, in his own lifetime, he devised the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her or their heirs and assigns.

The Act commonly known as the Act abolishing primogeniture, 14-15 Vict. ch. 6, was passed on the 2nd of August, 1851, and came into force on the 1st of January, 1852.

One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866, and his widow in 1870 :—

Held, Galt, C.J., dissenting, affirming the judgment of Robertson, J., 16 O. R. 341, that the Act abolishing primogeniture did not apply, (1) because the will was made before it was passed or took effect; and (2), because the land had been lawfully devised by the person who died seized, and therefore that the eldest son of the deceased nephew, as his common law heir, was entitled to the remainder in fee expectant upon the death of the widow.

Tylee v. *Deal*, 19 Gr. 601, approved.

Baldwin v. *Kingstone*, 18 A. R. 63. Affirmed on this point by the Judicial Committee.

Shelley's Case—"*Issue*"—"*Fee Simple*"—*Intention.*]—A testator by the third clause of his will devised certain lands "to my son James for the full term of his natural life, and from and after his decease, to the lawful issue of my said son James, to hold in fee simple; but in

default of such issue him surviving, then to my daughter Sarah Jane, for the term of her natural life; and upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane, to hold in fee simple; but in default of such issue of my said daughter Sarah Jane, then to my brothers and sisters and their heirs in equal shares." By a later clause, the testator added: "It is my intention that upon the decease of either of my said children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will:"—

Held, reversing the judgment of Ferguson, J., 23 O. R. 404, that the clauses must be read together, and that, having regard to the latter clause, and to the direction that the issue of James were to take in fee simple, there was a sufficiently clear expression of intention to give James a life estate only to prevent the application of the rule in *Shelley's Case*. *Evans* v. *King*, 21 A. R. 519. Affirmed by the Supreme Court, 24 S. C. R. 356.

ESTATE IN FEE.

See ESTATE.

ESTATE TAIL.

See ESTATE.

ESTOPPEL.

I. BY DEED.

Execution Creditor—*Purchase of Mortgage by—Denial of Mortgagor's Title.*]—An execution creditor who purchases and takes a transfer of a mortgage of property is not estopped thereby from setting up in an action against him for the seizure of the same property under his execution against the grantor of the mortgagor, that the said grantor was not the owner of the property in question and that the conveyance to the mortgagor by him was fraudulent and void as against the creditors of the latter. *Gordon* v. *Proctor*, 20 O. R. 53.

Grant From Local Government—*Conveyance by Grantee.*]—After the British North America Act came into force the Government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C.B. S. conveyed this lot, through the C. B. Coal Co. to the S. & L. Coal Co. S. having died his widow brought an action for dower in said lot, to which the company pleaded that the grant to S. was void, the property being vested in the Dominion Government:—

Held, affirming the judgment of the Court below, Strong and Gwynne, JJ., dissenting, that the company having obtained title to the property from S. they were estopped from saying that the title of S. was defective.

Per Strong and Gwynne, JJ., dissenting. The conveyance by S. to the C. B. Coal Co. was an innocent conveyance by which S. himself would not have been estopped and as estoppel must be mutual his grantees would not. There were no recitals in the deed that would estop them and an estoppel could not be created by the covenants. *Sydney and Louisburg Coal and R. W. Co.* v. *Sword*, 21 S. C. R. 152.

Release—*Recital.*]—A testator by his will devised to his son G. "the property I may die possessed of in the village of M., also lot 28 in the 10th concession of B." In the early part of the will he had used the words "wishing to dispose of my worldly property." The testator did not own lot 28, and the only land he did own in the 10th concession of B. was a part of lot 29. The will contained no residuary devise.

Upon a petition under the Vendor and Purchaser Act:—

Held, that the part of lot 29 owned by the testator did not pass by the will to the son.

After the death of the testator, all his children executed a deed of release to the executors of his will, containing a recital that the part of lot 29 owned by the testator was devised to the son G., and that he was then in possession:—

Held, that there was no estoppel as among the members of the family, who together constituted one party to the deed:—

Held, however, upon the evidence, that G. had acquired a good title to the lands in question by virtue of the Statute of Limitations. *Re Bain and Leslie*, 25 O. R. 136.

Title to Land—*Adverse Possession—Husband and Wife.*]—In 1841 land was granted by King's College to G., who in 1849 conveyed it to a married woman, who, with her husband, was in possession at the time of the grant to G. The conveyance to the married woman was executed by her husband. The husband and wife lived together on the land till her death, in 1864, and the husband till 1870, he dying in January, 1889. In an action of ejectment begun in October, 1889, by the heirs-at-law of the wife against persons claiming through the husband:—

Held, reversing the judgment of Rose, J., that the possession of the husband was not adverse at the time of the conveyance to G., and the conveyance to G. and the subsequent conveyance to the wife were operative, notwithstanding the statute 32 H. VIII. ch. 9, then in force.

Per Armour, C.J.—The conveyance to the wife was made by the procurement of the husband, and he took an estate under it, and having no other right or title to the land, was estopped from denying the validity of G.'s title:—

Held, also, upon the evidence, that the plaintiffs were not estopped by the dealings of their ancestress with the land, and that the defendants were not entitled to be subrogated to the rights of a mortgagee in whose mortgage she had joined as a granting party, but which had been paid off

and discharged. *Marsh* v. *Webb*, 21 O. R. 281. *See* this case in appeal, 19 A. R. 564, 22 S. C. R. 437, *ante* 128.

Ultra Vires Deed.]—The Act of incorporation of a railway company, the predecessors in title of the plaintiffs, which was incorporated for the purpose of constructing and operating a certain line of railway, conferred upon the company in respect of the disposition of lands acquired by them, "powers of letting, conveying and otherwise departing therewith for the benefit and on account of the company from time to time as they should deem necessary."

Nearly forty years before the commencement of this action the predecessors in title of the defendants laid pipes for conveying water along the railway track of the plaintiff's predecessors, using them for such purpose almost continuously up to the present time, such privilege having been given to them by resolution of the directors of the company, who a few years subsequently passed another resolution, and in pursuance thereof executed a deed granting, releasing and confirming such right and privilege which at the time this action was brought had become vested in the defendants.

The undertaking of the original railway company became vested in the plaintiffs, who, a few years before the commencement of this action desiring to alter the position of their track gave notice of expropriation to the immediate predecessors in title of the defendants, and placed the track over the water pipes.

The plaintiffs now sought to have the resolution and deed mentioned declared *ultra vires*, and also claimed an injunction restraining the user of the water pipes, and if necessary an order for their removal :—

Held, that the resolutions and deed were *ultra vires* as not within the powers specified by the charter, or such as could fairly be regarded as incidental thereto, or reasonably derived by implication therefrom :—

Held, also, that the plaintiffs were not estopped from asserting their own title and denying the defendants' :—

Held, lastly, that the defendants not having used and enjoyed their easement for forty years had not acquired a title thereto by prescription under R. S. O. ch. 111, sec. 35. *Canada Southern R. W. Co.* v. *Town of Niagara Falls*, 22 O. R. 41.

II. In Pais.

Chose in Action—*Equitable Assignment.*]—The contractor for building a church, being indebted to D. for materials furnished therefor, gave him the following order on the defendants, who were the building trustees, and of which they were duly notified : "Pay to the order of D. the sum of $306 out of certificate of money due me on 1st June for materials furnished to above church." This the defendants refused to accept, and on 31st May paid, out of moneys arising out of the contract, an order for a larger sum, made on that date in favour of another person, under an arrangement made by them with the latter alone :—

Held, that there was a good equitable assignment in favour of D. of money due on the 1st June ; and that defendants, by the payment of the other order, were estopped from denying that there were sufficient moneys then due to the contractor to cover his order. *Bank of British North America* v. *Gibson*, 21 O. R. 613.

Contract—*Boomage.*]—F. McC. brought an action against G. B. for $4,464 as due him for charges which he was authorized to collect under 36 Vict. ch. 81, (P.Q.) for the use by G. B. of certain booms in the Nicolet river during the years 1887 and 1888. G. B. pleaded that under certain contracts entered into between F. McC. and G. B. and his *auteurs*, and the interpretation put upon them by F. McC., the repairs to the booms were to be and were, in fact, made by him, and that in consideration thereof he was to be allowed to pass his logs free ; and, also, pleaded compensation of a sum of $9,620 for use by F. McC. of other booms, and repairs made by G. B. on F. McC.'s booms, and which by law he was bound to make :—

Held, reversing the judgment of the Court below, that there was evidence that F. McC. had led G. B. to believe that under the contracts he was to have the use of the booms free in consideration for the repairs made by him to piers, etc., and that F. McC. was estopped by conduct from claiming the dues he might otherwise have been authorized to collect :—

Held, further, that even if F. McC.'s right of action was authorized by the statute the amount claimed was fully compensated for by the amount expended in repairs for him by *G. Ball* v. *McCaffrey*, 20 S. C. R. 319. *See*, also, *O'Shaughnessy* v. *Ball*, 21 S. C. R. 415.

Contributory—*Petition for Incorporation.*]—Where in winding-up proceedings it appeared that an alleged contributory joined in the petition for incorporation, wherein it was untruly stated that he had taken 250 shares of the capital stock, whereas the shares he held, had, after incorporation, been voted to him by a resolution of the directors as paid up stock, for services in connection with the formation of the company :—

Held, that in view of the provisions of the Ontario Joint Stock Companies' Letters Patent Act, he was liable to be held a contributory in respect of, at the least, the number of shares voted to him.

Semble :—He was liable for the full number of shares mentioned in the petition. *Re Collingwood Dry Dock Ship Co., Weddell's Case*, 20 O. R. 107.

Damages to Property from Government Railway—*Claimant's Acquiescence in Construction of Culverts.*]—The suppliant sought to recover damages for the flooding of a portion of his farm at Isle Verte, P.Q., resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under the hand of the suppliant, given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the Intercolonial Railway, whereby he accepted a certain sum "in full compensation and final settlement for deprivation of water, fence-rails taken, damage by water and all damages past, present and prospective arising out of the construction of the Intercolonial Railway," and released the Crown

"from all claims and demands whatever in connection therewith." It was also proved that, although the works were executed subsequent to the date of this release, they were undertaken at the request of the suppliant and for his benefit, and not for the benefit of the railway, and that with respect to a part of them, he was present when it was being constructed and actively interfered in such construction :—

Held, that he was not entitled to compensation. *Bertrand* v. *The Queen*, 2 Ex. C. R. 285.

Damages — *Settlement of Damages With Claimant's Predecessor in Title.*]—A company, to whose rights in this behalf the Crown had succeeded, had paid damages to the claimant's predecessor in title for injury resulting to the property in question from the construction of a railway. But it was clearly shewn that at the time when such damages were assessed there was no intention to construct an overhead bridge, and that they were assessed on the understanding that there was to be a crossing at rail level :—

Held, that the defendant was not, by reason of such payment, precluded from recovering compensation for injuries occasioned by the overhead bridge.

The defendant, and a number of other persons interested in the manner in which the crossing was to be made, met the Chief Engineer of Government Railways and talked over the matter with him. The defendant, who does not appear to have taken any active part in the discussion, and the other persons mentioned wished to have a crossing at rail level with gates ; but the Chief Engineer declined to authorize such gates, and it was decided that there should be an overhead crossing with a grade of one in twenty. Subsequently the defendant signed a petition to have the grade increased to one in twelve, as the interference with the access to his property would in that way be lessened. The prayer of the petition was not granted :—

Held, that by his presence at such meeting the defendant did not waive his right to compensation. *The Queen* v. *Malcolm*, 2 Ex. C. R. 357.

Drainage.]—Owner of land affected acting so as to lead municipality to believe jurisdiction was not disputed. *Gibson* v. *Township of North Easthope*, 21 A. R. 504 ; 24 S. C. R. 707.

Forgery—*Ratification.*]—Y., who had been in partnership with the defendants, trading under the name of the H. C. Company, but had retired from the firm and become the general manager of the company, but with no power to sign drafts, drew a bill of exchange for his own private purposes in the name of the defendants on a firm in Montreal, which was discounted by the plaintiff bank. Before the bill matured Y. wrote to defendants informing them of having used their name, but that they would not have to pay the draft. The bill purported to be indorsed by the company *per* J. M. Y. (one of the defendants), and the other defendant having seen it in the bank examined it carefully, and remarked that J. M. Y.'s signature was not usually so shaky. J. M. Y. afterwards called at the bank and examined the bill very carefully, and in answer to a request from the manager for a cheque he said that it was too late that day, but he would send a cheque the day following. No cheque was sent, and a few days before the bill matured the manager and solicitor of the bank called to see J. M. Y., and asked why he had not sent the cheque. He admitted that he had promised to do so, and at the time he thought he would. Y. afterwards left the country, and in an action against the defendants on the bill they pleaded that the signature of J. M. Y. was forged, and on the trial the jury found that it was forged, and judgment was given for the defendants :—

Held, affirming the decision of the Court of Appeal, 15 A. R. 573, which reversed that of the Divisional Court, 13 O. R. 520, that though fraud or breach of trust may be ratified forgery cannot, and the bank could not recover on the forged bill against the defendants. *Banque Jacques Cartier* v. *Banque d'Epargne*, 13 App. Cas. 118, and *Earton* v. *London and North-Western R. W. Co.*, 6 Times L. R. 70, followed. *Merchants' Bank of Canada* v. *Lucas*, 18 S. C. R. 704.

Partnership.]—The defendant set up that the plaintiffs had elected to treat other members of his firm as their sole debtor, by reason of their having proved their claim with and purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm ; and that the defendant had relied and acted upon their conduct and election, and they were therefore estopped from suing him as a partner :—

Held, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiffs' action, no estoppel arose, because the plaintiffs did nothing shewing an election not to look to him, and he had no right to assume an election from what they did, nor to act as if such an election had been made. *Ray* v. *Isbister*, 24 O. R. 497. *See* this case in appeal, on another point, 22 A. R. 12, *post* 394.

Partnership.]—When a person, not in fact a partner, authorizes his name to be used in the firm name of a partnership there is a holding out of himself as a partner to any one who knows or has reason to believe that this represents the name of the person so authorizing its use, but a partnership by estoppel or by holding out will not be created if the real position of affairs is known to the creditor.

Judgment of the Common Pleas Division, 21 O. R. 683, reversed in part. *McLean* v. *Clark*, 20 A. R. 660.

Solicitor—*Practising Without Certificate—Allowing Name to Appear as a Member of Firm.*]—M., a solicitor who had not taken out the certificate entitling him to practice in the Ontario Courts, allowed his name to appear in newspaper advertisements and on professional cards and letter heads as a member of a firm in active practice. He was not, in fact, a member of the firm, receiving none of its profits and paying none of its expenses, and the firm name did not appear as solicitors of record in any of the proceedings in their professional business. The Law Society took proceedings against M. to recover the penalties imposed on solicitors prac-

tising without certificate, in which it was shewn that the name of the firm was endorsed on certain papers filed of record in suits carried on by the firm :—

Held, reversing the judgment of the Court below, 15 A. R. 150, that M. did not "practise as a solicitor" within the meaning of the Act imposing the penalties (R. S. O. [1877] ch. 149), and that he was not estopped, by permitting his name to appear as a member of a firm of practising solicitors, from shewing that he was not such a member in fact. *Macdougall* v. *Law Society of Upper Canada*, 18 S. C. R. 203.

III. By Record.

Court Equally Divided.]—When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the Supreme Court affects the actual parties to the litigation only, and the Court, when a similar case is brought before it, is not bound by the result of the previous case. *Stanstead Election Case*, 20 S. C. R. 12.

Different Causes of Action — *Statute of Frauds.*]—S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eighth of an interest of his, M.'s, interest in a gold mine but failed to recover, as the Court held the alleged agreement to be within the Statute of Frauds. On the hearing M. denied the agreement as alleged, but admitted that he had agreed to give S. one-eighth of his interest in the proceeds of the mine when sold, and it having been afterwards sold S. brought another action for payment of such share of the proceeds :—

Held, reversing the decision of the Supreme Court of Nova Scotia, Fournier and Taschereau, JJ., dissenting, that S. was not estopped by the first judgment against him from bringing another action :—

Held, also, that the contract for a share of the proceeds was not one for sale of an interest in land within the Statute of Frauds. *Stuart* v. *Mott*, 23 S. C. R. 384.

Ejectment—*Mesne Profits.*] — In a former action of ejectment brought by the plaintiff against the defendants, mesne profits were claimed, but no evidence was given in regard to them :—

Held, that the plaintiff was not estopped from recovering in this action occupation rent for the premises since the expiry of the term. *Elliott* v. *Elliott*, 20 O. R. 134.

Information of Intrusion—*Subsequent Action—Beneficial Interest in Land.*]—In proceedings on an information of intrusion exhibited by the Attorney-General of Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the Crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that Province. *The Queen* v. *Farwell*, 14 S. C. R. 392. The appellant having registered his grant and taken steps to procure an indefeasible title from the registrar of titles of British Columbia, thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the Attorney-General to direct the appellant to execute to the Crown in right of Canada a surrender or conveyance of the said lands :—

Held, affirming the judgment of the Exchequer Court, 3 Ex. C. R. 271, that the judgment in intrusion was conclusive against the appellant as to the title. *The Queen* v. *Farwell*, 14 S. C. R. 392, and *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295, commented on and distinguished. *Farwell* v. *The Queen*, 22 S. C. R. 553.

Promissory Notes—*Action Against Indorser—Action Against Same Person as Maker.*]—The defendant was sued by the same plaintiffs in a former action as indorser of a promissory note, and judgment was entered in his favour upon the defence that he indorsed it for the accommodation of the plaintiffs without consideration. In this action he was sued upon the same note and others as a partner in the firm who were the makers of the notes, along with the other partner :—

Held, that the fact of his establishing his defence in the former action had no effect upon the question of his liability in this.

Nor were the plaintiffs debarred by the recovery of a judgment against the partnership from bringing an action upon the judgment against the individual members of it.

Clark v. *Cullen*, 9 Q. B. D. 355, followed.

Ray v. *Ishister*, 24 O. R. 497. *See* the next case.

Promissory Notes—*Endorser—Res Judicata.*] —An action was brought against a firm in the firm name as makers and an individual as endorser of a note, and was dismissed as against the endorser on the ground that he had endorsed at the request of the holders for their accommodation, judgment being given against the firm :—

Held, reversing the judgment of Street, J., 24 O. R. 497, that the dismissal of this action was an answer to an action on the judgment, in which it was sought to prove that the endorser was, as regards the plaintiffs, a partner by estoppel and therefore bound by the judgment against the firm.

The practice to be followed in proceeding against an alleged partner on a judgment against the firm, considered. *Ray* v. *Ishister*, 22 A. R. 12.

Trustee's Accounts.] — Court of Probate passing trustee's accounts does not bind in action in Court of Equity. *Grant* v. *Maclaren*, 23 S. C. R. 310, *post*, Executors, I.

IV. Special Matters and Proceedings.

Crown.]—The doctrine of estoppel cannot be invoked against the Crown. *Humphrey* v. *The Queen*, 2 Ex. C. R. 386.

Division Court—*Res Judicata—Question for Jury.*]—When an issue arises on the plea of *res judicata* the identity of the facts in the former

case with those in the existing case is matter for the jury when the trial is by a jury in a Division Court. In a case in a Division Court where the defence of *res judicata* had been raised, and in which a jury notice had been given, the Judge determined the case himself, and refused to allow it to be tried by a jury:—

Held, that he had no jurisdiction to do so, and that a mandatory order must go to compel him to try the case in accordance with the practice of the Court. *In re Cowan* v. *Affie*, 24 O. R. 358.

EVIDENCE.

I. Admissibility.

1. *Evidence in Previous Proceedings.*

Action for Personal Injuries caused by Negligence—*Examination of Plaintiff de bene esse—Death of Plaintiff — Action by Widow under Lord Campbell's Act.*]—Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children are in effect claiming through the deceased. Therefore, when an action is commenced by a person so injured in which his evidence is taken *de bene esse* and the defendant has a right to cross-examine, such evidence is admissible in a subsequent action taken after his death under the Act. Taschereau and Gwynne, JJ., dissenting.

The admissibility of such evidence as against the original defendants, a municipal corporation sued for injuries caused by falling into an excavation in a public street, is not affected by the fact that they have caused a third party to be added as defendant as the person who was really responsible for such excavation, and that such third party was not notified of the examination of the plaintiff in the first action, and had no opportunity to cross-examine him. Taschereau and Gwynne, JJ., dissenting. *Town of Walkerton* v. *Erdman*, 23 S. C. R. 352, affirming *S. C.*, 20 A. R. 444; 22 O. R. 693. *See* the next case.

Action for Negligence — *Subsequent Action under Lord Campbell's Act—Identity of Issues—Examination de bene esse.*]—Although the widow's right of action under Lord Campbell's Act is in several respects distinct from the husband's right of action in his lifetime arising out of the same circumstances, still the issues are so far connected and identical that the examination *de bene esse* of the husband in an action brought by him in his lifetime, but which abated at his death, is admissible evidence in the widow's action against the same defendants, the husband having been cross-examined by them.

Where it is desired to use depositions at a trial, the order that should be made is that the depositions be transferred to the Clerk of Assize or local Registrar, the trial Judge being left free to decide as to their admissibility.

Judgment of the Queen's Bench Division, 22 O. R. 693, affirmed. *Erdman* v. *Town of Walkerton*, 20 A. R. 444.

Evidence before Committee of House of Commons — *Hearing before Magistrate.*]—At the hearing of a criminal charge before a County Judge sitting as police magistrate evidence given before a special committee of the House of Commons, and taken by stenographers, was tendered before the magistrate and refused by him:—

Held, that the Court had no power to grant a mandamus to the County Judge directing him to receive such evidence.

Rose, J., while concurring in the decision that a mandamus should not issue, was of opinion that Parliament having ordered the prosecution, the evidence should have been received by the magistrate.

Subsequent resolution of the House of Commons authorizing the evidence to be given. *Regina* v. *Connolly*, 22 O. R. 220.

Improper Admission—*Conversation Partly Given on Examination in Chief — Evidence of Counsel.*]—To an action on a bond the defendants pleaded that it was given in settlement of pro-

missory notes made by a brother of defendant, the indorsements to which were forged to the knowledge of plaintiffs, which settlement was the only consideration for the execution of the bond. On the trial a verdict was given for plaintiffs which was set aside by the full Court and a new trial ordered on the ground of improper admission of evidence as follows: 1st, evidence by a solicitor of what one of the officers of the plaintiff bank had told him relative to an admission by the alleged forger that the notes were genuine; part of this conversation, which related to a different matter, had been given in evidence by the same witness on direct examination, but the Court below held that the balance could not be given on cross-examination as it was not connected with what had been already proved. Secondly, evidence by counsel for plaintiffs in the proceedings on the notes which had led to the making of the bond of his belief in their genuineness, which the Court below held was not good evidence. On appeal to the Supreme Court of Canada from the judgment ordering a new trial:—

Held, that the evidence objected to was properly admitted and that the judgment should be reversed. *Halifax Banking Co.* v. *Smith*, 18 S. C. R. 710.

Malicious Prosecution—*Record of Acquittal—Admissions on Examination for Discovery.*]—In an action for malicious prosecution, the indictment, with an endorsement thereon of the acquittal of the plaintiff of the criminal charge of which he had been prosecuted, was produced by the clerk of the Court, having been sent to him by the Registrar of the Queen's Bench Division to whom the indictment had been returned and which he had been subpœnaed by the plaintiff to produce, the Court being informed that the Attorney-General had refused his *fiat* to enable a record of acquittal to be made up. The defendant's counsel objected to the admission of the indictment, and its admission was refused:—

Held, that the indictment so endorsed and produced was not, under the circumstances, sufficient evidence of the termination of the prosecution, but that the formal record of acquittal should have been produced; and that no such record, or a copy thereof, could be obtained without a *fiat* of the Attorney-General.

Quære, whether the termination of such prosecution can be proved by admissions made by the defendant on his examination for discovery. *Hewitt* v. *Cane*, 20 O. R. 133.

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

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2. *Privilege.*

Criminating Answers.]—In an action upon promissory notes, the defendants pleaded that the plaintiff and certain other persons had, contrary to 52 Vict. (D.) ch. 41, sec. 1 (*c*), conspired together to harass the defendants and lessen trade competition, and had procured the holders of the notes sued on to transfer them to the plaintiff, and the plaintiff was suing thereon as trustee for such other persons.

Upon his examination for discovery, the plaintiff refused to answer questions as to the names of the persons for whom he was acting as trustee, claiming privilege on the ground that to answer would tend to criminate him or render him liable to criminal prosecution under the above statute:—

Held, that he was not entitled to the privilege and must answer. *Mills* v. *Mercer Co.*, 15 P. R. 276.

Criminating Answers.]—In an action of libel and slander, the plaintiff complained that the defendant had communicated to several persons the contents of a letter received from another person in which the plaintiff was accused of larceny, etc. Upon an examination of the defendant for discovery, he refused to say whether he had received any letter from the person named, or to answer any questions in relation to such letter or its contents, giving as a reason that it might criminate him to do so:—

Held, that the reason given was sufficient to privilege the defendant from answering; and, although it was not the receipt of the letter, but the publication, that would make the offence, he was entitled to object to the line of inquiry at the outset.

Semble, that section 5 of the Dominion statute of 1893 respecting witnesses and evidence will, when it comes into force, supersede the privilege now existing in cases of this kind. *Weiser* v. *Heintzman*, 15 P. R. 258. *See* the next case.

Criminating Answers.]—The Ontario statute as to evidence, R. S. O. ch. 61, sec. 5, limits the scope of all preliminary examinations for discovery or otherwise in civil actions.

Jones v. *Gallon*, 9 P. R. 296, followed.

It has not been affected by section 5 of the Dominion statute 56 Vict. ch. 31, which, by necessary constitutional limitations as well as by express declaration (section 2), applies only to proceedings respecting which the Parliament of Canada has jurisdiction.

The language used in a previous decision in this case, 15 P. R. 258, at p. 260 is too broadly expressed, in the absence of concurrent Ontario legislation.

And therefore, a defendant, upon his examination for discovery in an action for defamation, cannot, even since the coming into force of 56 Vict. ch. 31, be compelled to answer questions which may tend to criminate him. *Weiser* v. *Heintzman*, 15 P. R. 407.

Criminating Answers — *Too Late to take Objection before the Divisional Court.*]—*See Millar* v. *McTaggart*, 20 O. R. 617, *post*, FRAUDULENT CONVEYANCE.

Husband and Wife—*Solicitor Withdrawing from Examination.*]—R. S. O. ch. 61, sec. 8, which provides that "no husband shall be compellable to disclose any communication made by his wife during the marriage," is still in force.

It is competent for a husband who is making disclosures as to what took place between his wife and himself during coverture, at any time during an examination for discovery to refuse to disclose anything further.

If upon such refusal the solicitor for the opposite party withdraws, the examination may be proceeded with and the evidence afterwards taken will not be struck out. *Connolly* v. *Murrell*, 14 P. R. 187. Affirmed on appeal, 14 P. R. 270.

Malicious Prosecution—*Police Officer.*]—In an action for malicious prosecution against a police officer, arising out of a public prosecution initiated on an information sworn by him, he is not bound on an examination for discovery to give the name of the person from whom the facts were obtained.

Judgment of the Chancery Division, 21 O. R. 553, reversed. *Humphrey* v. *Archibald*, 20 A. R. 267.

Pending Litigation—*Letters.*]—Letters written by the defendant to a third person, who was a principal in the transactions out of which the action arose, and letters written by such third person to the defendant:—

Held, privileged from production in the action, where it appeared that they were written after the plaintiff had threatened litigation, and in consequence of the advice of the defendant's solicitor, in the endeavour on the part of the defendant to obtain information for the purposes of the threatened litigation. *Donahue* v. *Johnston*, 14 P. R. 476.

Report as to Accident—*Names of Witnesses.*]—In an action for damages for personal injuries received by the plaintiff in a tramway car accident, as to which the conductor of the car had made a report to the defendants:—

Held, that the portion of the report containing the names of the eyewitnesses of the accident was privileged from production. *Armstrong* v. *Toronto R. W. Co.*, 15 P. R. 208.

Report as to Accident.]—Where reports by officers or servants of a railway company as to a casualty giving rise to an action are in good faith prepared for the purpose of being communicated to the company's solicitor with the object of obtaining his advice thereon and enabling him to defend the action, they are to be regarded as privileged communications and exempt from production for inspection by the opposite party, even if they answer the purpose of giving information to other people as well. *Hunter* v. *Grand Trunk R. W. Co.*, 16 P. R. 385.

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

II. Corroboration.

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

Executor and Administrator.]—To enable an opposite or interested party to recover in an action against the estate of a deceased person, it is sufficient if his evidence is corroborated, *i.e.*, strengthened, by evidence which appreciably helps the judicial mind to believe one or more of the material statements of facts deposed to. It is not necessary that the case should be wholly proved by independent testimony.

Parker v. *Parker*, 32 C. P. 113, approved.

The production by the plaintiff, an architect, claiming payment for his services in drawing plans and making estimates for the erection of a house, of a memorandum in the deceased's handwriting, shewing the rooms and the accommodation required and the suggested cost, and of a sketch of the property:—

Held, Burton, J. A., dissenting, sufficient corroboration of the plaintiff's evidence.

Judgment of the County Court of York affirmed. *Radford* v. *Macdonald*, 18 A. R. 167.

Executors.]—The evidence of executors that promissory notes belonging to the testator had, when they came into their hands, endorsements upon them shewing that payments had been made to him, does not require corroboration under section 10 of R. S. O. ch. 61.

Judgment of Ferguson, J., reversed. *In re Staebler, Staebler* v. *Zimmerman*, 21 A. R. 266.

Executors—*Two Defendants in Same Interest.*]—In an action by an executor of a deceased mortgagee against two joint mortgagors, both the latter deposed to certain payments made by one or the other in the lifetime of the mortgagee:—

Held that each mortgagor was an opposite or interested party in the same degree and of the same kind, and constituted together an opposite or interested party within the meaning of the section, and the fact of both the mortgagors testifying to such payments did not constitute corroboration within the meaning of R. S. O. ch. 61, sec. 10. *Taylor* v. *Regis*, 26 O. R. 483.

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

III. Examination de bene esse.

Rules 566, 588 — *Discretion — Appeal.*]—Rules 566 and 588 are *in pari materiâ* and contemplate the examination of a witness *de bene esse* who is about to withdraw from Ontario or who is residing without the limits thereof.

And where witnesses residing out of Ontario come within the jurisdiction and are about to return to their homes, an order may be made for their examination here before their departure.

Such an order is a discretionary one, and, where the witnesses have been examined under it, will not be reversed on appeal unless a very clamant case of error appears. *Delap* v. *Charlebois*, 15 P. R. 142.

IV. Examination for Discovery.

1. *In General.*

Costs.]—By Rule 1384, Rule 1177 was rescinded and a new Rule substituted, providing that the costs of every interlocutory examination should be borne by the examining party, unless otherwise ordered.

Where an action was begun and the defendants examined for discovery before the Rule was passed, but was tried and judgment given after it was passed, but before it came into force:—

Held, that the new Rule applied, and the taxing officer had no power to tax to the successful plaintiff the costs of the examination, without an order therefor.

Application for such order should be made to the trial Judge at the trial or immediately after judgment. *McClary* v. *Plunkett*, 16 P. R. 310.

Examiner's Chambers — *Discretion as to Admission of Persons.*]—A special examiner has a discretion to admit or exclude from his chambers persons who desire to be present upon an examination.

And where the defendant attended for examination as a judgment debtor, but refused to answer questions unless a former partner of his, who was present to instruct counsel for the judgment creditors, was excluded:—

Held, that the examiner rightly exercised his discretion in refusing to exclude; and the defendant was ordered to attend again at his own expense. *Merchants Bank of Canada* v. *Ketchum*, 16 P. R. 366.

Examination to Credit—*Identity of Plaintiff*]—The examination of a party for discovery in the cause under Rule 487 must be confined to matters which are relevant to the questions raised by the pleadings, but a fair amount of latitude is to be allowed.

Questions which go only to credit are not admissible.

In an action for a partnership account, where the defendant denied the partnership and set up that the plaintiff had been his servant, under the same name as that in which he brought the action, during the period of the alleged partnership:—

Held, that it was not material to the issue that the plaintiff bore another name at a previous time, and the defendant could not examine him as to the details of his past life, long prior to the alleged partnership. *Mark* v. *Dobie*, 14 P. R. 465.

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

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

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

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

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

Vacation — *Special Examiner.*] — Where a special examiner issues an appointment for the examination for discovery during vacation of a party to an action, such party, if duly subpœnaed, is bound to attend for examination.

A special examiner, although an officer of the Supreme Court of Judicature for Ontario, in the sense of being subject to its control and direction, has no office in connection with the Court that comes under any Rule requiring it to be kept open or closed during any particular period of the year.

Decisions of the Master in Chambers and Galt, C.J., 15 P. R. 23, reversed. *Hogaboom* v. *Cox*, 15 P. R. 127.

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2. *Before Pleadings.*

Defamation—*Slander—Examination of Defendant before Statement of Claim.*]—In actions of slander when the Court is satisfied of the *bonâ fides* of the plaintiff, and is convinced that he cannot state fully and with sufficient particularity his various grounds of complaint, and when the knowledge required is within the possession and control of the defendant, an examination for discovery before statement of claim will be ordered under Rule 566; but in such case a further examination after pleading will not be allowed except upon special grounds.

Fisher v. *Chamberlain*, 9 P. R. 283; *Gordon* v. *Phillips*, 11 P. R. 540; *McLean* v. *Barber*, 13 P. R. 500, followed. *Campbell* v. *Scott*, 14 P. R. 203. *See* the next case.

Defamation—*Libel—Examination of Plaintiff before Delivery of Defence.*]—Rule 566 does not apply to examinations for discovery.

Fisken v. *Chamberlain*, 9 P. R. 283, and cases following it, overruled.

But were that Rule applicable, it was not "necessary for the purposes of justice," in the circumstances of this case, an action for libel, to make an order allowing the defendants to examine the plaintiff for discovery before delivering their statement of defence.

Decision of the Common Pleas Division, 15 P. R. 473, reversed.

Tate v. *Globe Printing Co.*, 11 P. R. 251, and cases following it, specially referred to.

Gourley v. *Plimsoll*, L. R. 8 C. P. 362, and *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183, followed. *Beaton* v. *Globe Printing Co.*, 16 P. R. 281.

Liquidator—*Examination before Statement of Claim.*]—An official liquidator cannot, as an officer of the Court, be called upon to make discovery unless he is representatively in the position of an adverse litigant to the party requiring the discovery.

Where certain shareholders of an insolvent bank were suing the directors for negligence and misfeasance, and had made the bank defendants for conformity without asking any relief against them, an application by the plaintiffs under Rule 566 for leave to examine one of the liquidators for discovery before statement of claim was refused. *Henderson* v. *Blain*, 14 P. R. 308.

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3. *Physical Examination.*

Bodily Injury—*Examination of Person by Surgeons.*]—In an action to recover damages for bodily injuries caused to the plaintiff by the alleged negligence of the defendants:—

Held, that the Court had no power to order the plaintiff to attend and submit to an examination of her person by surgeons chosen by the defendants. *See* now 54 Vict. ch. 11 (O.). *Reily* v. *City of London*, 14 P. R. 171.

Bodily Injury — *Examination by Medical Practitioner—Questions.*]—The statute 54 Vict. ch. 11 (O.), by which it is provided that an order may be made directing that the person in respect of whose bodily injury damages or compensation is sought in an action "shall submit to be examined by a duly qualified practitioner," does not authorize the putting of questions by the medical practitioner to the examinee. *Clouse* v. *Coleman*, 16 P. R. 496.

Leave to appeal was refused by the Court of Appeal. *Clouse* v. *Coleman*, 16 P. R. 541.

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4. *Special Matters and Persons.*

Assignee for the Benefit of Creditors.]—*See Frothingham* v. *Isbister*, 14 P. R. 112, *ante* 75.

Champerty and Maintenance.]—Discovery was not enforceable in equity in cases of champerty and maintenance, nor should it be under the equivalent remedies given by the Judicature Act; and a plaintiff should not be compelled on examination to answer questions touching an alleged champertous agreement.

Semble, that the rigorous rules which obtained in earlier days in England are not to be imported into her dependencies without some modification.

Ram Coomar v. *Chunder*, 2 App. Cas., at p. 210, specially referred to. *Welbourne* v. *Canadian Pacific R. W. Co.*, 16 P. R. 343.

Controverted Elections—*Penalties.*]—The plaintiff is not entitled to examine the defendant for discovery in an action for penalties under the Ontario Elections Act, 1892.

Hunnings v. *Williamson*, 10 Q. B. D. 459, and *Martin* v. *Treacher*, 16 Q. B. D. 507, followed. *Malcolm* v. *Race*, 16 P. R. 330.

Criminal Conversation.]—In an action of criminal conversation there is no power, having regard to R. S. O. ch. 61, sec. 7, to order the examination of the wife for discovery as to the alleged acts of adultery. *Murray* v. *Brown*, 16 P. R. 125.

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

Libel.]—*Examination of Officer of Newspaper Publishing Company—Editorial Writer.*]—In an action against a newspaper publishing company for a libel contained in an article written by a member of the newspaper staff, who procured special information therefor, under the supervision of the managing editor, and in which action the defendants pleaded justification:—

Held, that the writer was not in a position of a sub-editor, nor could he be called an officer of the company, and he was not examinable for discovery under Rule 487:—

Held, also, that no sufficient foundation was otherwise laid for his examination; for it did not appear that he could give information of any facts, but merely that he could indicate where he procured evidence of the facts in dispute upon the plea of justification. *Murray* v. *Mail Printing Co.*, 14 P. R. 405.

Liquidator.]—*See Henderson* v. *Blain*, 14 P. R. 308, *ante* 153.

Malicious Prosecution — *Police Officer — Privilege.*]—In an action for malicious prosecution against a police officer, arising out of a public prosecution initiated on an information sworn by him, he is not bound on an examination for discovery to give the name of the person from whom the facts were obtained.

Judgment of the Chancery Division, 21 O. R. 553, reversed. *Humphrey* v. *Archibald*, 20 A. R. 267.

Officer of Municipal Corporation — *Caretaker of Building.*]—In an action for damages for negligence in keeping a building in such a dangerous condition that the plaintiff was injured while in it:—

Held, that the caretaker of the building, an employee of the defendants, was an officer examinable for discovery under Rule 487. *Schmidt* v. *Town of Berlin*, 16 P. R. 242.

Officer of Municipal Corporation—*Medical Health Officer.*]—In an action for an injunction and damages in respect of the alleged unsanitary condition of a certain bay into which the defendants drained part of their sewage, the plaintiffs sought to examine for discovery the medical health officer of the defendants, whose sole connection with the subject-matter of the action arose from his having made an examination of, and a report to the local board of health upon,

the sanitary condition of the bay. The only object of the examination was to ascertain the reasons and grounds of the report :—

Held, that for this purpose he was not examinable as an officer of the defendants.

Decision of Galt, C.J., 15 P. R. 27, affirmed on other grounds. *Coleman* v. *City of Toronto*, 15 P. R. 125.

Officer of Municipal Corporation—*Street Foreman.*]—In an action for damages for negligence in keeping a public way in a state of disrepair :—

Held, that a street foreman in the employment of the defendants under their street commissioner, the latter having general supervision of the roads and sidewalks, was not an officer examinable for discovery under Rule 487.

Thomas v. *Grand Trunk R. W. Co.*, 12 C. L. T. 42, followed. *Webster* v. *City of Toronto*, 15 P. R. 21.

Seduction — *Examination of Plaintiff's Daughter.*]—The plaintiff in an action for seduction was examined for discovery by the defendant, but was able to give very little information :—

Held, nevertheless, that the defendant was not entitled to examine the plaintiff's daughter. *Hollister* v. *Annable*, 14 P. R. 11.

Slander—*Examination of Defendant—Privilege—Criminating Answers.*]—In an action of libel and slander, the plaintiff complained that the defendant had communicated to several persons the contents of a letter received from another person in which the plaintiff was accused of larceny, etc.

Upon an examination of the defendant for discovery, he refused to say whether he had received any letter from the person named, or to answer any questions in relation to such letter or its contents, giving as a reason that it might criminate him to do so :—

Held, that the reason given was sufficient to privilege the defendant from answering; and, although it was not the receipt of the letter, but the publication, that would make the offence, he was entitled to object to the line of inquiry at the outset.

Semble, that section 5 of the Dominion Statute of 1893, respecting witnesses and evidence, will, when it comes into force, supersede the privilege now existing in cases of this kind. *Weiser* v. *Heintzman*, 15 P. R. 258. *See* the next case.

Slander—*Examination of Defendant—Privilege—Criminating Answers.*]—The Ontario Statute as to evidence, R. S. O. ch. 61, sec. 5, limits the scope of all preliminary examinations for discovery or otherwise in civil actions.

Jones v. *Gallon*, 9 P. R. 296, followed.

It has not been affected by section 5 of the Dominion Statute, 56 Viet. ch. 31, which, by necessary constitutional limitations, as well as by express declaration (section 2), applies only to proceedings respecting which the Parliament of Canada has jurisdiction.

The language used in a previous decision in this case, 15 P. R. 258, at p. 260, is too broadly expressed in the absence of concurrent Ontario legislation.

And, therefore, a defendant, upon his examination for discovery in an action for defamation, cannot, even since the coming into force of 56 Viet. ch. 31, be compelled to answer questions which may tend to criminate him. *Weiser* v. *Heintzman*, 15 P. R. 407.

See, also, *Nunn* v. *Brandon*, 24 O. R. 375, *ante* 342.

V. Examination on Pending Motion.

Examination of Party as Witness.]—Under Rule 578 a party may require the attendance of the opposite party for examination as a witness upon a pending motion; and the consequence of default on the part of the party to be examined is to put him in contempt.

And where, upon a motion by the plaintiff to set aside or vary an order staying proceedings until he should give security for costs, he required the attendance of the defendant for examination as a witness, and the defendant attended but refused to be examined, an order suspending the former order until he should submit to be examined, was affirmed. *Clark* v. *Campbell*, 15 P. R. 338.

VI. Foreign Commission.

Discretion—*Terms—Security for Costs.*]—An order for a foreign commission being discretionary, there is power to impose proper terms in making it.

And the plaintiff was required to give security for the costs of a commission to examine a witness abroad, where the information as to his exact locality was slender and it seemed doubtful whether he would attend to be examined.

Langen v. *Tate*, 24 Ch. D. 522, followed. *Coleman* v. *Bank of Montreal*, 16 P. R. 159.

Examination of Defendant—*Discretion.*]—An application for a commission to examine witnesses out of the jurisdiction is one going to the discretion of the Court, and this discretion will be more strictly exercised where the proposal is to examine an absent party on his own behalf.

In the case of a defendant proposing to have his own examination taken on commission, his personal affidavit may not be essential, but very cogent reasons should be given by some one who can speak with knowledge.

And where the affidavit in support of an application to have the defendant and his mother, by whom the negotiation was conducted with the plaintiff out of which the cause of action arose, examined abroad, was made by the defendant's solicitor, who swore that he believed it was necessary to have their evidence; that it would save expense if it were taken on commission; and that it would be very inconvenient for the defendant to be long away from his place of abode :—

Held, that no case was made for the examination of the defendant abroad; and as to his mother, that the absence of the usual affidavit as to her being a necessary and material witness, and the omission to state any reason why she should not appear at the trial, should prevail to the upholding of the discretion exercised by a Master in refusing to order a commission. *Kidd* v. *Perry*, 14 P. R. 364.

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

Jurisdiction of Referee.]—A referee upon a reference under section 102 of the Judicature Act, R. S. O. ch. 44, has jurisdiction to order the examination of foreign witnesses under a commission.

Rules 34-37, 52, 58, 59, 73, 552, considered.

Semble, the provisions of Rule 590 are embraced by inference in Rule 35 so as to enable the referee, by express terms, to grant certificates for the issue of foreign commissions.

But the mere form, whether by certificate or order, is immaterial, having regard to Rules 441, 442.

Hayward v. *Mutual Reserve Association*, [1891] 2 Q. B. 236, and *Macalpine* v. *Calder*, [1893] 1 Q. B. 545, followed. *Brooks* v. *Georgian Bay Saw-Log Salvage Co.*, 16 P. R. 511.

Material on Application—*Good Faith—Necessity for Evidence—Expense—Delay—Admissions.*]—In an action for a libel published in the defendants' newspaper, the plaintiff applied for the issue of a commission to take his own evidence and that of other witnesses in England, where he and they lived.

The plaintiff's affidavit stated only that the witnesses were material and necessary for him on the trial of the action, and that he was advised and verily believed that he could not safely proceed to trial without their evidence:—

Held, sufficient to entitle the plaintiff *prima facie* to a commission.

Smith v. *Greey*, 10 P. R. 531, commented on.

Every application for a commission must be made in good faith, and the evidence sought to be obtained must be such as to warrant a reasonable belief that it may be material and necessary for the purposes of justice; but it is safer where any injustice to other parties, in the way of delay or expense or otherwise, can be provided against, to favour the granting rather than the refusing of the application.

The main considerations are a full and fair trial and the saving of expense.

Under the circumstances of this case the order for a commission to take the evidence of the plaintiff and his witnesses abroad was granted, upon the plaintiff securing the defendants for their costs of the execution of the commission and undertaking to speed the proceedings and not delay the trial.

It was contended by the defendants that the evidence expected from the witnesses was unnecessary by reason of the implied admissions in the statement of defence:—

Held, that it was for the defendants to make the evidence unquestionably unnecessary, either by amending their pleadings so as to expressly make the admissions or by undertaking to do so at the trial. *Robins* v. *Empire Printing and Publishing Co.*, 14 P. R. 488.

Material on Application—*Staying Trial.*] Where an application for a foreign commission is made before issue joined, and it is not certain what the issues will be, the party applying must disclose the nature of the evidence to be given by the foreign witness, that the Court may gauge whether it is likely to be material and necessary.

Smith v. *Greey*, 10 P. R. 531, explained.

And where issue had been joined two months before the sittings for which the plaintiff gave notice of trial, and the defendant applied five days before the sittings for a commission to examine a foreign witness, upon an affidavit simply stating that the witness was necessary and material, and he was advised and believed he could not safely proceed to trial without his evidence, and while not explaining the delay, stating that the application was made in good faith and not for delay, a Judge in Chambers refused to interfere with a Master's order for a commission and a stay of the trial, except by directing that the trial should take place, on the return of the commission, in an adjoining county. *Morrow* v. *McDougall*, 16 P. R. 129.

Municipal Arbitration—*Jurisdiction.*]—A Judge of the Court of Appeal has no power to order the issue of a commission to take evidence abroad for use upon a compulsory arbitration pending before an arbitrator named by a Judge of that Court, under section 487 (1) of the Municipal Act, 55 Vict. ch. 42 (O.).

Such an arbitration is not a "reference by rule, order or submission," within the meaning of section 49 of the Act respecting arbitrations and references, R. S. O. ch. 53; nor, even if it were a "matter" within the meaning of Rule 566, would a Judge of the Court of Appeal have any jurisdiction, by reason of his having appointed the arbitrator or otherwise.

And *semble*, distinguishing *Re Mysore West Gold Mining Co. (Ltd.)*, 37 W. R. 794, it is not such a "matter." *Re Macpherson and City of Toronto*, 16 P. R. 230.

Prosecution for Indictable Offence—*Witnesses—Materiality.*]—A prosecution for an indictable offence is "pending" within the meaning of section 683 of the Criminal Code, 1892, when an information has been laid charging such an offence; and a commission to take evidence abroad for use before a magistrate upon a preliminary inquiry may then be ordered.

But the discretion of the Judge in ordering the issue of a commission is to be exercised upon a sworn statement of what it is expected the witnesses can prove, and he must be satisfied as to the materiality of the evidence.

And, under the circumstances of this case, a commission was granted to take the evidence of only one of three witnesses whom the Crown proposed to examine, it appearing that the other two had not been asked to come into the jurisdiction, and that their evidence would be in corroboration only of a statement of the third witness that he was with the defendant upon a certain occasion. *Regina* v. *Verral*, 16 P. R. 444. Affirmed on appeal, 17 P. R. 61.

VII. Particulars.

Criminal Conversation — *Affidavit of Denial.*]—In an action of criminal conversation, after pleading and examination of the plaintiff for discovery, particulars of the matters complained of should not be ordered except upon a full and satisfactory affidavit of the defendant shewing his innocence and ignorance of the ground of complaint.

Keenan v. *Pringle*, 28 L. R. Ir. 135, followed. *Murray* v. *Brown*, 16 P. R. 125.

Crown—*Petition of Right—Injury Received on Government Railway—Negligence.*]—Where in his petition the suppliant alleged in general terms that the injuries he received in an accident on a Government railway in the Province of Quebec resulted from the negligence of the servants of the Crown in charge of the train, and from defects in the construction of a railway, an order was made for the delivery to the respondent of particulars of such negligence and defects. *Dubé* v. *The Queen*, 2 Ex. C. R. 381.

Libel—*Damages in way of Trade.*]—In an action for damages for libelling the plaintiffs in the way of their trade, the plaintiffs did not allege special damage, but alleged generally that their business and commercial reputation had suffered. Upon the examination of the plaintiffs for discovery they refused to answer as to what business they had lost by reason of the alleged libels:—

Held, that no evidence of special damage would be admissible at the trial, but that the plaintiffs would have the right to place the figures before the jury to shew a general diminution of profits since the publication of the alleged libels; and if the plaintiffs proposed to give this class of evidence at the trial, the defendants were entitled on the examination for discovery to know how such diminution was made out and the figures by which it was proposed to support it, but not to seek information as to the loss of any particular custom; but if the plaintiffs did not propose to give such evidence, the defendants were not entitled to the discovery.

It was, therefore, ordered that the plaintiffs should give particulars of any damage intended to be claimed for diminution of profits; and if particulars given, that the examination should be continued and discovery afforded; but if particulars not given, that evidence of diminution of profits should not be given at the trial. *Blackford* v. *Green*, 14 P. R. 424.

Patent Action—*Excision of Pleading—Exclusion of Evidence—Discretion.*]—In making an order for particulars of the defence in a patent action, the better practice is to provide merely for exclusion of evidence in case of no particulars or insufficient particulars being delivered, and not to order the excision of the defence, if good *per se*.

And where both excision of the pleading and exclusion of evidence were provided for in an order:—

Held, that the discretion of a Judge in Chambers in striking out the provision for excision was rightly exercised. *Noxon Brothers Manufacturing Co.* v. *Patterson and Brother Co.*, 16 P. R. 40.

Seduction.]—The defendant having made an affidavit denying the seduction and all knowledge of it, an order was made for particulars of specific acts, with regard to which the plaintiff proposed to give evidence.

Turner v. *Kyle*, 2 C. L. T. 598; 18 C. L. J. 102, explained. *Hollister* v. *Annable*, 14 P. R. 11.

Seduction.]—Where the defendant in an action of seduction denies the seduction on oath, the plaintiff will be required to furnish particulars of the times and places at which it is charged that the alleged seduction took place.

Hollister v. *Annable*, 14 P. R. 11, approved.

Notwithstanding differences in the Rules, the principle upon which particulars are ordered is the same here as in England. *Mason* v. *Van Camp*, 14 P. R. 296.

Slander.]—In an action of slander, the statement of claim, after various specific allegations, charged that at divers times during the years 1888, 1889, and 1890, and to many people in and about the city of T., the defendant falsely and maliciously repeated the said slanders and words of like effect, and spoke of the plaintiff words conveying the meaning the said slanders and the said words conveyed:—

Held, that this was embarrassing and should be stricken out unless the plaintiff elected to amend, by giving details, upon payment of costs. *Paterson* v. *Dunn*, 14 P. R. 40.

Slander—*Names, Times, and Places.*]—In an action for slander the statement of claim alleged that the defendant, on a specified day, spoke to C. and others the slanderous words alleged. In answer to a demand for particulars, the plaintiff's solicitor wrote to the defendant's solicitor stating that he had given all the information the plaintiff had, the names of the others to whom the words were spoken not being known to him, and the plaintiff, when a motion for particulars was made, deposed on affidavit to the same facts.

An order of a Master requiring the plaintiff to furnish particulars of all the persons within his knowledge to whom the places where, and the times when the words were spoken, was affirmed by a Judge in Chambers, but reversed by a Divisional Court:—

Held, that the plaintiff having given all the information in his possession, and the defendant not having sworn that she could not plead without further particulars, or that she was ignorant of what occasion was complained of, it was useless and unnecessary to order the particulars.

Thornton v. *Capstock*, 9 P. R. 535, approved. *Winnett* v. *Appelbe*, 16 P. R. 57.

Slander of Title to Goods—*Damping Auction Sale.*]—In an action for slander of title to goods the statement of special damage was that by reason of the utterances of the defendant to a crowd of persons assembled at an auction sale which he had advertised, a large number of them withdrew from it, and the goods which were sold at it brought less money than they would otherwise have done:—

Held, that the plaintiff should not be required to give particulars of the names of the persons who would have given for each article in respect of which damage was claimed a larger price than was realized at the sale; all that he could reasonably be required to particularize was the amount by which his sale had been damped. *Catton* v. *Gleason*, 14 P. R. 222.

Wrongful Dismissal — *Defence of Misconduct.*]—In an action for wrongful dismissal, where the defence is misconduct generally, it is proper to direct particulars shewing the nature and character of the instances relied on by the employer; these particulars should set forth the dates, substantial particulars, and circumstances of all the instances and occasions wherein and whereon the plaintiff misconducted himself, on which the defendant means to rely; and leave should be given to supplement with further particulars if discovered before trial. *Crabbe* v. *Hickson*, 14 P. R. 42.

VIII. Presumptions and Onus of Proof.

1. *Onus of Proof.*

Agistment.]—*See Pearce* v. *Sheppard*, 24 O. R. 167, as to *primâ facie* proof of negligence.

Election Appeal—*Status of Petitioner.*]—By preliminary objections to an election petition, that the respondent claimed the petition should be dismissed because the petitioner had no right to vote at the election. On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed:—

Held, per Ritchie, C.J., and, Taschereau and Patterson, JJ., that the *onus probandi* was upon the petitioner to establish his status and that the appeal should be allowed and the election petition dismissed.

Per Strong, J., that the *onus probandi* was upon the petitioner, but in view of the established jurisprudence the appeal should be allowed without costs.

Fournier, and Gwynne, JJ., contra, were of opinion that the *onus probandi* was on the respondent. *Megantic Election Case*, 8 S. C. R. 169, discussed. *Stanstead Election Case*, 20 S. C. R. 12.

Election Petition—*Status of Petitioner.*]—The election petition was served upon the appellant on the 12th of May, 1891, and on the 16th May, the appellant filed preliminary objections, the first being as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of the petitioners and the Court dismissed the objections. On appeal to the Supreme Court:—

Held, reversing the judgment of the Court below, Gwynne, J., dissenting, that the onus was on the petitioners to prove their status as voters. *Stanstead Case*, 20 S. C. R. 12, followed. *Bellechasse Election Case*, 20 S. C. R. 181.

Executors—*Breach of Trust.*]—*See Cumming* v. *Landed Banking and Loan Co.*, 22 S. C. R. 246, *post*, Executors, IV.

Expropriation of Mineral Lands—*Proof of Value.*]—In a case of expropriation, the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land. *Brown* v. *Commissioner for Railways*, 15 App. Cas. 240, referred to. Where, however, such tests or experiments have not been resorted to, the Court, or jury, must find the facts as best it can from the indications and probabilities disclosed by the evidence. *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Negligence.]—In an action to recover damages for negligence, tried with a jury, where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant, and though the judge may rule negatively that there is no evidence to go to the jury on either issue he cannot declare affirmatively that either is proved. The question of proof is for the jury.

Weir v. *Canadian Pacific R. W. Co.*, 16 A. R. 100, was a non-jury case, and laid down no rule for the disposition of a case tried with a jury.

Judgment of the Queen's Bench Division affirmed. *Morrow* v. *Canadian Pacific R. W. Co.*, 21 A. R. 149.

Negligence—*Latent Defect in Axle of Car—Undue Speed in Passing Sharp Curve.*]—On the trial of a petition claiming damages for personal injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must shew affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *primâ facie* case of negligence. *Dubé* v. *The Queen*, 3 Ex. C. R. 147.

Patent of Invention—*Duty of Patentee as to Creating Market for his Invention.*]—It is not incumbent upon a patentee to shew that he has made active efforts to create a market for his patented invention in Canada. It rests upon those who seek to defeat the patent to shew that he neglected or refused to sell the invention for a reasonable price when proper application was made to him therefor. *Barter* v. *Smith*, 2 Ex. C. R. 455.

Promissory Note.]—A prescription of thirty years is substituted for that of five years only where the admission of the debt from the debtor results from a new title which changes the commercial obligation to a civil one.—In an action of account instituted in 1887, the plaintiff claimed *inter alia* the sum of $2,361.10, being the amount due under a deed of obligation and *constitution d'hypothèque* executed in 1866, and which, on its face, was given as security for an antecedent unpaid promissory note dated in 1862. The deed stipulated that the amount was payable on the terms and conditions and the manner mentioned in the said promissory note. The defendants pleaded that the deed did not affect a novation of the debt, and that the amount due by the promissory note was prescribed by more than five years. The note was not produced at the trial:—

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the deed did not effect a novation. Articles 1169 and 1171 C. C. At most, it operated as an interruption of the prescription and a renunciation to the benefit of the time up to then elapsed, so as to prolong it for five years if the note was then overdue. Article 2264 C. C. And as the onus was on the plaintiff to produce the note, and he had not shewn that less than five years had elapsed since the maturity of the note, the debt was prescribed by five years. Article 2260 C. C. *Paré* v. *Paré*, 23 S. C. R. 243.

Seal Fishery—*Presence of a British Ship Equipped for Sealing in Behring Sea.*]—On 30th August, 1891, the ship "Oscar and Hattie," a fully equipped sealer, was seized in Gotzleb harbour, in Behring Sea, while taking in a supply of water :—

Held, affirming the judgment of the Court below, 3 Ex. C. R. 241, that when a British ship is found in the prohibited waters of Behring Sea, the burden of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of the Seal Fishery (Behring's Sea) Act, 1881, 54-55 Vict (Imp.), ch. 19, sec. 1, sub-sec. 5:—

Held, also, reversing the judgment of the Court below, 3 Ex. C. R. 241, that there was positive and clear evidence that the "Oscar and Hattie" was not used or employed at the time of her seizure in contravention of 54-55 Vict. ch. 19, sec. 1, sub-sec. 5. *Ship "Oscar and Hattie"* v. *The Queen*, 23 S. C. R. 396.

Seal Fishery.]—The ship in question in this case having been seized within the prohibited waters of the thirty-mile zone round the Komandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the onus cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the Order-in-Council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and Order-in-Council. *The Ship "Minnie"* v. *The Queen*, 23 S. C. R. 478.

Slander—*Privilege.*]—Where the occasion is privileged, the plaintiff's case fails, unless there is evidence of malice in fact, and the burden of proving this is on the plaintiff, who must adduce evidence upon which a jury might say that the defendant abused the occasion either by wilfully stating as true that which he knew to be untrue, or stating it in reckless disregard of whether it was true or false. *Hanes* v. *Burnham*, 26 O. R. 528. Affirmed in appeal, 23 A. R. 90.

Testamentary Capacity.]—*See Currie* v. *Currie*, 24 S. C. R. 712.

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2. *Presumptions.*

Appropriation of Payments.]—Appropriation of payments is a question of intention; and where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold, and crediting him with moneys received and crediting and charging notes on account in such a way as to render the original indebtedness undistinguishable, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness.

Judgment of Street, J., reversed. *Griffith* v. *Crocker*, 18 A. R. 370.

Assignments and Preferences.]—Where an instrument made by a person in insolvent circumstances has the effect of giving one creditor a preference over others, and the instrument is attacked within sixty days after it is made, there is under the amended enactment 54 Vict. ch. 20 (O.), an incontrovertible statutory presumption that the instrument has been made with intent to give an unjust preference and it is void. *Cole* v. *Porteous*, 19 A. R. 111. *See* the next case.

Assignments and Preferences.] — Held, per Hagarty, C.J.O. (*hesitante*), and Burton, J.A.—The presumption spoken of in sub-sections 2 (*a*) and 2 (*b*) of section 2 of R. S. O. ch. 124, "An Act respecting Assignments and Preferences by Insolvent Persons," as amended by 54 Vict. ch. 20 (O.), is a rebuttable one, the onus of proof being shifted in cases within the sub-sections.

Per Maclennan, J.A.—The presumption is limited to cases of pressure, and as to that is irrebuttable.

Per Osler, J.A.—The presumption is general, and is irrebuttable; but the security in question in this action is supportable under the previous promise.

Cole v. *Porteous*, 19 A. R. 111, distinguished.

Judgment of the Common Pleas Division, 22 O. R. 474, affirmed. *Lawson* v. *McGeoch*, 20 A. R. 464.

Land Titles Act—*Woman Past Child-bearing.*]—Land was devised to the petitioner for life, with remainder in fee to her children surviving her. At the age of fifty-six the petitioner and one of her children, all the other children having conveyed their shares to her, applied under the Land Titles Act, R. S. O. ch. 116, to be registered as owners with absolute title.

The petitioner's monthly periods began at the age of eleven; she was married in her twenty-second year, and bore children rapidly till her thirty-sixth year, when her tenth child was born; five months after this her periods, having regularly continued, suddenly ceased, and up to the time of the application had never returned.

The evidence of a physician who had made a medical examination of the petitioner, shewed that senile atrophy of the uterus and ovaries had proceeded so far that it would be an impossibility for pregnancy to take place :—

Held, having regard to the provisions of section 23, sub-section 5, of the Act, that the Master should have accepted the evidence as sufficient proof that the petitioner was physically incapable of child-bearing, and should have acted upon it by granting the registration. *Re G.*, 21 O. R. 109.

Mercantile Usage]. — Where goods are sold by sample, the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there, when opportunity therefor is afforded, is a breach of the contract to purchase. Evidence of mercantile usage will not be allowed to add to or to affect the construction of a contract for sale of goods unless such custom is general. Evidence of usage in Canada will not affect the construction of a contract for sale of goods in New York by parties domiciled there, unless the latter are shewn to have been cognizant of it, and can be presumed to have made their contract with reference to it. If parties in Canada contract to purchase goods in New York through brokers, first by telegram

and letters, and completed by exchange of bought and sold notes signed by the brokers, the latter may be regarded as agents of the purchasers in Canada; but if not, if the purchasers make no objection to the contract, or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract. *Trent Valley Woollen Mfg. Co.* v. *Oelrichs*, 23 S. C. R. 682.

Partnership Dealings—*Laches and Acquiescence*.]—A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands, the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands, and to take an account of the dealings between J. and K. In the Master's office K. claimed that in the course of the partnership business he signed notes which J. indorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he claimed a large sum to be due him from J. for such overcharge. The Master held that as these transactions had taken place nearly twenty years before, K. was precluded by the Statute of Limitations, and by laches and acquiescence, from setting up such claim. His report was overruled by the Divisional Court and Court of Appeal on the ground that the matter being one between partners, and the partnership affairs never having been formally wound up, the statute did not apply:—

Held, reversing the decision of the Court of Appeal, and restoring the Master's report, that K.'s claim could not be entertained; that there was, if not absolute evidence, at least a presumption of acquiescence from the long delay; and that such presumption should not be rebutted by the evidence of the two partners considering their relationship, and the apparent concert between them. *Tooth* v. *Kittredge*, 24 S. C. R. 287.

IX. Production of Documents.

Action For Account—*Preliminary Trial of Right to Require Account.*]—Whenever discovery is sought in aid of an issue which must be determined at the hearing, the plaintiff is entitled to it to help him prove the issue; but where it is sought in aid of something which does not form part of what he must prove at the hearing, but is merely consequential to it, the right is not absolute, but discretional, until the plaintiff has established his fundamental right at the hearing.

Where the plaintiff claimed a declaration of the right of himself and all other persons insured in the temperance section of the defendant company to the profits earned by that section, payment thereof, and an account and apportionment thereof:—

Held, that upon the mere statement of the plaintiff in pleading that he was the holder of a policy entitling him to share in certain profits of the company, and without any proof of the statement, the Court, in its discretion, should not require the company to produce and lay open to him all their books of account and the papers relating to them; but it was a proper case in which to permit the defendants to apply under Rule 655 for an order for a preliminary trial of the plaintiff's right to require an account, and to postpone discovery of the books until after such trial. *Graham* v. *Temperance and General Life Assurance Co.*, 16 P. R. 536.

Life Insurance Applications.]—It is provided by sub-section 2 of section 33 of the Insurance Corporations Act, 55 Vict. ch. 39 (O.), that no untrue statement in an application for insurance shall vitiate the contract unless material thereto; and by sub-section 3, that the question of materiality is for the jury, or if there is no jury, for the Court.

Where, therefore, a benevolent and provident institution refused to recognize a certificate of membership issued to the plaintiff, under which he was entitled to certain insurance benefits, on the ground that he had untruly stated in the application that he was not, and never had been, subject to asthma, in an action to have it declared that the contract was a subsisting contract, production by the defendants was ordered of all applications and medical examinations in which the answer as to asthma had been in the affirmative, and upon which certificates had issued. *Ferguson* v. *Provincial Provident Institution*, 15 P. R. 366.

Third Person's Documents.]—Where a party to an action referred in his affidavit on production to certain documents as being in the hands of a third person, who refused to give them up until paid certain charges which were disputed:—

Held, by the Master in Chambers, that the opposite party must content himself with inspecting the documents and taking copies, unless he would agree to indemnify his opponent against the cost of obtaining the documents. *Hogaboom* v. *Cox*, 15 P. R. 23. Reversed in part, 15 P. R. 127.

See, also, Sub-Title I., *ante* 395.

X. Varying and Explaining Written Documents.

Absolute Transfer—*Commencement of Proof by Writing—Oral Evidence—Articles 1233, 1234, C. C.*]—Verbal evidence is inadmissible to contradict an absolute notarial transfer even where there is a commencement of proof by writing. Article 1234 C. C. *Bury* v. *Murray*, 24 S. C. R. 77.

Action For Relief Against Re-entry For Non-payment of Rent—*Admissibility of Evidence to Show Misrepresentations by Lessee in Obtaining Lease.*]—To an action for relief against a re-entry made by a landlord for non-payment of rent, the defendant pleaded that she had been induced to grant the lease by reason of representations made by the plaintiff to the effect that he would improve and beautify the demised premises, which would enhance the value of other lands of the defendant, but that the plaintiff had not done as he represented he would, and that the defendant had been thereby damnified:—

Held, that evidence tendered by the defendant to establish the truth of this defence was

admissible in answer to the claim of the plaintiff for relief.

The origin both of the action for specific performance and of the action for relief against re-entry for non-payment of rent is in the equitable jurisdiction of the Court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the Court; and in each the Court has regard to the conduct of the party seeking to compel such performance or to obtain such relief. *Coventry* v. *McLean*, 22 O. R. 1. Approved in appeal, 21 A. R. 176.

Contract to Supply Printing Paper—*Omission in Schedule.*]—On the 1st December, 1879, B., to whose rights the suppliants had succeeded, entered into a contract with the Crown to supply, for a given time, "such quantities of paper, and of such varieties, as may be required or desired from time to time for the printing and publishing of the *Canada Gazette*, of the statutes of Canada, and of such official and departmental and other reports, forms, documents, and other papers as may at any time be required to be printed and published, or as may be ordered from time to time by the proper authority therefor, according to the requirements of Her Majesty in that behalf." Attached to the contract, and made part thereof, were a schedule and specifications shewing the paper to be supplied and the price to be paid therefor, but in which no mention was made of double demy,—the paper ordinarily, though not exclusively, used for departmental printing:—

Held, that notwithstanding this omission, the contractor had agreed to supply the Crown and the Crown by implication had agreed to purchase of the contractor, among other paper, that required for departmental printing. *Clarke* v. *The Queen*, 2 Ex. C. R. 141.

Contract—*Horses*—"*Plant.*"]—By one of the clauses of a railway contract for excavation, "all machinery and other plant, materials and things whatsoever," provided by the contractor were until the completion of the work to be the property of the company, when such as had not been used and converted into the works and remained undisposed of were to be delivered over to the contractor, but in other clauses the words "teams and horses" were respectively used as well as the word "plant":—

Held, under the contract, that horses were not included in the word "plant;" and that expert evidence was not admissible to explain its meaning. *Middleton* v. *Flanagan*, 25 O. R. 417.

Contract—*Representations Prior to Formation of Contract—Absence of Stipulation Embodying Same in Contract.*]—Suppliant alleged that one M., who had acted on behalf of the Government in making a contract with him for the carriage of Canadian Pacific Railway steel rails between Montreal and Lachine for the year 1875, had represented to him that a very large quantity of rails, amounting to some 25,000 or 35,000 tons, would have to be carried by the suppliant as such contractor; and that it was upon this representation that he entered into the said contract and made a large outlay with a view to efficiently removing and carrying the rails and delivering them safely at their place of destination:—

Held, (1.) The fact that no stipulation embodying such representation appeared in the written instrument was evidence that it formed no part of the contract.

(2.) That although the suppliant could not import into the formal contract any representations made by M. prior to it being reduced to writing, yet under the terms of the written contract he was entitled to remove all the rails landed from ships in the port of Montreal during the year 1875, for the purpose mentioned in the contract, and should have damages for the loss of the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. *Kenney* v. *The Queen*, 1 Ex. C. R. 68.

Partnership—*Registered Declaration.*]—An action was brought by W. McL. and F. W. R. to recover the amount of an accident policy insuring the members of the firm of McL. Bros. & Co., alleging that J. S. McL., one of the partners, had been accidentally drowned. After the policy was issued the plaintiffs signed and registered a declaration to the effect that the partnership of McL. Bros. & Co. had been dissolved by mutual consent, and they also signed and registered a declaration of a new partnership under the same name, comprising the plaintiffs only. At the trial the plaintiffs tendered oral evidence to prove that these declarations were incorrect, and that J. S. McL. was a member of the partnership at the time of his death:—

Held, affirming the judgment of the Court below, that such evidence was inadmissible. Article 1835 C. C. and ch. 65 C. S. L. C. *Caldwell* v. *Accident Insurance Co. of North America*, 24 S. C. R. 263.

Receipt—*Error.*]—S. brought an action to compel V. to render an account of the sum of $2,500, which S. alleged had been paid on the 6th October, 1885, to be applied to S.'s first promissory notes maturing and in acknowledgment of which V.'s book-keeper gave the following receipt: "Montreal, October 6th, 1885. Received from Mr. D. S. the sum of two thousand five hundred dollars to be applied to his first notes maturing. M. V., per F. L.," and which V. failed and neglected to apply. V. pleaded that he never got the $2,500 and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, dismissed S.'s action. On appeal to the Supreme Court of Canada:

Held, (1.) That the finding of the two Courts on the question of fact as to whether the receipt had been given through error should not be interfered with. (2.) That the prohibition of Article 1234 C. C. against the admission of parol evidence to contradict or vary a written instrument, is not *d'ordre public*, and that if such evidence is admitted without objection at the trial it cannot subsequently be set aside in a Court of Appeal. (3.) That parol evidence in commercial matters is admissible against a written document to prove error. *Ætna Insurance Co.* v. *Brodie*, 5 S. C. R. 1, followed. *Schwersenski* v. *Vineberg*, 19 S. C. R. 243.

See, also, CONSTITUTIONAL LAW—DEED, III.

XI. Miscellaneous Cases.

Account Sales — *Letter of Guarantee by Bank—Claim for Loss—Proof of Claim.*]—H. *et al.*, upon receipt of an order by telegram from the Exchange Bank to load cattle on a steamer for M. S., with guarantee against loss, shipped three days after the suspension of the bank some cattle and consigned them to their own agents at Liverpool. Subsequently they filed a claim with the liquidators of the bank for an alleged loss of $7,965 on the shipments, and the claim being contested the only witness they adduced at the trial was one of their employees who knew nothing personally about what the cattle realized, but put in account sales received by mail as evidence of loss :—

Held, affirming the judgment of the Court below, that assuming that there was a valid guarantee given by the bank, upon which the Court did not express any opinion, the evidence as to the alleged loss was insufficient to entitle H. *et al.* to recover. Per Taschereau, J.—That the guarantee was subject to a delivery of the cattle to M. S. and that H. *et al.* having shipped the cattle in their own name could not recover on the guarantee. *Hathaway* v. *Chaplin*, 21 S. C. R. 23.

Arbitration and Award — *Swearing Witnesses before Arbitrators — Right to Cross-Examine.*]—*Semble* : Where an arbitrator or assessor to whom a claim is referred by the Crown for report is empowered to take oral evidence, he cannot proceed to take such evidence without swearing the witnesses and giving each party an opportunity to cross-examine them. *Pouliot* v. *The Queen*, 1 Ex. C. R. 313.

Arbitration and Award — *View of Premises.*]—*See In re Christie and Toronto Junction*, 22 A. R. 21, *ante* 30 ; and *Re Macpherson and City of Toronto*, 26 O. R. 558, *ante* 31.

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

Certificate of Foreign Court—*Petition for Appointment of Trustee.*]—Where certain infants living with their mother in the Province of Nova Scotia were entitled to insurance moneys payable in Ontario, and their mother petitioned to be appointed trustee, without security, under R. S. O. ch. 136, sec. 12, as amended by 56 Vict. ch. 32, sec. 7 (O)., to receive such moneys, letters of guardianship having been issued to her by a Probate Court of the Province of Nova Scotia, a certificate of the Judge of that Court shewing the facts necessary to bring the case within the proviso to the amending section, was received as evidence in support of the petition. *Re Daniel*, 16 P. R. 304.

Club—*Notice.*]—The directors of a club in exercising disciplinary jurisdiction under a by-law providing that "any member guilty of conduct which in the opinion of the board merits such a course may be expelled," are not bound by legal rules of evidence, and their decision, arrived at after a fair investigation of the facts, will not be interfered with because they have admitted as part of the evidence in proof of the charge the informally sworn statement of one of the persons concerned in the transaction.

Where the charge has been made, discussed, and replied to, in the public prints, it is not necessary to give to the accused person who has taken part in such discussion, when calling upon him to shew cause against his proposed expulsion, specific particulars of the accusation ; a general statement is sufficient.

Judgment of Armour, C.J., affirmed. *Guinane* v. *Sunnyside Boating Co.*, 21 A. R. 49.

Club—*Expulsion of Member of a Benefit Society.*]—*Gravel* v. *L'Union St. Thomas*, 24 O. R. 1, *ante* 94.

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

Deed—*Description.*]—*See Scotten* v. *Barthel*, 21 A. R. 569 ; 24 S. C. R. 367, *ante* 335.

Experts.]—An action for damages caused by collision between two vessels was tried without a jury, and after the evidence had been taken the trial Judge, with the consent of both parties, consulted two master mariners, and adopted as his own their opinion, based on a consideration of conflicting testimony, as to the responsibility for the collision :—

Held, that this was a delegation of the judicial functions and a new trial was ordered.

The scope of Con. Rule 207, as to calling in the assistance of experts, considered. *Wright* v. *Collier*, 19 A. R. 298.

Heirship — *Declaration of Deceased.*] — In answer to a claim of heirship to one S., a witness, who had known him in England as a boy, before he came to Canada, alleged that S. had always been reputed to be illegitimate, and had been left by his mother on the parish, and that he had also known his reputed father, who bore a different surname. Another witness stated that S. had told him that one H. was his father, and that S. on his return from a visit to England said he had seen the place where his mother met with her misfortune :—

Held, sufficient evidence of illegitimacy to displace the claim of heirship. *In re Staveley, Attorney-General* v. *Brunsden*, 24 O. R. 324.

Judicial Notice — *Order-in-Council — Seal Fishery — War Vessel.*]—The Admiralty Court is bound to take judicial notice of an order-in-council from which the Court derives its jurisdiction, issued under the authority of the Act of the Imperial Parliament, 56 & 57 Vict. ch. 23, The Seal Fishery (North Pacific) Act, 1893. A Russian cruiser manned by a crew in the pay

of the Russian Government and in command of an officer of the Russian navy is a "war vessel" within the meaning of the said order-in-council, and a protocol of examination of an offending British ship by such cruiser signed by the officer in command is admissible in evidence in proceedings taken in the Admiralty Court in an action for condemnation under the said Seal Fishery (North Pacific) Act, 1893, and is proof of its contents. *Ship "Minnie" v. The Queen*, 23 S. C. R. 478.

Malicious Prosecution—*Record of Acquittal—Admissions on Examination for Discovery.*]—In an action for malicious prosecution, the indictment, with an endorsement thereon of the acquittal of the plaintiff of the criminal charge of which he had been prosecuted, was produced by the clerk of the Court, having been sent to him by the registrar of the Queen's Bench Division to whom the indictment had been returned and which he had been subpœnaed by the plaintiff to produce, the Court being informed that the Attorney-General had refused his *fiat* to enable a record of acquittal to be made up. The defendant's counsel objected to the admission of the indictment, and its admission was refused:—

Held, that the indictment so endorsed and produced was not, under the circumstances, sufficient evidence of the termination of the prosecution, but that the formal record of acquittal should have been produced; and that no such record, or a copy thereof, could be obtained without a *fiat* of the Attorney-General.

Quære, whether the termination of such prosecution can be proved by admissions made by the defendant on his examination for discovery. *Hewitt v. Cane*, 26 O. R. 133.

Malicious Prosecution—*Proof of Acquittal—Production of Original Record by Clerk—Certified Copy.*]—In an action for malicious prosecution, the plaintiff sought but was not permitted to prove his acquittal before the County Judge's Criminal Court of a charge of misdemeanour, by means of the production of the original record signed by the County Judge under the Speedy Trials Act, R. S. C. ch. 175, and produced and verified by the Clerk of the Peace in whose custody it was, or else by being allowed to put in a copy thereof, certified by that officer:—

Held, that the evidence should have been admitted in either of the above two forms, and judgment dismissing the action was set aside and a new trial ordered.

Decision of MacMahon, J., at the trial reversed. *O'Hara v. Dougherty*, 25 O. R. 247.

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

Held, that, apart from the Indian marriage, there was evidence from which a legal marriage according to the recognized form amongst Christians could be presumed, and that the daughter was therefore his legitimate child and "legal heir." *Robb v. Robb*, 20 O. R. 591.

Medical Practitioner—*Expulsion.*]—*See Re Waskington*, 23 O. R. 299.

Notes—*Copies.*]—In a libel action it was held that the evidence of what took place at a meeting was admissible as proof that the plaintiff was the person intended by a resolution passed at it, the defendant having been present; and that a witness who was present at the meeting and took notes, which were afterwards printed, could refer to the printed copy, after the destruction of the original notes, to shew exactly what did take place. *Taylor v. Massey*, 20 O. R. 429.

Secondary Evidence—*Execution of Agreement—Laches—Right to Relief Inconsistent with Claim.*]—On the hearing of an equity suit secondary evidence of a document was tendered on proof that its proper custodian was out of the jurisdiction and supposed to be in Scotland; that a letter had been written to him asking him for it, and to his sister and other persons connected with him inquiring as to his whereabouts, but information was not obtained:—

Held, affirming the decision of the Supreme Court of New Brunswick, that this was not a sufficient foundation for secondary evidence; that the letters should have stated that this specific paper was wanted; that an independent person should have been employed to make inquiries in Scotland for the custodian of the document, and to ask for it if he had been found; and that a commission might have been issued to the Court of Session in Scotland, and a commission appointed by that Court to procure the attendance of the custodian and his examination as a witness. The suit was for a specific performance of an agreement by C., one of the beneficiaries under a will vesting the testator's estate in trustees for division among her children, to sell lands of the estate in New Brunswick to the plaintiff P.; and the document as to which secondary evidence was offered was an alleged agreement by the trustees and other beneficiaries to convey the said lands to C. The evidence was received, but only established the execution of the alleged agreement by one of the trustees and one of the beneficiaries, and the proof of the contents was not consistent with the documentary evidence and the case made out by the bill:—

Held, that if the evidence was admissible it would not establish the plaintiff's case; that the alleged agreement, not being signed by both the trustees, could convey no estate, legal or equitable, to C.; and that the proof of its contents was not satisfactory. *Porter v. Hale*, 23 S. C. R. 265.

Shorthand Notes — *Election Trial.*] — Evidence taken by a shorthand writer, not an official stenographer of the Court, but who has been sworn and appointed by the Judge, need not be read over to the witnesses when extended. *Pontiac Election Case*, 20 S. C. R. 626.

Survey—*Plan—Description.*]—The description of a lot prepared for and used by the Crown Lands Department in framing the patent, which grants the lot by number or letter only, is admissible evidence to explain the metes and bounds of that lot.

The plan of survey of record in and adopted by the Crown Lands Department governs on a question of location of a road, when the surveyor's field notes do not conflict with the plan and no road has been laid out on the ground.

Judgment of the Common Pleas Division reversed. *Kenny* v. *Caldwell*, 21 A. R. 110. Affirmed by the Supreme Court, 24 S. C. R. 699.

Survey—*Road Allowance between Counties.*]—Monuments placed in compliance with the provisions of sections 34, 35, 36 and 37 of R. S. O. (1877) ch. 146, must be placed at the true corners, governing points or off-sets, or at the true ends of concession lines, and there is nothing in these sections making a survey thereunder or the placing of the monuments conclusive, whether right or wrong, and evidence may be received in contradiction. So held on a case reserved from General Sessions on an indictment for obstruction of a highway, being the town line between two counties.

Tanner v. *Bissell*, 21 U. C. R. 553; *Regina* v. *McGregor*, 19 C. P. 69; *Re Fairbairn and Sandwich East*, 32 U. C. R. 573; and *Boley* v. *McLean*, 41 U. C. R. 260, distinguished. *Regina* v. *Crosby*, 21 O. R. 591.

Witnesses Resident in Foreign Country Temporarily Within the Jurisdiction—*Right to Examine.*]—*See Delap* v. *Charlebois*, 15 P. R. 142, *ante* 24.

EXAMINATION DE BENE ESSE.

See EVIDENCE, III.

EXAMINATION FOR DISCOVERY.

See EVIDENCE, IV.

EXAMINATION OF JUDGMENT DEBTOR.

See JUDGMENT DEBTOR.

EXCHANGE.

Executor.]—An executor or administrator cannot, having regard to R. S. O. ch. 108, sec. 9, and 54 Vict. ch. 18, sec. 2 (O.), make the lands of the testator or intestato the subject of speculation or exchange by him in the same manner as if the lands were his own.

The Court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted. *Teaute* v. *Walsh*, 24 O. R. 309.

Power of Sale—*Sale by Way of Exchange—"Sell and Absolutely Dispose of."*]—A mortgagee with power of sale under the Short Forms of Mortgages Act can exercise the power by way of exchange for other land instead of, in the usual way, by sale for money. The words "absolutely dispose of" in the power are appropriate to an exchange. *Smith* v. *Spears*, 22 O. R. 286.

Separate Estate—*Contract by Implication.*]—Held, reversing the decision of the Common Pleas Division, 19 O. R. 739, that the power of attorney to the husband of the married woman defendant, authorizing him to sell her lands, did not authorize him to exchange such lands for others or to bind her to assume payment of a mortgage on the land given in exchange, and that on the evidence she was not bound thereby. *McMichael* v. *Wilkie*, 18 A. R. 464.

Specific Performance—*Title not in Plaintiff—Knowledge of Defendant.*]—Where the plaintiff, at the time he entered into a contract with the defendant for the exchange of lands, had no title to the lands he proposed to exchange, which were, to the knowledge of the defendant at the time of the contract, vested in the plaintiff's wife:—

Held, in an action for specific performance, that the defendant could not withdraw on the ground that the plaintiff had no title, at any rate before the time fixed for the completion of the exchange; and the plaintiff having tendered a conveyance from his wife before action, was entitled to succeed; for the defendant, having entered into the contract knowing that it did not bind the estate, but only the person, of the plaintiff, must be taken to have relied from the beginning upon the promise of the plaintiff to procure the concurrence of the owner, and could not set up that the plaintiff was not the owner.

Dictum of Kekewich, J., in *Wylson* v. *Dunn*, 34 Ch. D. 569, not followed. *St. Denis* v. *Higgins*, 24 O. R. 230.

EXCHEQUER COURT.

I. JURISDICTION.

Concurrent Original Jurisdiction of Exchequer Court—*Injunction to Restrain Interference with Navigation of a Public Harbour Authorized by Provincial Legislature.*]—An

information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbour is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50 & 51 Vict. ch. 16, sec. 17 (*d*). *The Queen* v. *Fosker*, 2 Ex. C. R. 365.

Dominion Interests.]—The Parliament of Canada has the right to enact that all actions and suits of a civil nature at common law or equity, in which the Crown in right of the Dominion is plaintiff or petitioner may be brought in the Exchequer Court. *Farwell* v. *The Queen*, 22 S. C. R. 553.

Maritime Law—*Action of Account between Co-owners.*]—The Exchequer Court has jurisdiction to hear and determine actions of account between co-owners of a ship. *Hall* v. *Ship Seaward*, 3 Ex. C. R. 268.

Patents—*Jurisdiction of the Minister of Agriculture.*]—The jurisdiction, in respect of the avoidance of patents, conferred upon the Minister of Agriculture by section 28 of The Patent Act of 1872 is exclusive of that possessed by any other tribunal in the Dominion. *Toronto Telephone Manufacturing Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 524.

Seamen's Wages—*Claim under $200.*]—In the year 1887, A. sold a vessel to M. and S. under an agreement stipulating, among other things, that the vessel was to remain in the name and under the control of A. until the purchase money was fully paid, and that, in the event of the terms of the contract not being performed by the vendees, A. was entitled to take possession and the vendees would thereupon lose all claim or title they might have to the ship or to moneys paid by them in respect of the contract. This agreement was not registered. For some time the vendees performed the terms of the agreement, but having failed to do so after a certain period A. resumed possession of the vessel. Upon an action *in rem* for wages due to a seaman employed by the vendees and which were earned during their possession of the vessel:—

Held, that the amount of the claim being below $200, the Exchequer Court had no jurisdiction under section 34 of The Inland Waters Seamen's Act. *The Jessie Stewart*, 3 Ex. C. R. 132.

Trade-marks.]—The questions which the Court has jurisdiction to determine under the Act 53 Vict. ch. 14 are such as relate to rights of property in trade-marks, and not questions as to whether or not a trade-mark ought not to be registered, or continued on the registry, because it is calculated to deceive the public or for such other reasons as are mentioned in R. S. C. ch. 63, sec. 12. *The Queen* v. *Van Dalken*, 2 Ex. C. R. 304.

Trade-marks.]—The Court has jurisdiction to rectify the register of trade-marks in respect of entries made therein without sufficient cause either before or subsequent to the 10th day of July, 1891, the date on which the Act 54 & 55 Vict. ch. 35 (D.) came into force.

Quære. Has the Court jurisdiction to give relief for the infringement of a trade-mark where the cause of action arose out of acts done prior to the passage of 54 & 55 Vict. ch. 26 (D.). *D'Kuyper* v. *Van Dalken*, 3 Ex. C. R. 88. *See S. C.*, 24, S. C. R. 114.

II. Practice.

Co owners—*Endorsement of Writ.*]—*Semble*, In an action by the managing owner of a ship against his co-owner, the endorsement on the writ need not shew that there was any dispute as to the amount involved. *Hall* v. *Ship Seaward*, 3 Ex. C. R. 268.

Extension of Time—*Expiration of Statutory Period for Appeal.*]—Where sufficient grounds are disclosed, the time for leave to appeal from a judgment of the Exchequer Court of Canada prescribed by section 51 of the Exchequer Court Act (as amended by 53 Vict. ch. 35, sec. 1), may be extended after such prescribed time has expired. [The application in this case was made within three days after the expiry of the thirty days within which an appeal could have been taken.] (2.) The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time for leave to appeal prescribed by the statute has expired. (3) Pressure of public business preventing a consultation between the Attorney-General for Canada and his solicitor within the prescribed time for leave to appeal is sufficient reason for an extension being granted, although the application therefor may not be made until after the expiry of such prescribed time. *Clarke* v. *The Queen*, 3 Ex. C. R. 1.

Information of Intrusion.]—An order directing the defendant to reconvey the land is not an appropriate part of the remedy to be given upon an information of intrusion. *The Queen* v. *Farwell*, 3 Ex. C. R. 271.

Official Arbitrators—*Exchequer Court Act—Rule of Court—Report by Two Arbitrators.*]—By a rule of Court made on 7th March, 1883, it was ordered that, unless it was otherwise specially ordered, any matter pending before the official arbitrators when the Exchequer Court Act, 50 & 51 Vict. ch. 16, came into force that had been heard or partly heard by such arbitrators should be continued before them as official referees, and that their report thereon should be made to the Court in like manner as if such matter had been referred to them by the Court under the 23th section of the said Act. Prior to the making of this rule a claim had been referred by the Minister of Railways and Canals to the official arbitrators for investigation and award. The claim, however, was proceeded with and heard before two of such arbitrators only, and a report thereon in favour of the claimant was made by them to the Court. On motion by claimant for judgment on such report:—

Held, that the hearing of the claim by two of the official arbitrators was not a hearing within the meaning of the rule, and that judg-

ment could not be entered on the report. *Rioux* v. *The Queen*, 2 Ex. C. R. 91.

Successive Applications for Same Relief.]—*See Attorney-General for Ontario* v. *Attorney-General for Canada*, 1 Ex. C. R. 184.

EXECUTION.

I. Creditors' Relief Act.

Assignment for the Benefit of Creditors.]—Creditors whose executions or certificates under the Creditors' Relief Act are placed in the sheriff's hands after the execution debtor has made a general assignment for the benefit of his creditors, are not entitled to share, under that Act, in the proceeds of goods seized by the sheriff under prior executions before the assignment was made, the proceeds being insufficient to pay these prior executions.

Roach v. *McLachlan*, 19 A. R. 496, applied.

Judgment of the County Court of Simcoe reversed. *Breithaupt* v. *Marr*, 20 A. R. 689.

Certificate of Claim — *Contestation.*]—Although, under the Creditors' Relief Act, a creditor who does not come in within the period prescribed, may not be entitled to rank for a dividend, he is interested in the proper distribution of the moneys realized, and is therefore under section 10 of the Act, entitled to contest the certificates of claim of other creditors, for in case of success there may be a surplus available for him, or at least the liabilities of the common debtor will be reduced. *Bank of Hamilton* v. *Aitken*, 20 A. R. 616.

Chattel Mortgage — *Wages.*]—Executions against goods in the hands of a sheriff subsequent to the making of a chattel mortgage by the execution debtor, on the goods seized, attach only on the equity of redemption, and are not entitled, under the Creditors' Relief Act, to share with executions prior to the giving of the mortgage.

The fact that in such a case the subsequent executions are on judgments recovered for wages gives them no priority under the Wages Act, R. S. O. ch. 127, sec. 3, and they can take nothing until the prior executions and the mortgagee are paid in full.

Judgment of the County Court of Elgin, confirming the sheriff's scheme of distribution, reversed. *Roach* v. *McLachlan*, 19 A. R. 496.

Receiver.]—The provisions of the Creditors' Relief Act are not to be extended to cases not actually provided for by that Act, and therefore the appointment of a receiver may properly be made for the benefit of the plaintiff alone. *McLean* v. *Allen*, 14 P. R. 84.

Sheriff's Interpleader — *Claim by Chattel Mortgagee — Claimant Abandoning — Rights of Claimant Under Execution Subsequently Obtained.*]—Certain goods of the defendant seized by a sheriff under the plaintiffs' execution were claimed by a chattel mortgagee, whereupon an interpleader issue was directed. The goods were sold under the interpleader order by the sheriff, who deducted his fees from the proceeds, and by consent retained the residue in his hands pending the result of the issue, entering it in his books as held under the Creditors' Relief Act. The claimant never delivered any issue, and abandoned the interpleader proceedings. He obtained judgment against the defendant, and, within thirty days of the entry in the sheriff's books, placed an execution in the sheriff's hands:—

Held, that the claimant was entitled to participate in the proceeds, and was not barred of his rights as an execution creditor because, before he had attained that status, he had asserted a right in a different capacity.

Whatever might have been the effect, had his claim been insisted upon, of section 4, sub-section 3, of the Creditors' Relief Act, R. S. O. ch. 65, none should follow the fact that a claim was made and abandoned before it became necessary to contest it. *Wait* v. *Sager*, 14 P. R. 347.

Staying Proceedings.]—After service of a writ of summons upon one of the partners in an action against a partnership in the firm name, an appearance was entered by a solicitor in the names of both partners individually, but upon the instructions of one partner only, and without the authority of the other. Upon motion by the latter to set aside the appearance and subsequent proceedings:—

Held, that the appearance and the plaintiffs' judgment founded thereon were irregular.

After the judgment had been set aside, several creditors of the defendants obtained judgments against them, and placed writs of *fi. fa.* in the sheriff's hands, under which he sold the defendants' goods. Upon a motion by the plaintiffs, made in their own action, and also in the several actions in which judgments had been obtained, for an order directing the sheriff to pay the proceeds of the sale into Court, instead of making the usual entries under the Creditors' Relief Act, in order to preserve the priority of the plaintiffs' judgment, in case it should be restored upon appeal:—

Held, that there was no power, upon the plaintiffs' application, to interfere with the sheriff's proceeding upon writs of *fi. fa.* regularly in his hands. *Mason* v. *Cooper*, 15 P. R. 418.

II. Equitable Execution by Appointment of Receiver.

Judgment for Costs only — *Assignee of Judgment—Residuary Legatee and Executor.*]

—Under Rule 935 an order to attach debts may be founded on a judgment for costs only.

Trontman v. *Fisken*, 13 P. R. 153, distinguished.

Under the same rule an assignee of a judgment, though not a party to the action, may apply to enforce the judgment by attachment.

An order may be made attaching the amount, if any, coming to a judgment debtor as residuary legatee under a will, although it is undetermined whether anything, and, if anything, how much, is due to him.

Upon an inquiry as to whether anything is due to a judgment debtor as residuary legatee, where he also has the character of executor, the legatees and creditors ought to be before the Court; and the way to bring them before the Court is by administration proceedings.

Quære, whether the assignee of the judgment would be entitled to administration.

The assignee of a judgment appointed receiver by way of equitable execution to receive whatever interest the judgment debtor might have as residuary legatee. *McLean* v. *Bruce*, 14 P. R. 190.

Life Insurance — *Subsequent Declaration by Insured for Benefit of his Wife and Children.*] —An order was made, after judgment in an action, appointing a receiver and for the sale by him of a policy on the life of the defendant for $1,000 which would be fully paid up in ten years, and enjoining the defendant from dealing with the policy. Notwithstanding this, the defendant made an assignment or declaration for the benefit of his wife and children, under R. S. O. ch. 136, sec. 5:—

Held, reversing the decision of Ferguson, J., that the order for sale was improper.

Per Boyd, C.—No order to sell should have been made against the will of the beneficiaries under the assignment, and *quære* if there was jurisdiction to make any such order.

If the beneficiaries failed to pay the accruing premiums, it might then be proper, as the receiver had no funds wherewith to pay them, to negotiate with the company for the surrender of the policy.

Stokoe v. *Cowan*, 29 Beav. 637, doubted.

Per Robertson, J.—It was competent for the defendant at any time, even after the receivership order and injunction to make the declaration for the benefit of his wife and children, and the plaintiff could not interfere with the rights of the beneficiaries under it at the maturity of the policy, even supposing their rights to be limited to the residue after payment of the plaintiff's execution, which *semble* they were not.

Per Meredith, J.—Whether there was power to make the order to sell or not, it should not have been made in this case, it not being shewn to be necessary, having regard not only to the plaintiff's interests, but to those of other parties in the subject matter. *Weekes* v. *Frawley*, 23 O. R. 235.

Taxes—*Rents.*] — *See Re Denison, Waldie* v. *Denison*, 24 O. R. 197, *ante* 56.

Will—*Action for Construction.*]—A receiver appointed by way of equitable execution to receive the share of a judgment debtor under a certain will, applied for an order for leave to bring an action in the name of the debtor for construction of the will. The receiver had not requested the debtor to bring the action, and upon the application the latter expressed his willingness to do so and to proceed without unnecessary delay:—

Held, that the receiver would have been entitled to the order if the debtor had refused to bring the action or had delayed unreasonably.

No order was made, but leave was reserved to the receiver to apply again if the debtor did not proceed with diligence. *McLean* v. *Allen*, 14 P. R. 291.

Will—*Infant—Maintenance—"He who Seeks Equity must do Equity."*]—Under a devise of land to a father "during his life, for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body or to such of his children as he may devise the same to" there is no trust in favour of the children so as to give them a beneficial interest apart from and independently of their father, but the children being in needy circumstances will be entitled as against the father's execution creditor who has been appointed receiver of his interest to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. *Allen* v. *Furness*, 20 A. R. 34.

Will — *Right to "a Home" — Interest in Land.*] — A testator devised land to one in trust, first, to permit his nephew and his wife and children to use it for a home, and, second, to convey it to such child of the nephew as the latter should nominate in his will. The nephew and his family were living upon the land at the time of the making of the will and at the death of the testator, when there were two dwelling-houses thereon. Afterwards the trustee and the nephew's father-in-law, at their expense, improved and altered the property so that the number of houses was increased to seven. The nephew lived with his family in one and received the rents of the others.

In an action by judgment creditors of the nephew and his wife seeking the appointment of a receiver to receive the rents in satisfaction of the judgment:—

Held, that the judgment debtors took no estate in the land under the will, and nothing more than the right to call upon the trustee to permit them to use the land for "a home," which expression, however, meant more than simply a house to live in; that they were entitled to the advantage of the increased value of the land; and that their right to the use of the land for a home could not be reached through a receiver so as to make it available for the satisfaction of the plaintiff's claim.

Allen v. *Furness*, 20 A. R. 34, distinguished. *Cameron* v. *Adams*, 25 O. R. 229.

Will—*Security.*]—Motion by the plaintiff to continue an order for the appointment of a receiver by way of equitable execution, and motion by the defendant to discharge the order.

The interest of the defendant in the property sought to be realized was acquired under a will devising an interest to him during his life for

the support and maintenance of himself and his children, with remainder to the heirs of his body or to such of his children as he might devise the same to. The property in question consisted of real as well as personal property:—

Held, that the defendant was entitled under the will to a beneficial interest which should be applied in payment of his debts; but it could not be decided upon this motion whether his creditors were entitled to the whole or only to a portion.

2. That as the rights of the receiver were limited to receiving those moneys which were the absolute property of the debtor free from any trust, it was not improper to make the appointment without security.

3. That the provisions of the Creditors' Relief Act form an exception to the general rule and are not to be extended to cases not actually provided for by that Act; and therefore the appointment of the receiver was properly made for the benefit of the plaintiff alone.

4. That costs should not have been awarded against the defendant upon an *ex parte* motion.

5. That it is proper to appoint the receiver in the action in which judgment had been recovered. *McLean* v. *Allen*, 14 P. R. 84.

See, also, ATTACHMENT OF DEBTS.

III. EXEMPTIONS.

Free Grants—*Interest of Locatee as Mortgagee.*]—The interest of a locatee in a mortgage taken by him to secure part of the purchase money of land granted to him under the Free Grants Act is not exempt. Judgment of Boyd, C., 19 O. R. 422, affirmed. *Cann* v. *Knott*, 20 O. R. 294.

Insurance.] — A judgment creditor cannot obtain by a receiving order money payable to his debtor in respect of insurance upon exempted chattels. The money takes the place of the chattels and is subject to the same protection. *Osler* v. *Muter*, 19 A. R. 94.

Interpleader—*Sheriff.*] — A sheriff sued in the County Court by an execution debtor for $100 damages, the value of implements seized and sold by the sheriff without any special direction from the execution creditor and alleged to be exempt, cannot obtain in that Court an interpleader order directing the trial of an issue between the execution debtor and the execution creditor, to settle whether the implements were exempt or not. The sheriff acts at his own peril in granting or refusing the exemption.

Prohibition granted, the County Court having no jurisdiction to make such an order.

Judgment of the Queen's Bench Division, 21 O. R. 624, reversed, Maclennan, J. A. dissenting. *In re Gould* v. *Hope*, 20 A. R. 347.

Interpleader—*Sheriff—Bill of Sale.*] — An execution debtor can do as he pleases with the statutory exemptions and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor.

Where in an interpleader issue the claimant alleges that the goods seized include the statutory exemptions, that is a question for trial in the issue and is not to be left to the sheriff to deal with.

Judgment of the County Court of Ontario reversed. *Field* v. *Hart*, 22 A. R. 449.

IV. ISSUING EXECUTION.

Death of Plaintiff after Verdict and Before Judgment—*Assignment of Verdict.*]—In an action for malicious prosecution the jury found a general verdict for the plaintiff with damages. The defendant moved to set aside the verdict, and his motion being dismissed, gave security for the purpose of an appeal, after which the plaintiff assigned "the verdict or judgment" to his daughter, and died about three months later. No judgment had been entered, nor was there any order or direction of the Judge for the entry of judgment. By an *ex parte* order, made on the application of the next friend of the plaintiff's daughter, after his death, the assignment to her was recited, and it was ordered that the action should stand revived in her name:—

Held, that the action could not be revived or continued by or against the daughter, she not being the assignee of a judgment, and the cause of action not being one capable of being assigned to her so as to sue for it in her own name; and the defendant's appeal could not be heard in the absence of the legal personal representative of the plaintiff.

Semble, the assignee of a judgment debt may obtain an order to enter a suggestion reviving the action for the purpose of issuing execution in his own name.

Philips v. *Fox*, 8 P. R. 51, referred to. *Blair* v. *Assalstine*, 15 P. R. 211.

Judgment More than Twenty Years Old—*Statute of Limitations.*]—The limit of twenty years being fixed by R. S. O. ch. 60, sec. 1, after which, in the absence of payment or acknowledgement, an action cannot be brought upon a judgment, the analogy of the statute applies to applications for leave to issue execution after the lapse of twenty years from the date of the judgment or the return of the last execution.

An issue directed under Rule 886, to try the question of liability upon a judgment more than twenty years old, is an action within the meaning of R. S. O. ch. 60, sec. 1, and the Statute of Limitations would be a good defence. *Price* v. *Wade*, 14 P. R. 351.

Motion to Set Aside Judgment—*Execution Issued Before Revivor.*] — After judgment pronounced by the Court upon default of defence the plaintiff died, and the defendant, desiring to have the judgment set aside and be let in to defend, issued a *præcipe* order under Rule 622 reviving the action in the name of the executor of the plaintiff's will.

Upon motion to set this order aside:—

Held, that Rule 622 should be read as applicable to a case in which final judgment has been entered; and, as it was necessary that the defendant should be allowed to carry on the proceedings, the order should be sustained.

Arnison v. *Smith*, 40 Ch. D. 567, distinguished.

Curtis v. *Sheffield*, 20 Ch. D. 398, and *Twycross* v. *Grant*, 4 C. P. D. 40, followed.

After the death of the plaintiff and before the order of revivor the solicitor who had acted for her issued a writ of *hab. fac. poss.* upon the judgment, without the leave required by Rule 886:—

Held, that the writ was irregular; and it was competent for the party affected by it to apply to set it aside without first reviving the action. *Chambers* v. *Kitchen*, 16 P. R. 219.

V. Special Matters and Persons.

Administrators.]—The administrators of an insolvent deceased person contracted to sell some of his lands. Subsequently to the contract a creditor who had obtained a judgment against the deceased in his life time issued execution thereon under an *ex parte* order therefor against the estate in the hands of the administrators:—

Held, that the execution formed no charge or encumbrance on the lands contracted to be sold.

Orders should not be made *ex parte* allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator. *In re Trusts Corporation of Ontario and Bachmer*, 26 O. R. 191.

Alimony — *Master's Report.*] — Where a reference is directed to the master to ascertain and state the amount of alimony which the defendant should pay, execution may be issued for the amount found by his report before confirmation thereof. *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P. R. 15, approved and followed. *Bovck* v. *Bovck*, 16 P. R. 313.

Artisan's Lien—*Manufacture of Bricks on Property of Another Person—Possession.*]—The plaintiff was employed to manufacture bricks for another in a brickyard belonging to the latter, of which, however, the plaintiff held possession for the purpose of his contract, and remained and was in possession of the bricks at the time of their seizure by the sheriff under an execution against the owner of the brickyard, who, immediately after such seizure, made an assignment for the benefit of creditors:—

Held, that the plaintiff was entitled to a lien upon the bricks in priority to the execution and assignment for the benefit of creditors, and also in priority to the claim of a chattel mortgagee, though his mortgage covered brick in course of manufacture during its continuance. *Roberts* v. *Bank of Toronto*, 25 O. R. 194.

Assignment for Creditors—*Purchase Money of Land Sold Under Mortgage.*]—Where, after a sale of mortgaged premises in an action for that purpose, the mortgagor made an assignment for the benefit of his creditors under R. S. O. ch. 124, before certain prior execution creditors had established their claims in the Master's Office to the balance of purchase money, after satisfying the amount of the mortgage:—

Held, that the assignee for creditors was entitled to such balance freed from any liability to satisfy the executions out of it. *Carter* v. *Stone*, 20 O. R. 340.

Collusive Purchase.]—The goods of a tenant were seized for rent and offered for sale by a bailiff. The tenant bid them in and they were immediately seized under an execution against him on behalf of an execution creditor of the tenant. They were then claimed by a third person, who alleged that the tenant was in reality bidding for him and this claimant paid the purchase money:—

Held, that if the goods were sold at an undervalue owing to the bids being made by the tenant ostensibly for himself as part of a scheme between the tenant and claimant to defeat creditors by keeping down the price, the sale would be fraudulent and void as against the creditors of the tenant, though it would be good as far as the purchase money was concerned, which could not in any event be recovered back by the claimant.

Appeal allowed and a new trial ordered. *Sullivan* v. *Francis*, 18 A. R. 121.

Costs—"*Immediately.*"]—The word "immediately" in Rule 863 means "instanter;" and a party to whom costs are awarded by an order may issue execution therefor on the day of the taxation. *Clarke* v. *Creighton*, 14 P. R. 34.

Equitable Interest of Purchaser under Contract—*Judgment against Assignee of such Purchaser.*]—The equitable interest of an assignee from the purchaser of a contract for the sale lands, is exigible under a writ of *fieri facias* of against the lands of such assignee, and the purchaser at a sheriff's sale of such interest is entitled to specific performance of the contract.

Re Prittie and Crawford, 9 C. L. T. 45, declared to have been inadvertently decided or reported. *Ward* v. *Archer*, 24 O. R. 650.

Fixtures—*Mortgage of Realty.*]—The fact that fixtures affixed to the freehold in the usual way have sometimes been mortgaged as chattels, and on other occasions have passed with a mortgage of the freehold does not render them exigible to an execution against goods if at the time of the seizure the chattel mortgages are non-existent, and a mortgage of the freehold is in existence as a first charge thereon. *Carson* v. *Simpson*, 25 O. R. 385.

Goods.]—Where purchasers are not in question, the issue of a writ of execution gives a specific claim to the goods of a judgment debtor, which remains till satisfaction of the debt; and, therefore, the withdrawal of the sheriff does not preclude further action upon the writ. *Gemge* v. *Freeman*, 14 P. R. 330.

Married Women—*Execution against Husband.*]—In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act, R. S. N. S. 5th ser. ch. 94, the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was claimed that the husband's name was Daniel. The jury found that he was well known by both names, and that A.'s right to the goods seized was acquired from her husband after marriage, which would not make it her separate property under the Act:—

Held, reversing the judgment of the Court below, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without shewing the judgment. *Hannon* v. *McLean*, 3 S. C. R. 706, followed; and that under the findings of the jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband, which was a complete answer to the action. *Crowe* v. *Adams*, 21 S. C. R. 342.

Lands Vested in Trustee — *Executions against Cestui que Trust.*]—Lands were conveyed to, and held in the name of a trustee, at the instance and for the benefit of another, but without any disclosed trust. Writs of *fi. fa.* lands against the *cestui que trust* were placed in the sheriff's hands before his death, but after the conveyance to the trustee. After the death of the *cestui que trust* his administrators sold the lands, and offered to convey the lands with the trustee:—

Held, that the purchaser was not bound to carry out the sale unless the writs were removed or released. *Re Trusts Corporation of Ontario and Medland*, 22 O. R. 538.

Mortgage—*Power of Sale—Notice of Sale—Execution Creditor.*]—In taking proceedings under a power of sale in a mortgage drawn under the "Short Forms Act," execution creditors of the mortgagor come within the scope of the word "assigns," and as such are entitled to notice under power of sale, but only those having executions in the sheriff's hands at the time notice of default is given need be served, *Re Abbott* v. *Medcalf*, 20 O. R. 299.

Partner—*Determining Liability.*]—Where an application is made under Rule 876 for leave to issue execution, upon a judgment against a firm, against an alleged member of the firm, who has not admitted that he was and has not been adjudged to be a partner, and who was not served as a partner with the writ of summons, and who disputes his liability, there is no power in the Court or a Judge, under Rule 756 or otherwise, to summarily determine the question of his liability; but an issue must be directed. *Tennant* v. *Manhard*, 12 P. R. 619, overruled. *Standard Bank* v. *Frind*, 14 P. R. 355.

Partner—*Sale of Share.*]—Under an execution against an individual partner the sheriff can seize the partnership goods and sell the execution debtor's share, whatever may be the difficulties which arise thereafter; and the Judicature Act has made no difference in this respect. *Harrison* v. *Harrison*, 14 P. R. 436.

Shares—*Assignment not Entered.*]—A *bond fide* assignment or pledge for value of shares in the capital stock of a company incorporated under R. S. O. ch. 157 is valid between the assignor and the assignee, notwithstanding that no entry of the assignment or transfer is made in the books of the company; and, as only the debtor's interest in property seized can be sold under execution, the rights of a *bond fide* assignee cannot be cut out by the seizure and sale of the shares, under execution against the assignor, after the assignment.

R. S. O. ch. 157, sec. 52, considered and construed.

Semble, that nothing passes by such a sale under execution; for the words "goods and chattels" in section 16 of the Execution Act, R. S. O. ch. 64, do not include shares in an incorporated company so as to authorize the sale of the equity of redemption in such shares. *Morton* v. *Cowan*, 25 O. R. 529.

See 58 Vict. ch. 13, sec. 32 (O.).

Writ of Execution — *Form.*] — In the Province of Nova Scotia writs of execution need not be signed by the prothonotary of the Court. It is the seal of the Court which gives validity to such writs, not the signature of the officer. *Archibald* v. *Hubley*, 18 S. C. R. 116.

VI. Staying and Setting Aside Executions.

Appeal to Court of Appeal — *Manifold Judgment.*]—The defendant in appealing to the Court of Appeal from a manifold judgment of the High Court in an action for specific performance, directing the execution by him of a conveyance, the delivery of documents, etc., and also the payment of a sum for costs of the action, gave security for the costs of the Court of Appeal and for payment of the costs of the action, but did not execute the conveyance, deposit the documents in Court, or otherwise comply with the judgment or the provisions of Rule 804, sub-sections 1, 2, 3:—

Held, that, upon the perfecting of the security, there was a stay of execution, amounting to a supersedeas, as to the costs of the action, by virtue of sub-section 4 of Rule 804, although the defendant had done nothing with respect to the parts of the judgment falling under the other sub-sections; and garnishing proceedings taken for the purpose of collecting such costs were not sustainable. *Vigeon* v. *Northcote*, 15 P. R. 171.

Appeal to the Privy Council.]—Where the plaintiffs were appealing to the Privy Council from a judgment of the Court of Appeal dismissing with costs an appeal from the judgment of the Queen's Bench Division in favour of the defendants with costs, and had given security in $2,000, as required by section 2 of R. S. O. ch. 41:—

Held, that the order of a Judge of the Court of Appeal, under section 5, allowing the security, should not have stayed the proceedings in the action, and so much of the order as related to the stay should be rescinded:—

Held, also, that the plaintiffs not having given security to stay execution for the costs in the Courts below, and the stay being removed, if they now desired to have execution for such costs stayed, they should give security therefor as provided by Rule 804, which is made applicable by section 4 of the Act:—

Held, also, that if an order for payment out of the High Court of money therein, awaiting the result of litigation, was "execution" within the meaning of section 3, it was stayed by the allowance of the security, and required no order; if it was not execution, a Judge of the Court of Appeal had no jurisdiction to stay proceedings in the Court below; and it was for the High

Court to determine whether such an order was "execution," and if not, whether the money should be paid out. *McMaster* v. *Radford*, 16 P. R. 20.

Appeal to the Supreme Court of Canada —*Condition of Bond—Costs Awarded by Judgment Appealed From.*]—In an appeal to the Supreme Court of Canada, although it is not necessary that the appellant should be a party to the appeal bond, if he is made a party and does not execute the bond, the respondent is entitled to have it disallowed.

In an appeal bond, where the object was not only to secure payment of the costs which might be awarded by the Supreme Court of Canada under section 46 of R. S. C. ch. 135, but also under section 47 (*c*) to procure a stay of execution of the judgment appealed from as to the costs thereby awarded against the appellant, the condition was "shall effectually prosecute the said appeal and pay such costs and damages as may be awarded against the appellant by the Supreme Court of Canada, and shall pay the amount *by the said mentioned judgment* directed to be paid, either as a debt or for damages or costs," etc.:—

Held, that this did not cover the costs awarded against the appellant by the judgment appealed from. *Robinson* v. *Harris*, 14 P. R. 373.

Appeal to the Supreme Court of Canada —*Money in Court—Payment Out.*]—The plaintiffs appealed to the Court of Appeal from a judgment of the High Court dismissing their action with costs, and gave the security for the costs of appeal required by section 71 of the Judicature Act, by paying $400 into Court, and also gave the security required by Rule 804 (4), in order to stay the execution of the judgment below for taxed costs, by paying $322.14 into Court. Their appeal was dismissed with costs. Desiring to appeal to the Supreme Court of Canada, they paid $500 more into Court, and this was allowed by a Judge of the Court of Appeal as security for the costs of the further appeal:—

Held, that execution was stayed upon the judgments of the High Court and Court of Appeal until the decision of the Supreme Court.

Construction of sections 46, 47 (*c*), and 48 of the Supreme and Exchequer Courts Act, R. S. C. ch. 135.

Semble, that payment out of the moneys in Court to the defendant of his costs of the High Court and Court of Appeal, upon the undertaking of his solicitors to repay in the event of the further appeal succeeding, could not properly be ordered.

Kelly v. *Imperial Loan Co.*, 10 P. R. 499, commented on. *Agricultural Insurance Co.* v. *Sargent*, 16 P. R. 397.

Attaching Order.]—A sheriff's return to a writ of *fi. fa.* goods set forth that he was notified that the amount of the judgment to be executed had been attached by a judgment creditor of the execution creditor, and that the execution debtor (the garnishee) had thereupon satisfied the claim of the garnishor. In fact there was only an order to attach and a summons to pay over, but no order absolute:—

Held, that the return was insufficient in substance, because it shewed that the writ remained unexecuted without legal excuse; a garnishee order absolute would have operated as a stay of execution, but not so the attaching order and summons; the duty of the garnishee was to pay the sheriff, advising him at the same time of the existence of the attaching order, and this would have been equivalent to a payment into Court. *Gouge* v. *Freeman*, 14 P. R. 330.

Order for Costs—*Notice of Taxation—Retaxation.*]—The defendant obtained an order dismissing the action with costs for non-prosecution, upon notice to the plaintiff, who did not appear upon the motion. The defendant did not serve the plaintiff with a copy of the order, and went on and taxed his costs, without notice to the plaintiff, and issued execution for the amount taxed:—

Held, no ground for setting aside the execution that the order had not been served before the taxation.

Hopton v. *Robertson*, 23 Q. B. D. 126*n.*, distinguished:—

Held, also, that the absence of a notice of taxation was not an irregularity entitling the plaintiff to set aside the execution, but only to a retaxation of the costs.

Lloyd v. *Kent*, 5 Dowl. 125, followed. *Cranston* v. *Blair*, 15 P. R. 167.

Revivor.]—After the death of the plaintiff and before the order of revivor the solicitor who had acted for her issued a writ of *hab. fac. poss.* upon the judgment, without the leave required by Rule 886:—

Held, that the writ was irregular; and it was competent for the party affected by it to apply to set it aside without first reviving the action. *Chambers* v. *Kitchen*, 16 P. R. 219.

EXECUTORS AND ADMINISTRATORS

I. Accounts.

Jurisdiction of Probate Court — *Res Judicata.*]—A court of probate has no jurisdic-

tion over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other Court, and a Court of equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court. *Grant* v. *Maclaren*, 23 S. C. R. 310.

Reddition of Account — *Release.*]—P. A. A. D., respondent, as representing the institutes and substitutes under the will of the late J. D. brought an action against J. B. T. D. (appellant), who was one of the institutes and had acted as curator and administrator of the estate for a certain time, for reddition of an account of three particular sums, which the plaintiff alleged the defendant had received while he was a curator:—

Held, reversing the judgment of the Court below, that an action did not lie against the appellant for these particular sums apart and distinct from an action for an account of his administration of the rest of the estate.

The plaintiff in his action alleged that he represented S. D., one of the substitutes, in virtue of a deed of release and subrogation by which it appeared he had paid to S. D.'s attorney for and on behalf of the defendant a sum of £447 7*s*. 6½*d*., the defendant having in an action of reddition of account settled by notarial deed of settlement with the said S. D. for the sum of $4,000 which he agreed to pay and for which amount the plaintiff became surety:—

Held, that as the notarial deed of settlement gave the defendant a full and complete discharge of all redditions of account as curator or administrator of the estate, the plaintiff could not claim a further reddition of account of these particular sums.

The plaintiff also claimed that he represented F. D. and E. D. two other institutes under the will, in virtue of two assignments made to him by them on the 21st January, 1869, and 15th November, 1869, respectively. In 1865, and after the defendant had been sued in an action of reddition of account, by a deed of settlement the said F. D. and E. D. agreed to accept as their share in the estate the sum of $4,000 each, and gave the defendant a complete and full discharge of all further redditions of account:—

Held, affirming the judgment of the Court of Queen's Bench, that the defendant could not be sued for a new account, but could only be sued for the specific performance of the obligations he had contracted under the deed of settlement. *Dorion* v. *Dorion*, 20 S. C. R. 430.

II. Administration.

Administrator ad Litem — *Devolution of Estates Act—Real Estate.*]—Rule 311, though in existence, as sec. 11 of 48 Vict. ch. 13 (O.), before the passing of the Devolution of Estates Act, may be applied as to realty falling under the operation of that Act.

If it appears that there is no personalty, or personalty of such trifling amount as will not suffice to answer the claims made in respect of the deceased's real estate against which litigation is brought or is impending, administration *ad litem* may be granted under the Rule, limited to the real estate in question.

An application for the appointment of an administrator *ad litem* is properly made before action. *Re Williams and McKinnon*, 14 P. R. 338.

Contention as to Grant—*Surrogate Court—Removal into High Court—Disqualification of Surrogate Judge—Administration Quoad—Joint Administration.*]—Upon an application by certain of the next of kin of an intestate, under section 31 of the Surrogate Courts Act, R. S. O. ch. 50, to remove from a Surrogate Court into the High Court a cause in which a contention arose as to the grant of administration, it appeared that the widow and a trust company had petitioned for joint administration of the estate, which was a large one; that the next of kin opposed the petition; that neither widow nor next of kin could, unaided, supply the necessary security; and that there were no creditors.

Held, that the jurisdiction to award [illegible], being of a discretionary kind, could be better exercised by the Surrogate Judge, and the cause should not be removed.

The personal disqualification of a Surrogate Judge to pass upon an application, by reason of his interest as a shareholder in a company applicant, is not a ground for removal to the High Court; for he can call in the aid of a neighbouring County Judge.

Where the assets are separable, administration may be granted *quoad*, *i.e.*, to the widow as to one part, and to the next of kin as to another part, or there may be a joint grant to the widow and next of kin. *Re McLeod*, 16 P. R. 261.

Domestic and Foreign Creditors — *Priorities.*]—In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors.

Re Klobe, 28 Ch. D. 175, followed.

Con. Rule 271, which came into force since the above decision, and which relates to service of initiatory process out of the jurisdiction, if applicable at all to such a case, merely relates to procedure, and does not affect a proceeding in which all the parties have attorned to the jurisdiction of the Court. *Milne* v. *Moore*, 21 O. R. 456.

Judgment Debtor.]—Upon an inquiry as to whether anything is due to a judgment debtor as residuary legatee, where he also has the character of executor, the legatees and creditors ought to be before the Court; and the way to bring them before the Court is by administration proceedings.

Quære, whether the assignee of the judgment would be entitled to administration. *McLean* v. *Bruce*, 14 P. R. 190.

Revocation of Letters of Administration —*Surrogate Court.*]—The High Court of Justice for Ontario has no jurisdiction to revoke the grant by a Surrogate Court of letters of administration. *McPherson* v. *Irvine*, 26 O. R. 438.

Solicitor's Lien—*Jurisdiction of Referee.*]—A referee, before whom administration proceedings are taken, has no authority to make an

order depriving a solicitor of his lien for costs on a fund in Court on the ground that adverse parties had a prior claim on such fund for costs which said solicitor's client had been personally ordered to pay, the administration order not having so directed the referee, and there being no general order permitting such an interference with the solicitor's *primâ facie* right to the fund. *Bell* v. *Wright*, 24 S. C. R. 656.

III. Advertisement for Creditors.

Ontario Gazette.]—Publication in the Ontario *Gazette* of an advertisement for creditors, pursuant to R. S. O. ch. 110, sec. 36, is not necessary to release executors from liability for payments made by them. *Re Cameron, Mason* v. *Cameron*, 15 P. R. 272.

IV. Breach of Trust.

Breach of Trust by One Executor—*Notice—Inquiry.*]—After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of the several executors and trustees dealing with assets is so dealing *qua* trustee and not as executor, to shift the burden of proof. *Ewart* v. *Gordon*, 13 Gr. 40, discussed.

W. and C. were executors and trustees of an estate, under a will. W., without the concurrence of C., lent money of the estate on mortgage, and afterwards assigned the mortgages which were executed in favour of himself, described as "trustee of the estate and effects of" (the testator). In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same:—

Held, reversing the judgment of the Court of Appeal, 19 A. R. 447, that in taking and assigning said mortgages W. acted as a trustee and not as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts, which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees, inasmuch as the breach of trust consisted in the dealing with the securities themselves and not in the use made of the proceeds. *Cumming* v. *Landed Banking and Loan Co.*, 22 S. C. R. 246. *See* the next two cases.

Breach of Trust by One Executor.]—One executor may, without the concurrence of his co-executor, validly sell or pledge assets of the estate to a purchaser or mortgagee in good faith, and the purchaser or mortgagee is not put upon inquiry or affected with notice of breach of trust because the executor is described in the transfer or mortgage as "trustee."

Every executor is a trustee, but he does not cease to be an executor and become merely a trustee until the testator's wishes are completely carried out, and the estate has been appropriated to the purposes of the trusts declared.

Judgment of the Queen's Bench Division, 20 O. R. 382, affirming that of Boyd, C., 19 O. R. 426, reversed; Hagarty, C. J. O., dissenting. *Cumming* v. *Landed Banking and Loan Co.*, 19 A. R. 447.

Breach of Trust by One Executor.]—A sole executor of the surviving executors of a deceased person may at any time within twenty years from the death of the testator, sell or pledge any of the estate to any purchaser or mortgagee who has no notice of a breach of trust, and the purchaser or mortgagee is under no obligation to make enquiry as to the destination of the purchase or mortgage money, or to see to its application; but with regard to trustees there is no rule which entitles a person advancing money to them to disregard the notice which is found in the mere description of trustee, that the person to whom it is applied is not absolute owner of the security which he proposes to pledge.

By a will two persons were appointed executors and trustees, one of the trusts being to invest the moneys of the estate; both proved the will, though one was at the time an infant; the other invested certain moneys of the estate in mortgages, which were made to himself alone "as trustee of the estate and effects of J. C., deceased;" and ten years after the testator's death he hypothecated these mortgages to the defendants for advances, which he misapplied:—

Held, that when the defendants found securities of a permanent character vested in one of the trustees named in the will, as a trustee, they were charged with notice that these were securities which he held as trustee, and not as executor, and that he was committing a breach of trust in holding, in his separate name, securities belonging to a joint trust; and therefore that the plaintiffs, representing the estate, were entitled to have the mortgages transferred to them, and to make the defendants account for the moneys paid thereon:—

Held, also, that as the defaulting trustee had no power to pledge the assets of the estate, the onus was upon the defendants to shew that the proceeds were applied for the purposes of the estate:—

Held, also, that the grant of probate to the infant executor, along with the adult, was not a nullity:—

Held, lastly, that the recovery of judgment by the plaintiffs against the defaulting trustee for the amount advanced by him upon these mortgages did not bar the right of the action against the defendants.

Judgment of Boyd, C., 19 O. R. 426, affirmed. *Cumming* v. *Landed Banking and Loan Co.*, 20 O. R. 382.

Liability for Misappropriation by Agent.]—Held, affirming the judgments of the Courts below, that when a testamentary executrix employs an agent as attorney, she is bound to supervise his management of the matters entrusted to him, and to take all due precautions and cannot escape liability for the misappropriation of funds committed by such agent, although he was a notary public of excellent standing prior to the misappropriation. *Low* v. *Gemley*, 18 S. C. R. 685.

V. Costs.

Administration Action—*Unnecessary Proceedings—Writ of Summons Instead of Notice of Motion.*]—In an administration action commenced by writ, the plaintiff was allowed upon taxation only such costs as would have been taxed had he begun his proceedings by a summary application under Rule 965. The defendant claimed to have taxed to him and set off his additional costs incurred by reason of the less expensive procedure not having been adopted. He had not in the action admitted the right of the plaintiff to an account, but had pleaded a release, and had not objected to the procedure adopted :—

Held, that the defendant's additional costs had not been incurred by reason of the plaintiff's improper or unnecessary proceedings, but by his own conduct in not admitting the right to an account, and in not objecting to the plaintiff's manner of proceeding at the earliest possible stage ; and the case therefore did not come within Rule 1195.

Semble, it would have been proper to raise the question at the hearing ; but the taxing officer had jurisdiction under Rule 1195, without an order, to "look into" it. *Moon* v. *Caldwell*, 15 P. R. 159.

Failure to Establish Will—*Costs of Person Named as Executor.*]—Where the person named as an executor in a written instrument failed, in the final result of this action, to establish it as the last will of the testator, and the Court of last resort refused to order that his costs incurred therein should be paid out of the estate :—

Held, that the Court of first instance could not make an order for payment, out of moneys paid into that Court by the administrators, *pendente lite*, of these costs as costs of the litigation, because they were refused by the only tribunal which had jurisdiction to award them, nor as costs and expenses properly incurred by the applicant in the performance of his duties as executor, because he never was an executor. *Purcell* v. *Bergin*, 16 P. R. 301.

Just Allowance—*Unsuccessful Litigation—Advice of Court.*]—Where the administrators of the estate of a deceased assignee for creditors defended in good faith an action brought by his successor in the trust to recover damages for breach of trust committed by the intestate, and being unsuccessful, were obliged to pay the plaintiff's costs and those of their own solicitors, they were held entitled to credit for these payments in passing their accounts.

Where it is plain that a dispute can be settled only by litigation, it is not necessary for a trustee to ask the advice of the Court before defending.

Judgment of the Surrogate Court of Grey reversed. *In re Williams*, 22 A. R. 196.

Mortgage Action—*Personal Order.*]—Where an action to enforce a mortgage by foreclosure is brought against the executors of a deceased mortgagor, and an order for payment of the mortgage debt is, in addition, asked against the executors, and judgment is entered for default of appearance, only the additional costs occasioned by the latter claim should be taxed against the executors personally. *Miles* v. *Brown*, 15 P. R. 375.

Security for Costs—*Money in Court—Motion for Payment Out.*]—An executrix stands in no different position as to the liability to give security for costs from a litigant suing in his own right.

And an executrix resident abroad, applying for payment out of Court of moneys to the credit of her testator, was ordered to give security for costs of an alleged assignee of the fund, who opposed the application.

The rule as to security applies to a motion as well as to a petition. *Re Parker, Parker* v. *Parker*, 16 P. R. 392.

VI. Judgment Against.

Form of.]—In an action of seduction, continued against the administratrix of the original defendant, who died before the trial, the administratrix denied the plaintiff's right to recover, but did not set up *plene administravit*, and a verdict for $500 was recovered by the plaintiff :—

Held, that the judgment should be that the debt and costs should be levied *de bonis testatoris ; et si non, de bonis propriis* as to the costs only.

The Judicature Act has not altered the form of the judgment in such cases. *Lince* v. *Faircloth*, 14 P. R. 253.

Form of.]—The practice in force before the Judicature Act, under which a plaintiff taking issue on and failing on an executor's plea of *plene administravit*, could not have judgment of assets *quando*, no longer exists, and it is now proper to give a plaintiff judgment of assets *quando*, if his debt be established and such a judgment be desired.

Judgment of the County Court of Prince Edward on this point reversed. *McKibbon* v. *Feegan*, 21 A. R. 87.

VII. Payment to and by.

Life Insurance—*Infants.*]—Moneys payable to infants under a policy of life insurance may, when no trustee or guardian is appointed under secs. 11 and 12 of R. S. O. ch. 136, be paid to the executors of the will of the insured as provided by section 12, without security being given by them, and payment to them is a good discharge to the insurers. *Dodds* v. *Ancient Order of United Workmen*, 25 O. R. 570.

Maintenance—*Fund in Hands of Administrator.*]—Where an infant's fund is in Court or under the control of the Court, a summary order may be granted for the application of it in maintenance, upon a simple notice of motion.

But if the money is outstanding in the hands of trustees or others, unless they submit to the jurisdiction, summary proceedings are inappropriate.

And a summary application by the guardian of infants for payment to him or into Court, by the administrator of the estate of the infants'

father, of a fund in his hands, was dismissed, where it was opposed by the administrator.

Re Wilson, 14 P. R. 261, distinguished.

Re Lofthouse, 29 Ch. D. 921, followed. *Re Coutts*, 15 P. R. 162.

Payment out to Administrator—*Infants.*]—Money in Court belonging at the time of her death to an intestate was paid out to her administrator notwithstanding that infants might be or might become entitled to it or a share of it.

Semble, if the money belonged specifically to infants, the disposition might be otherwise. *Stewart* v. *Whitney*, 14 P. R. 147.

Payment out to Administratrix—*Infants.*]—The administratrix of a deceased party who had died before the Devolution of Estates Act came into force was allowed to take out of Court a sum of $210, which was part of the personal estate of the deceased, notwithstanding that two infants were among the next of kin who would be entitled to share in the estate after payment of debts, etc.

Hanrahan v. *Hanrahan*, 19 O. R. 396, followed. *Re Parsons, Jones* v. *Kelland*, 14 P. R. 144.

VIII. Powers and Liabilities.

Building—*Want of Repair — Damages.*]—The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair, or use and management, which reasonable care can guard against.

Dame A. T. sued J. F. and M. W. F. personally as well as in their quality of testamentary executors and trustees of the will of the late J. F., claiming $4,000 damages for the death of her husband who was killed by a window falling on him from the third story of a building, which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F., and his children for whom the said J. F. and M. W. F. were also trustees. The judgment of the Courts below held the appellants liable in their capacity of executors of the general estate and trustees under the will:—

Held, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair as well personally as in their quality of trustees (*d' héritiers fiduciaires*) for the benefit of G. F.'s children; but were not liable as executors of the general estate.

Where parties are before the Court *qua* executors and the same parties should also be summoned *qua* trustees an amendment to that effect is sufficient and a new writ of summons is not necessary. *Ferrier* v. *Trepannier*, 24 S. C. R. 86.

Contract to Buy from Administrators—*Execution.*]—The administrators of an insolvent deceased person contracted to sell some of his lands. Subsequently to the contract a creditor who had obtained a judgment against the deceased in his life time issued execution thereon under an *ex parte* order therefor against the estate in the hands of the administrators:—

Held, that the execution formed no charge or encumbrance on the lands contracted to be sold.

Orders should not be made *ex parte* allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator. *In re Trusts Corporation of Ontario and Bickmer*, 26 O. R. 191.

Devise—*Legacy Charged on Land—Sale by Executors in Order to Pay the Legacy.*]—A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children to whom the lot descended.

On an application by the executors at the instance of the Official Guardian, it was:—

Held, that it was the duty of the executors to sell the land and pay the legacy. *Re Eddie*, 22 O. R. 556.

Exchange—*Speculation.*]—An executor or administrator cannot, having regard to R. S. O. ch. 108, sec. 9, and 54 Viet. ch. 18, sec. 2 (O.), make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own. *Tenute* v. *Walsh*, 21 O. R. 309.

Renewal of Lease.]—Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew. *Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205.

Sale—*Surviving Executor.*]—Where executors are given express power to sell lands, whether coupled with an interest or not, such power can be exercised by a surviving executor.

The Devolution of Estates Act and amendments do not interfere with an express power of sale given by a will to executors extending beyond the periods of vesting prescribed by those Acts. *In re Koch and Wideman*, 25 O. R. 262.

Sale — *Executor of Surviving Executor.*]—A testator by his will directed his real and personal property to be sold and the proceeds to be divided and distributed, and appointed two executors to carry out his will, both of whom died before the estate was realized:—

Held, that the executor of the last surviving executor of the testator's will had power to sell and convey the land. *Re Stephenson, Kinnee* v. *Malloy*, 24 O. R. 395.

Statute of Limitations—*Acknowledgment.*]—An acknowledgment of indebtedness by letter written after the creditor's decease by the defendant to the person who is entitled to take out letters of administration to the creditor's estate and who does, after the receipt of the letter, take out such letters, is a sufficient acknowledgment within the Statute of Limitations.

Judgment of the County Court of Bruce affirmed, Macleman, J.A. dissenting. *Robertson* v. *Burrill*, 22 A. R. 356.

Vesting of Estate—*Registration of Caution.*]—The provisions of 56 Viet. ch. 20 (O.), as to registration of caution apply to a case in which probate has not been taken out or letters of

administration obtained till more than a year after the death of the owner. By virtue of section 2, the effect of such subsequent registration would be only to withdraw to or vest in the executor or administrator so much of the land as is properly available for the purposes of administration.

The provisions of 56 Vict. ch. 20 (O.), are so engrafted on 54 Vict. ch. 18 as to make both Acts apply to all persons dying after 1st July, 1886.

In re Baird, 13 C. L. T. 277, reconsidered. *In re Martin*, 26 O. R. 465.

IX. Probate.

Ancillary Probate—*Surrogate Court.*]—A will executed by a person when domiciled in the Province of Quebec before two notaries there, in accordance with the law of that Province, not acted upon or proved in any way before any Court there, is not within the Act respecting Ancillary Probates and Letters of Administration, 51 Vict. ch. 9 (O.).

Judgment of the Surrogate Court of Bruce affirmed. *In re Maclaren*, 22 A. R. 18.

Infant Executor.]—A grant of probate to an infant executor along with an adult is not a nullity. *Cumming* v. *Landed Banking and Loan Co.*, 20 O. R. 382. *See* this case, *ante* 442.

Letters of Administration—*Revocation.*]—*See McPherson* v. *Irvine*, 26 O. R. 438, *ante* 440.

X. Restraining Executor From Acting.

Executor Becoming Bankrupt and Intemperate—*Appointment of Receiver.*]—Where a person named as an executor was at the time of the making of the will in excellent credit and circumstances, but before the death of the testator became insolvent and made an assignment for the benefit of his creditors, and also apparently became intemperate, an injunction was granted restraining him from interfering with the estate; and the appointment of a receiver was directed. *Johnson* v. *McKenzie*, 20 O. R. 131.

XI. Right of Retainer.

Devolution of Estates Act—*Assignment for Creditors.*]—Under their father's will, two of his sons were to receive a share of the proceeds of certain land to be sold on the death of t widow, who was still alive. They also owed the testator a certain debt, which, by the will, was to be payable in five yearly instalments from the time of his death.

About two years subsequent thereto the sons made an assignment for the benefit of their creditors under R. S. O. ch. 124:—

Held, (1) that the effect of the assignment was by virtue of sec. 20, sub-sec. 4, of that Act, to accelerate payment of the debt due to the estate. (2) That the executors, being also the trustees of the land of which the sons were to receive shares when sold under the will, held security for their claim within the meaning of that Act, having (because of the Devolution of Estates Act) the right to impound the sons' shares under the will as against their debt to the estate. This security the executors and trustees should value pursuant to R. S. O. ch. 124. *Tillie* v. *Springer*, 21 O. R. 585.

XII. Succession Duty.

Residue — *Pro Rata.*]—A testator devised and bequeathed all his real and personal estate to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees, and others to charitable associations, and provided that the residue of his estate should be divided *pro rata* among the legatees:—

Held, that it was the duty of the executors to deduct the succession duty payable in respect of the pecuniary legacies, before paying the amounts over to the legatees, and they had no right to pay such succession duty out of the residue left after paying the legacies in full.

Where the residue of an estate is directed to be divided *pro rata* among prior legatees they take such residue in proportion to the amount of their prior legacies. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

XIII. Survival of Action.

Damages.] — An action of injury to the person now survives to the executor of the plaintiff, who can, in case of his death *pendente lite*, on entering a suggestion of the death and obtaining an order of revivor, continue the action. *Mason* v. *Town of Peterborough*, 20 A. R. 683.

EXECUTORY DEVISE.

See Will.

EXEMPTIONS.

See Assessment and Taxes, V.—Execution, III.

EXPERTS.

See Wright v. *Collier*, 19 A. R. 298, *ante* 420.

EXPRESS COMPANY.

See Carriers.

EXPRESS WAGGONS.

By-law Licensing—*Ultra Vires.*]—A by-law passed under sec. 436 of the R. S. O. ch. 184, for licensing express waggons, authorized the alteration by agreement of the rates fixed thereby :—

Held, beyond the powers conferred by the statute, and a conviction under the by-law for refusal to pay charges was quashed. *Regina* v. *Latham*, 21 O. R. 616.

EXPROPRIATION OF LAND.

See ARBITRATION AND AWARD—CROWN, I.—RAILWAYS.

EXPULSION.

See CLUB—INSURANCE, V.

EXTENSION OF TIME.

See CONTRACT, V.

EXTRADITION.

Alibi—*Identity—Extradition Judge—Forgery—Variance from Proof—Christian Name of Endorser—Reading over Foreign Depositions to Prisoner.*]—Where evidence is given by the prosecution before an extradition Judge positively identifying the prisoner, the Judge cannot receive evidence on behalf of the prisoner to shew an *alibi* ; for that would be in effect trying the guilt or innocence of the prisoner ; if the evidence given by the prosecution is sufficient to justify the committal of the prisoner, he must be committed under section 11 of the Extradition Act, R. S. C. ch. 142.

Semble, that a prisoner is entitled to go into evidence to disprove his identity ; but that means his identity with the person named in the warrant ; not his identity with the person who actually committed the extradition crime.

The Junior Judge of a County Court is "a Judge of a County Court," and has the functions of an extradition Judge.

Re Parker, 19 O. R. 612, followed.

R. S. C. ch. 142, sec. 6, sub-sec. 2, is directory only ; and the neglect of a Judge to forward to the Minister of Justice a report of the issue of a warrant, as required by the sub-section, is not a ground for the discharge of the prisoner.

The information upon which a warrant issued committing a person to await extradition for forgery, stated the Christian name of the endorser of the forged instrument as Albert, whereas when the instrument was proved it appeared to be James :—

Held, that the variance was immaterial under sections 57 and 58 of R. S. C. ch. 174, which are made applicable to extradition proceedings by section 9 of R. S. C. ch. 142.

It was objected by the prisoner that certain depositions taken abroad and put in by the prosecution were not read over to the prisoner as required by section 70 of R. S. C. ch. 174 :—

Held, that the objection was not one which as a matter of law would entitle a prisoner to be discharged ; and it should not be given effect to as a matter of discretion because it was entirely technical in its character. *Re Garbutt*, 21 O. R. 179. *See* the next case.

Alibi—*Identity—Extradition Judge—Forgery—Interested Witness—Corroboration.*]—In extradition proceedings for forgery of a draft on a bank in the United States :—

Held, that a Junior Judge of a County Court of this Province is an extradition Judge within the Extradition Act, R. S. C. ch. 142.

Re Parker, 19 O. R. 612, followed.

In extradition cases a warrant of commitment may be issued in proceedings instituted in this Province ; the previous issue of a warrant in the country demanding extradition not being essential.

Re Caldwell, 5 P. R. 217, followed.

In such cases evidence in support of an *alibi* should be refused.

A witness identifying the prisoner as the forger was the person who identified him at the bank when he procured the amount of the forged draft ; but it did not appear that he had incurred any responsibility to the bank :—

Held, that no interest was shewn in the witness so as to require corroboration ; and further that the interest must be apparent on the face of the draft or immediately arise from the nature of the transaction or from his own acknowledgment.

Regina v. *Hagerman*, 15 O. R. 598, followed.

Semble, in extradition cases the evidence of interested parties need not be corroborated. *Re Garbutt*, 21 O. R. 465.

Forgery—*Fictitious Bank Account—Law of Canada—Defective Warrant—Amendment.*]—In extradition proceedings, it is sufficient if the evidence disclose that the offence under the Extradition Acts is one which, according to the laws of Canada, would justify the committal for trial of the offender had the offence been committed therein, it not being essential to shew that the offence was of the character charged according to the laws of the foreign country where it was alleged to have been committed ; and *quære*, whether evidence is admissible to shew what the foreign law is.

In pursuance of a fraudulent conspiracy between the prisoner and his brother, a cheque was drawn by the latter, under a fictitious name, on a bank in which an account had been opened by him in such fictitious name, there being, to the knowledge of the prisoner, no funds to meet it, and which, on the faith of its being a genuine cheque, another bank was induced by the prisoner to cash :—

Held, that the cheque was a "false document," both at common law and under section 421 of the Criminal Code, 1892, and that there was sufficient evidence to justify the committal of the prisoner for extradition for uttering a forged instrument.

Regina v. *Martin*, 5 Q. B. D. 34, distinguished.

Where, in such proceedings, the warrant of commitment stated that the prisoner had been "committed" for an extraditable offence, instead of his having been "accused" thereof, the fact that the evidence shewed such an offence will not warrant the Court in remanding the prisoner for extradition ; but the Court may, if necessary, permit the return to be amended, and for such purpose allow it to be taken off the files and refiled. *Re Murphy*, 26 O. R. 163. *See* the next case.

Forgery—*False Document.*]—The prisoner's brother opened a bank account in an assumed name and drew cheques from time to time thereon. Several of these cheques were paid, but the last one the prisoner cashed at his own bank, knowing that there were no funds to meet it :—

Held, per Hagarty, C.J.O., and Maclennan, J.A. That there was evidence from which it might reasonably be inferred that the opening of the account in the assumed name was part of a conspiracy between the prisoner and his brother to defraud and that there was, therefore, the fraudulent uttering of a false document which would constitute forgery.

Per Burton, and Osler, JJ.A.—That as the account was a genuine one, and there was no false representation as to the drawer of the cheque, the offence of forgery was not made out :—

Held, also, per Hagarty, C.J.O., and Maclennan, J.A.—That it is not necessary to shew in extradition proceedings that the prisoner is liable to conviction of the crime charged according to the law of the demanding country.

Per Burton, and Osler, JJ.A.—That it must be shewn that the prisoner is liable to conviction for the crime charged, according to the law of both countries.

In the result the judgment of the Common Pleas Division, 26 O. R. 163, was affirmed. *In re Murphy*, 22 A. R. 386.

FACTORIES ACT.

See Master and Servant, III.

FAMILY ARRANGEMENT.

Division of Property.]—Upon the death of a life tenant the three surviving children of a deceased nephew of the testator (one daughter had died a short time before intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew, and one-sixth to each of the others. In 1885 a partition deed was executed of part of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards commenced by him, asking that the title might be declared, the partition deed set aside and the rents and proceeds of sales received by the brother and sister repaid to him :—

Held, affirming the judgment of Robertson, J., 16 O. R. 341, that as there was no consideration therefor and no compromise or settlement of any disputed question the partition deed and other dealings could not be supported as in the nature of family arrangements. *Baldwin* v. *Kingstone*, 18 A. R. 63.

Affirmed by the Privy Council, 18 A. R. Appendix.

FALSE IMPRISONMENT.

See Malicious Prosecution.

FELONY.

See Criminal Law.

FENCES.

Division Fences—*Trespass—Fence-Viewers.*]—The Line Fence Act, R. S. O. ch. 219, sec. 3, provides that "owners of occupied adjoining lands shall make, keep up, and repair a just proportion of the fence which marks the boundary between them" :—

Held, per Ferguson, J., affirming the decision of Armour, C.J., that a boundary fence, under R. S. O. ch. 219, should be so placed that when completed the vertical centre of the board wall will coincide with the limit between the lands of the parties, each owner being bound to support it by appliances placed on his own land :—

Held, per Boyd, C., contra, that if the boundary line be between the posts on one side of the fence, and the scantling and boards on the other, so that there is practical equality in the amount of space occupied by the posts and that occupied by the continuous boards, and if that method is sanctioned by local usage, neither owner has legal ground for complaint. *Cook* v. *Tate*, 26 O. R. 403.

FINAL JUDGMENT.

See Supreme Court of Canada, XI., XIII.

FIRE.

Expropriation.]—Danger of fire to be considered in awarding compensation for lands expropriated for railways. *See Straits of Canseau Marine R. W. Co.* v. *The Queen*, 2 Ex. C. R. 113; *ante* 277.

Fall of Wall After Fire.]—Where a fire destroyed the defendant's house, leaving one of the walls standing in a dangerous condition, and the defendant knowing the fact, neglected to secure or support the wall or take it down, and some days after the fire it was blown down by a high wind and damaged the plaintiff's house :—

Held, affirming the judgments of the Courts below, that the defendant could not shield himself under the plea of *vis major*, and was liable for the damage caused. *Nordheimer* v. *Alexander*, 19 S. C. R. 248.

Steam Thresher—*Spark Arrester.*]—On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of defendants in working a steam engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on

said engine, and the learned Judge directed the jury that "if there was no spark arrester in the engine that in itself would be negligence for which defendants would be liable."

Plaintiff obtained a verdict which was set aside by the Court *en banc* and a new trial ordered for misdirection.

On appeal to the Supreme Court of Canada :—

Held, Strong, J., dissenting, that the Judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence, and such direction may have influenced them in giving their verdict; therefore the judgment ordering a new trial should not be interfered with. *Peers* v. *Elliott*, 21 S. C. R. 19.

Storage of Wheat — *Loss by Fire.*]—*See Clark* v. *McClellan*, 23 O. R. 465, *ante* 65.

Tug—*Proximate Cause—Reasonable Precautions.*]—The plaintiff, owner of a scow, had, without authority, moored it permanently to the shore of a basin artificially created by the excavation of land adjacent to a navigable river, which formed the boundary at that point between Canada and the United States The soil of the shore and basin had been patented to certain persons, the usual rights of access to the shore and of navigation being reserved. The defendants, licensees of the owners of the shore, with authority to take, and for the purpose of taking, sand from the shore by means of their own scow and hired tug, of which the master was the owner, placed the tug and scow alongside the plaintiff's scow, by order of the foreman of the defendants' scow, to whose orders the master of the tug was bound to conform.

Owing to the negligence of the master, the plaintiff's scow caught fire from sparks emanating from the smoke-stack of the tug, and was destroyed :—

Held, that the plaintiff, although he had a right to use the waters of the basin for navigation and the shore for landing, was not entitled to use them in the way he was doing :—

Held, however, that the defendants, while entitled to similar rights, and, in addition, to use the shore for any other purpose which did not interfere with the rights of the public, were bound to omit no reasonable precautions to avoid injuring the plaintiff's property; and that they were liable for the negligence of the master of the tug.

Davies v. *Mann*, 10 M. & W. 546, applied and followed. *Cram* v. *Ryan*, 24 O. R. 500. *See* the next case.

Tug.]—Held, affirming the decision of Street, J., 24 O. R. 500, that the defendants were liable for the negligence of the owner of the tug hired by them in so placing it as to communicate fire to the plaintiff's scow, as in doing so he was obeying the orders of the defendants foreman, and was under his direct and personal control.

Bartonshill Coal Co. v. *Reid*, 3 Macq. 266, followed :—

Held, however, reversing the decision of Street, J., that the plaintiff in mooring his scow where he did was not a trespasser, at all events as against the defendants, who were mere licensees "to take sand from in front of" the land granted by the Crown.

The grant to the shore of the river, reserving free access to the shore for all vessels, boats, and persons, carried the land to the water's edge, and not to the middle of the stream.

The effect of the removal of the shore line back from its natural line was to make the water so let in as much *publici juris* as any other part of the water of the river, and such removal did not take away the right of free access to the shore so removed. *Cram* v. *Ryan*, 24 O. R. 524.

FIRE INSURANCE.

See INSURANCE, III.

FISHERIES.

See GAME.

FIXTURES.

Execution—*Mortgage of Fixtures as Chattels —Mortgage of Realty — Discharge of Chattel Mortgage.*]—The fact that fixtures affixed to the freehold in the usual way have sometimes been mortgaged as chattels, and on other occasions have passed with a mortgage of the freehold, does not render them exigible to an execution against goods, if at the time of the seizure the chattel mortgages are non-existent, and a mortgage of the freehold is in existence as a first charge thereon. *Carson* v. *Simpson*, 25 O. R. 385.

Immovables—*Immovables by Destination—Mill Machinery.*] — Under the provisions of Articles 379 and 380 C. C. L. C. machinery in mills becomes immovable by destination, and forms part of the realty. *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121.

Landlord and Tenant — *Machinery — Chattels.*]—Where a trade fixture is attached to the freehold, it becomes part thereof, subject to the right of the tenant to remove it, if he does so in proper time; in the meantime it remains part of the freehold.

Meux v. *Jacobs*, L. R. 7 H. L., at pp. 490, 491, followed.

But where the parties have made a special contract, they have defined and made a law for themselves on the subject.

Davey v. *Lewis*, 18 U. C. R., at p. 30, followed.

In a lease dated in July, 1890, there was a provision that the lessees might, during the term, erect machinery upon the demised premises, which should be the property of the lessees and removable by them, but not so as to injure the building, etc. The lessees affixed machinery to the building demised, and afterwards, in April, 1892, made an assignment for the benefit of creditors. The lessors elected to forfeit, under a clause in the lease, but they permitted M. G., a purchaser of the machinery from the lessee's assignee, to remain in possession, paying rent until December, 1892, when

she ceased, leaving the machinery on the premises. The defendants became the purchasers of the freehold by virtue of a sale under the power in a mortgage in July, 1892, but the lease had come to an end before their title commenced. The plaintiffs claimed the machinery under a chattel mortgage made by M. G. on the 25th April, 1892, and a subsequent assignment from her of the whole of her interest therein, and in March, 1893, they brought this action to obtain possession :—

Held, that the machinery was, owing to the provisions in the lease, chattels, and the property of the lessees, and continued to be so until they made the assignment, when it passed as chattels to their assignee, who transferred it as chattels to M. G., and she to the plaintiffs; that the forfeiture of the term did not affect the right to the property, nor the right to remove it; that nothing had taken place to defeat that right, and the plaintiffs were in good time to exercise it.

The defendants, being in possession of the machinery, and being asked for it by the plaintiffs, asserted title in themselves, and warned the plaintiffs that if proceedings were taken they would set up such title :—

Held, that a wrongful detention of the goods was shewn, and that the action of replevin therefore lay. *Scarth* v. *Ontario Power and Flat Co.*, 24 O. R. 446.

Landlord and Tenant—*Short Forms Act, R. S. O. ch. 106—Removal of Fixtures.*]—The term "fixtures," as used in the extended form of the covenants to repair and leave the premises in good repair, in a lease made pursuant to the Short Forms Act, R. S. O. ch. 106, includes only irremovable fixtures, which are such things as may be affixed to (*e.g.*, doors and windows), or placed on (*e.g.*, rail fences), the freehold by the tenant, the property in which passes to the landlord immediately upon being so affixed or placed, and in which the tenant at the same time ceases to have any property; and does not include removable fixtures, which are such things as may be affixed to the freehold for the purpose of trade or of domestic convenience or ornament, a qualified property in which remains in the tenant, or such things as may be affixed to the freehold for merely a temporary purpose, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains in the tenant.

Where the lessor has elected to re-enter for a forfeiture, the lessee has the right, while he remains in possession, to remove fixtures put up by him for the purposes of his trade, and has a reasonable time, after such election, within which to do so.

And where he attempts to do so within a reasonable time, and is prevented by the lessor, the latter is liable to an action for the value.

Judgment of Boyd, C., reversed. *Argles* v. *McMath*, 26 O. R. 224. Affirmed in appeal, 23 A. R. 44.

Lien Agreement—*Machinery.*]—*See Waterous Engine Works Co.* v. *McCann*, 21 A. R. 486, *post*, MORTGAGE, VIII.

Mortgage — *Dwelling-house — Hot-air Furnace.*]—A hot-air furnace fixed to the floor by screws and placed in a dwelling-house, during its construction, by a mortgagor, in pursuance of the agreement for the loan on the property, cannot be removed by him during the currency of the mortgage. The mortgagee is entitled to an order restraining its removal, and if removed no title to it passes as against the mortgagee even to an innocent purchaser, and the former is entitled to an order for its replacement. *Scottish American Investment Co.* v. *Sexton*, 26 O. R. 77.

Mortgage—*Execution—Machinery.*]—Certain machinery was placed *in situ* on land and housed with a view to the utilization of the land as a phosphate mine; and it was intended to utilize the machinery upon the land, moving it from place to place so long as veins could be found. The soil was excavated in order to form a bed for the boiler and hoist, and the machinery was firmly attached by bolts to sleepers or skids placed on the rock bottom of the excavation; and a house was erected over the machinery, to erect which the soil was also to some extent excavated. The boiler and machinery were also fastened to the building by rods inside underneath the floor, and the smoke stack was steadied by guys fastened to the ground and to stumps in the ground :—

Held, that the chattels in question were fixtures and could not be removed without the consent of the mortgagee.

Semble, that apart from this, it was impossible to sell these fixtures under an execution against goods so long as the physical attachment to the land existed, even if the owner of the equity of redemption had the right to detach and remove them as chattels. *Rogers* v. *Ontario Bank*, 21 O. R. 416.

Railways—*Immovables by Destination.*]—In virtue of the provision of a trust conveyance, granting a first lien, privilege and mortgage upon the railway property, franchise and all additions thereto of the South Eastern Railway Company, and executed under the authority of 43 & 44 Vict. (Q.) ch. 49, and 44 & 45 Vict. (Q.) ch. 43, the trustees of the bond holders took possession of the railway. In actions brought against the trustees after they took possession, by the appellants, for the purchase price of certain cars and other rolling stock used for operating the road, and for work done for, and materials delivered to, the company after the execution of the deed of trust, but before the trustees took possession of the railway :—

Held, 1st, affirming the judgments of the Court below, that the trustees were not liable. 2. That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when movables become immovable by destination (as was the result with regard to the cars and rolling stock in this case) and the immovable to which the movables are attached is in the possession of a third party or is hypothecated. Article 2017 C.C. 3. But even considered as movables such cars and rolling stock became affected and charged by virtue of the statute and mortgage made thereunder, as security to the bond holders, with right of priority over all other creditors, including the privileged unpaid vendors.

Per Gwynne, J., that the appellants might be entitled to an equitable decree, framed with due

regard to the other necessary appropriations of the income in accordance with the provision of the trust indenture, authorizing the payment by the trustees "of all legal claims arising from the operation of the railway including damages caused by accidents and all other charges," but such a decree could not be made in the present action.

Per Strong, J., *quære*, whether the principle as to the applicability of current earnings to current expenses, incurred either whilst or before a railway comes under the control of the Court by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by courts in this country. *Wallbridge* v. *Farwell*, *Ontario Car and Foundry Co.* v. *Farwell*, 18 S. C. R. 1.

FORECLOSURE.

See MORTGAGE, VI.

FOREIGN COMMISSION.

See EVIDENCE, VI.—PRACTICE, XIV.

FOREIGN CREDITOR.

See ALIEN.

FOREIGN JUDGMENT.

See JUDGMENT, VII.

FOREIGN LAW AND FOREIGNER.

Administration.]—*See Milne* v. *Moore*, 24 O. R. 456, *ante* 13, as to rights of foreign creditors in administration proceedings.

Ante-nuptial Contract—*Matrimonial Domicil.*] — The plaintiff's husband entered into an ante-nuptial contract in the Province of Quebec with her concerning their rights and property, present and future. He subsequently moved to this Province and died there intestate:—

Held, that this contract must govern all his property movable and immovable, though situate in this Province, provided that the laws of this Province relating to real property had been complied with; and that it made no difference whether the matrimonial domicil of the parties at the time of the contract and marriage was in Ontario or Quebec. *Taillifer* v. *Taillifer*, 21 O. R. 337.

Bill of Lading.]—A bank in this Province, under an agreement with a customer, domiciled here, advanced money to him to enable him to buy cattle in this Province, which, under the agreement, when purchased were to be forwarded by rail by him to Montreal, and to be shipped by steamship thence to Liverpool, the bank having no control over the cattle until they reached the vessel, when they were to be received by the steamship for the bank, and the customer's possession and control over them was to end; bills of lading therefor in favour of the bank being then signed. The cattle were purchased and sent to Montreal as agreed on. On arriving at the steamship, and before the bills of lading were made out, a creditor of the customer attached the cattle under a writ of *saisie-arret*, but the steamship owners, disregarding the writ, signed the bills of lading and conveyed the cattle to their destination. The creditor subsequently recovered a judgment for the value of the cattle, in the Province of Quebec, against the steamship owners, which the latter, having paid, sought to prove on the estate of the bank in winding-up proceedings, but the claim was disallowed by the Master.

On appeal from him it was:—

Held, that, apart from the Banking Act, R. S. C. ch. 120, by virtue of the agreement between the bank and its customer the possession and a special property in the goods passed to the bank, of which the steamship owners were aware, and having assented thereto upon receipt of the cattle, before any process was served, must be taken to have held the cattle for the bank.

The agreement having been made, and the parties to it being domiciled in this Province, the rights of the parties to it must be determined by the laws of this Province and not by those of Quebec, which, however, were not shewn to be different:—

Held, also, that the rights of the parties were entirely governed by the provisions of the Banking Act, and following, though not altogether approving, *Merchants' Bank* v. *Suter*, 24 Gr. 356, that under sec. 53, sub-sec. 4 of the Act, the bank had, under the agreement and the facts proved, an equitable lien upon the cattle from the time of the making of the agreement, which prevailed over the attachment:—

Held, lastly, that the bank "acquired" the bills of lading within the meaning of the Banking Act as soon as the cattle were received by the steamship, although it did not at that time actually "hold" the bills. The appeal was therefore dismissed. *Re Central Bank, Canada Shipping Co.'s Case*, 21 O. R. 515.

Bill of Sale.]—The rights of parties resident in a foreign country and there making a contract in regard to goods in Ontario, so far as the formalities of registration or change of possession are concerned, are governed by the law of Ontario.

River Stave Co. v. *Sill*, 12 O. R. 557, followed. *Marthinson* v. *Patterson*, 20 O. R. 125. Affirmed in appeal, 19 A. R. 188.

Bond—*Interest.*] — In assessing damages in the nature of interest on a bond payable at a particular place reference should, in general, be had to the rules in force at the place where the same is so payable. *The Queen* v. *Grand Trunk R. W. Co.*, 2 Ex. C. R. 132.

Foreign Land—*Fraudulent Conveyance.*]—An action will not lie in this Province by a

judgment creditor to set aside as fraudulent, a conveyance made by his debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in this Province.

Although the Court will interfere where the parties are within the jurisdiction in some cases where fraud exists in respect to specific property out of the jurisdiction, by ordering conveyances to be made to the person entitled, it will not do so when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce. *Burns* v. *Davidson*, 21 O. R. 547.

Foreign Land — *Redemption Action.*] — A creditor who has recovered judgment in Manitoba, and who has by virtue of an Act of that Province a lien on the lands of the judgment debtor there, cannot maintain in the Courts of Ontario an action against a mortgagee, for redemption of a mortgage on lands in Manitoba, which are subject to the lien.

Judgment of the Queen's Bench Division, 23 O. R. 327, reversed. *Henderson* v. *Bank of Hamilton*, 20 A. R. 646. Affirmed by the Supreme Court, 23 S. C. R. 716.

Foreign Land— *Title.*]—The Courts in this Province have no jurisdiction to entertain an action for determining the title to lands in the North-West Territories, even though the parties be resident here.

Re Robertson, 22 Gr. 449, distinguished. *Ross* v. *Ross*, 23 O. R. 43.

Legacy to Unincorporated Association.]—A testator domiciled in the State of Missouri, U.S., at the time of the execution of his will, and at the time of his death, bequeathed personal property, situate in this Province, to a Lodge of Oddfellows in the State of New York, U.S., which, although unincorporated at the time of the testator's death, was subsequently authorized by law to take and hold, in the names of trustees, property devised to the lodge.

In an action to test the validity of the bequest :—

Held, that the parties having selected their forum in this Province, the action must be dealt with here according to the law of the testator's domicil, which, in the absence of evidence to the contrary, would be presumed to be the same as the law of this Province :—

Held, also, there being no prohibitory law of the legatee's domicil, the bequest to the lodge was a valid bequest to the members thereof, and that the trustees of the lodge could be added as parties defendants, on behalf of all the members.

Walker v. *Murray*, 5 O. R. 638, followed. *Graham* v. *Canandaigua Lodge*, 24 O. R. 255.

Money in Court—*Payment Out—Marriage.*] —Where a female was entitled, at majority, to payment out of Court of a sum of money, and it appeared that, although only nineteen years of age, she was married and domiciled in a foreign country, by the laws of which a female is entitled, upon marriage, to receive money due her, an order was made for immediate payment out. *Kavanagh* v. *Lennon*, 16 P. R. 229.

Money in Court—*Foreign Guardian—Payment Out.*]—*See Re Slosson*, 15 P. R. 156, *post* 502.

Penalty.]—An action for a penalty incurred under a foreign law, brought by a private individual in his own interest in the foreign country, is not "penal" in the sense used in international law, and may be enforced by action in this Province. The proper test, whether an action is in such a sense penal, is whether the proceeding is in favour of the State whose law has been infringed; if it is it cannot be enforced.

By a statute of the State of New York, any of the officers of a corporation signing any certificate or report, which shall be false in any material representation, shall be liable for all the debts of the corporation contracted while they are officers thereof. The respondent, while a director of a corporation, organized under the laws of New York, signed a certificate containing representations which were material and false, and was sued in that State by the appellant, who was then a creditor, and judgment was recovered against him for the debt. On an action on this judgment in this Province :—

Held, that the action was maintainable.

Judgment of Street, J., 17 O. R. 295, and of the Court of Appeal, 18 A. R. 136, reversed. *Huntington* v. *Attrill*, 20 A. R. Appendix i. S. C., [1893] A. C. 150.

Winding-Up Act — *Claim Under Quebec Law.*]—There is nothing in section 56 of the Dominion Winding-Up Act which alters or interferes with the *lex loci contractus* in the case of a claim.

Where a lease of property situate in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the lessor, on the insolvency of the lessee, and by the law of that Province (Civil Code, Article 1092) on such insolvency, the rent not yet exigible, by the terms of the lease, becomes so, a claim for the whole rent, taxes, etc., to the end of the term was, on the insolvency of the lessee company, allowed to the lessors in liquidation proceedings under the Dominion Act. *In re Harte and Ontario Express and Transportation Co.*, 22 O. R. 510.

Winding-Up Act—*Foreign Company.*]—A winding-up order by a Canadian Court in the matter of a Scotch company incorporated under the Imperial Winding-Up Acts doing business in Canada, and having assets and owing debts in Canada, which order was made upon the petition of a Canadian creditor, with the consent of the liquidator previously appointed by the Court in Scotland, as ancillary to the winding-up proceedings there, is a valid order under the said Winding-up Act of the Dominion. *Merchant's Bank of Halifax* v. *Gillespie*, 10 S. C. R. 312, distinguished. *Allen* v. *Hanson*. *In re Scottish-Canadian Asbestos Co.*, 18 S. C. R. 667.

FORFEITURE.

See LANDLORD AND TENANT, VIII.—PATENT OF INVENTION.

FORGERY.

See CONSTITUTIONAL LAW, II.—CRIMINAL LAW, IV.—EXTRADITION.

FORTUNE TELLING.

See CRIMINAL LAW, IV.

FRAUD AND MISREPRESENTATION.

Collusive Purchase—*Division Court.*]—The goods of a tenant were seized for rent and offered for sale by a bailiff. The tenant bid them in and they were immediately seized under an execution against him on behalf of an execution creditor of the tenant. They were then claimed by a third person, who alleged that the tenant was in reality bidding for him, and this claimant paid the purchase money :—

Held, that if the goods were sold at an undervalue owing to the bids being made by the tenant ostensibly for himself as part of a scheme between the tenant and claimant to defeat creditors by keeping down the price, the sale would be fraudulent and void as against the creditors of the tenant, though it would be good as far as the purchase money was concerned, which could not in any event be recovered back by the claimant. *Sullivan* v. *Francis*, 18 A. R. 121.

Deceit.]—In order that a representation may be actionable it must be fraudulently made. Where, therefore, in an action to recover damages for falsely representing that a forged cheque was genuine, the jury answered in the negative the question "Did the defendant falsely, fraudulently and deceitfully represent the signature to the cheque to be genuine, when in truth and in fact it was a forgery?" The action was held not maintainable, though in answer to other questions they found that the defendant made the representation without knowing whether it was true or false, without a reasonable belief in its truth and without making proper enquiries. *White* v. *Saye*, 19 A. R. 135.

Pretended Agent—*False Representations as to Authority—Ratification by Creditor—Indictable Offence.*]—Where payment is obtained from a debtor by one who falsely represents that he is agent of the creditor, upon whom a fraud is thereby committed, if the creditor ratifies and confirms the payment he adopts the agency of the person receiving the money and makes the payment equivalent to one to an authorized agent. The payment may be ratified and the agency adopted, even though the person receiving the money has, by his false representations, committed an indictable offence. *Scott* v. *Bank of New Brunswick*, 23 S. C. R. 277.

Life Insurance—*Surrender of Policy.*]—The rules which govern the purchase and sale of policies of life insurance are the same as those which govern the purchase and sale of any other species of personal property.

A contract for the surrender of a life policy, unlike a contract for life insurance, is not *uberrimæ fidei*.

The insured in a life policy, having no surrender value, applied to the insurers to purchase it, which they did for a small sum, he being at the time, to their knowledge as well as his own, seriously ill with heart disease. The insurers in no way misled the insured, who died shortly after the sale.

In an action by his executors to set aside the transaction :—

Held, that there was no evidence of fraud to submit to a jury. *Hill* v. *Gray*, 1 Stark. 434, explained and distinguished; *Smith* v. *Hughes*, L. R. 6 Q. B. 597, followed. *Jones* v. *Keene*, 2 Moo. & R. 348, distinguished. *Potts* v. *Temperance Life Assurance Co.*, 23 O. R. 73.

Sale of Goods—*Mistake of Vendor as to Identity of Vendee.*]—A manufacturing company transferred to a syndicate, which had lent it money, its works, plant, and material, and in effect its whole business, which the syndicate proceeded to carry on, on the company's premises, for its own benefit, and at its own risk. The managing director of the company, who had become the manager of the syndicate, after the above transfer, but pursuant to a correspondence commenced a few days before it, ordered as in his former capacity certain goods from the plaintiff, who subsequent to the transfer supplied the goods ordered which were used by the syndicate, and he afterwards took a note of the company for their price, on which, when dishonoured, he sued and obtained judgment against the company, being, however, all the time, ignorant of the circumstances above mentioned. About a week prior to the judgment, a winding-up order was obtained against the company, hearing of which the plaintiff at once commenced this action against the syndicate for the price of the goods, and afterwards before trial he obtained *ex parte* an order vacating the judgment against the company :—

Held, that the plaintiff was entitled to recover from the syndicate the price of the goods :—

Held, also, per Robertson, J., that the judgment vacated was absolutely null and void, having been obtained after the winding-up order without the leave of the Court :—

Per Meredith, J.—The judgment was at any rate irregularly entered, and when set aside, was as if it had never existed. *Keating* v. *Graham*, 26 O. R. 361.

Taking Advantage of One's Own Wrong.]—In an action to recover an amount received by the defendant for the plaintiff, the defendant pleaded *inter alia* that the action was premature inasmuch as he had got the money irregularly from the treasurer of the Province of Quebec on a report of distribution of the prothonotary before all the contestations to the report of collocation had been decided :—

Held, affirming the judgment of the Court below, that this defence was not open to the defendant, as it would be giving him the benefit of his own improper and illegal proceedings. *Bury* v. *Murray*, 24 S. C. R. 77.

Undisclosed Trust—*Enforcement.*]—The property of M. having been advertised for sale under power in a mortgage his wife arranged with the mortgagee to redeem it by making a cash payment and giving another mortgage for the balance. To enable her to pay the amount, B. agreed to lend it for a year taking an absolute deed of the property as security and holding it in trust for that time. A contract was drawn up by the mortgagee's solicitor for a purchase by B. of the property at the agreed price which B. signed, and he told the solicitor that he would advise him by telephone whether

the deed would be taken in his own name or his daughter's. The next day a telephone message came from B.'s house to the solicitor instructing him to make the deed in the name of B.'s daughter, which was done, and the deed was executed by M. and his wife and the arrangement with the mortgagee carried out. Subsequently B.'s daughter claimed that she had purchased the property absolutely, and for her own benefit, and an action was brought by M.'s wife against her and B. to have the daughter declared a trustee of the property subject to repayment of the loan from B. and for specific performance of the agreement. The plaintiff in the action charged collusion and conspiracy on the part of the defendants to deprive her of the property, and in addition to denying said charge defendants pleaded the Statute of Frauds:—

Held, affirming the decision of the Court of Appeal, 19 A. R. 602, Strong, J., dissenting, that the evidence proved that his daughter was aware of the agreement made with B., and the deed having been executed in pursuance of such agreement she must be held to have taken the property in trust as B. would have been if the deed had been taken in his name, and the Statute of Frauds did not prevent parol evidence being given of the agreement with the plaintiff. *Barton* v. *McMillan*, 20 S. C. R. 404.

Undue Influence — *Excessive Payment for Services.*]—Where by reason of the confidential relationship existing between plaintiff and defendant and the influence he was able to exert over her by asserting knowledge of matters which he alleged could be used to her prejudice, and which at the trial he admitted had no existence, he was enabled to procure from plaintiff an excessive amount for services performed, and which was paid by her even after she had obtained independent advice, the plaintiff was held entitled to recover the same back, less a reasonable amount for the services performed. *Disher* v. *Harris*, 25 O. R. 493.

FRAUD ON COMPOSITION.

See Bankruptcy and Insolvency, III.

FRAUDS—STATUTE OF.

See Contract, IV.—Principal and Agent, III.

FRAUDULENT CONVEYANCE.

Creditor's Action — *Attacking Creditor — Claim Under $40.*]—A creditor for an amount under $40 cannot attack a conveyance of land as voluntary or fraudulent, and he cannot improve his position by bringing his action on behalf of other creditors. *Zilliax* v. *Deans*, 20 O. R. 539.

Creditor's Action — *Execution Creditor — Voluntary Conveyance.*] — Where a creditor brings his action to set aside as fraudulent a conveyance made by his debtor of his property, without first obtaining judgment and execution, he must sue on behalf of all the creditors of the debtor, and in such action his relief will be confined to setting aside the conveyance, leaving him to resort to some independent proceeding to obtain execution against the property comprised in such conveyance.

The protection of 13 Eliz. ch. 5, is not confined to creditors only, but extends to creditors and others who have lawful actions; and in this case, where, before the impeached conveyance was made, all the moneys secured by a mortgage, subject to which the plaintiff had conveyed the mortgaged lands to the fraudulent grantor, had fallen due, the plaintiff had at the time of the making of the conveyance a lawful action upon the implied contract of his vendee to pay the moneys secured by the mortgage; and this implied contract was sufficiently proved against the fraudulent grantee by proof of the mortgage and of the conveyance by the plaintiff to the fraudulent grantor subject to the mortgage.

Where a conveyance is voluntary, it is only necessary to shew fraudulent intent on the part of the grantor. *Oliver* v. *McLaughlin*, 24 O. R. 41.

Creditor's Action — *Settlement.*] — Before judgment in an action by a creditor, on behalf of himself and all other creditors, to set aside a fraudulent conveyance, the actual plaintiff may settle the action on any terms he thinks proper, and no other creditor can complain; but where judgment has been obtained by the plaintiff, it enures to the benefit of all creditors, and the defendant cannot get rid of it by settling with the actual plaintiff alone. If they do so, any other creditor will be entitled to obtain the carriage of the judgment, and to enforce it; and if, upon appeal from the judgment, the actual plaintiff refuses to support it, the Court will give the other creditors an opportunity of doing so before reversing it. *Canadian Bank of Commerce* v. *Tinning*, 15 P. R. 401.

Estoppel — *Execution Creditor — Purchase of Mortgage — Denial of Mortgagor's Title.*]—An execution creditor who purchases and takes a transfer of a mortgage of property is not estopped thereby from setting up in an action against him for the seizure of the same property under his execution against the grantor of the mortgagor, that the said grantor was not the owner of the property in question, and that the conveyance to the mortgagor by him was fraudulent and void as against the creditors of the latter. *Gordon* v. *Proctor*, 20 O. R. 53.

Fraudulent Sale of Goods — *Debt not Due.*] —Under the 28th section of R. S. C. ch. 173, every one who makes or causes to be made, amongst other things, any assignment, sale, etc., of any of his goods and chattels with intent to defraud his creditors, or any of them, is guilty of a misdemeanour:—

Held, it is not essential, under the Act, that the debt of the creditor should, at the time of the sale, etc., be actually due. *Regina* v. *Henry*, 21 O. R. 113.

Fraudulent Sale of Goods — *Following Money in the Hands of Nominal Purchaser.*]— Where moneys arising from a feigned sale of goods, fraudulent and void as against creditors,

were at the time of the commencement of the action by a creditor to set the same aside, in the hands of the nominal purchaser, one of the defendants and a party to the transaction, he was ordered to pay the moneys into Court for distribution among the creditors of the insolvent, and in default of payment by him, it was ordered that execution should issue for the amount. *Musgrave* v. *Stewart*, 22 O. R. 290.

Fraudulent Transfer of Goods—*Action to Set Aside—Joinder of Action for Recovery of Penalty—Notes, Goods and Chattels.*]—An action by the party aggrieved to recover the moiety of the penalty imposed by section 3 of 13 Eliz. ch. 5, may be joined with an action to set aside a fraudulent transfer under that Act, in this case the transfer of certain promissory notes.

Bills and notes are, by virtue of the legislation passed since 13 Eliz., goods and chattels within that Act.

Section 28 of the R. S. O. ch. 173, only applies to the concluding part of said section 3, namely that relating to imprisonment on conviction, etc.

Where a defendant at the trial raises no claim of privilege, if any such exists, to his being examined in support of a claim for the recovery of the penalty under the statute of Elizabeth, such claim cannot afterwards be set up on appeal to the Divisional Court. *Millar* v. *McTaggart*, 20 O. R. 617.

Fraudulent Transfer of Property—*Following Proceeds.*]—An insolvent debtor, for the purpose of defeating the plaintiffs' claim against him, by voluntary deed conveyed the equity of redemption in certain lands to another creditor who, as previously arranged with the grantor, sold the property to an innocent purchaser and applied the proceeds in payment of all encumbrances on the property and all his own debts and those of certain other creditors of the grantor, and of a commission to himself in respect of the sale, and paid over the final balance to the grantor:—

Held, that the plaintiffs had no right of action against the fraudulent grantee to recover any part of the purchase money.

Musgrave v. *Stewart*, 22 O. R. 290, and *Cornish* v. *Clark*, L. R. 14 Eq. 184, distinguished. *Tennant* v. *Gallow*, 25 O. R. 56.

Husband and Wife—*Ante-nuptial Contract—Intent to Defeat Creditors.*]—A young man under twenty-one made an offer of marriage by letter to a young woman, and in the letter promised that if she would marry him he would, after the marriage, give her all the property he had (meaning real property), describing it as "my farm in Osprey," and "my property in Elmvale." She accepted the offer unconditionally, also by letter; the marriage took place; and he afterwards conveyed the two properties to her. After the conveyances the parties, voluntarily and without any evil intent, destroyed the letters, believing that they had no longer any use for them:—

Held, that the letters formed a pre-nuptial contract, enforceable in spite of their destruction, upon satisfactory evidence of their contents being given.

Gilchrist v. *Herbert*, 20 W. R. 348, followed:—

Held, also, that the description of the properties in the man's letter was sufficient, he having no other properties in the places mentioned:—

Held, lastly, that there was a duty on the part of the husband to convey to his wife, which negatived the existence of an intent to defeat creditors. *Stuart* v. *Thomson*, 23 O. R. 503.

Husband and Wife—*Conveyance to Wife of Property Purchased by Husband—Subsequent Conveyance by Wife—Right of Wife's Creditors to Set Aside as Fraudulent.*]—Whether a conveyance to a wife of property purchased with the money of the husband is a gift to the wife, is a question of fact, as to which there is no presumption, at any rate in the lifetime of the parties.

Although the object with which a conveyance of property is placed in the name of another may be to protect it against the creditors of the actual purchaser, yet the property belongs to such purchaser, and if in an action to have the grantee in such a conveyance declared a trustee for the true owner, the grantee does not choose to raise such a defence, the plaintiff will be entitled to judgment.

The grantee having no interest in the property may convey it to the true owner at any time, and creditors of the former have no right to have the conveyance set aside to obtain that which does not really belong to their debtor.

Johnston v. *Cline*, 16 O. R. 129, dissented from.

Day v. *Day*, 17 A. R. 157, specially referred to. *Gibbons* v. *Tomlinson*, 21 O. R. 489.

Husband and Wife—*Estate by the Curtesy—Attachment by Husband's Creditor.*]—*See Palmer* v. *Lovett*, 14 P. R. 415, *ante* 61.

Husband and Wife—*Voluntary Conveyance—Confidential and Fiduciary Relationship.*]—A voluntary conveyance of a large portion of his property by a husband to his wife, a woman of good business ability and having great influence over him, executed without competent and independent advice, when his physical and mental condition were greatly impaired, he subsequently becoming an incurable lunatic, was set aside.

The doctrine of undue influence and fiduciary relationship discussed.

Distinction between undue influence in cases of gifts *inter vivos* and testamentary gifts referred to.

Judgment of Rose, J., reversed, Hagarty, C.J.O., dissenting. *McCaffrey* v. *McCaffrey*, 18 A. R. 599.

Husband and Wife—*Working Farm.*]—It appeared that the judgment debtor's wife had mortgaged her farm for the purpose of paying some of his debts; and that after the mortgage, instead of his continuing to work the farm for his own benefit or on shares with his wife, as he had formerly done, he had agreed that until the mortgage was paid off he would work it for his wife alone:—

Held, that this arrangement was not illegal nor unreasonable, and on no principle could it be said that it was a making away with property in order to defeat or defraud creditors. *Baby* v. *Ross*, 14 P. R. 440.

Intent — *Defeating Creditors.*]— Fraudulent intention is a material element in an action to set aside a conveyance as being voluntary and fraudulent against creditors, and where it does not exist the action cannot succeed.

The fact that the result of a conveyance is to defeat creditors is not necessarily proof that the intention of the grantor in making it was fraudulent.

And where a debtor, under the mistaken belief that she was a trustee of a sum of money invested by her in land, in her own name, made a conveyance thereof to the supposed *cestuis que trust*, honestly thinking she was carrying the trust into effect, an action to set aside the conveyance was dismissed. *Carr* v. *Corfield*, 20 O. R. 218.

Knowledge by Grantee of Insolvency—*Valuable Consideration—Actual Intent to Defraud.*]—The fact that the grantors in a deed were to the knowledge of the grantee insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S. O. (1887), ch. 124, following *Molson's Bank* v. *Halter*, 18 S. C. R. 88, and where valuable consideration has been given, clear evidence of actual intent to defraud the creditors of the grantor is necessary to have the deed declared void under the statute 13 Elizabeth ch. 5.

Judgment of the Common Pleas Division, affirming the judgment of Armour, C.J., reversed. *Hickerson* v. *Parrington*, 18 A. R. 635.

Land in Foreign Country — *Absence of Remedy There—Action to Set Aside Here.*]—An action will not lie in this Province by a judgment creditor, to set aside, as fraudulent, a conveyance made by a debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in this Province.

Although the Court will interfere where the parties are within the jurisdiction in some cases where fraud exists in respect to specific property out of the jurisdiction, by ordering conveyances to be made to the person entitled, it will not do so when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce. *Burns* v. *Davidson*, 21 O. R. 547.

Mortgage—*Subsequent Voluntary Settlement by Mortgagor.*]—Mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within the 13th Eliz. ch. 5, nor is the mortgage debt a debt within that statute, unless it is shewn that the mortgage security at the time of the alleged fraudulent conveyance was of less value than the amount of the loan.

Where, therefore, shortly after the making of a mortgage, the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the value of the mortgaged property at the time being greatly in excess of the amount of the loan, and deemed by all parties to be ample security, and no intention to defraud being shewn, the settlement was upheld, although, from the stagnation in real estate when the mortgage matured, a sale of the property for the amount of the indebtedness thereon could not be effected. *Crombie* v. *Young*, 26 O. R. 194.

Preference—*Hindering and Delaying Creditors.*]—In an assignment for the benefit of creditors one preferred creditor was to receive nearly $300 more than was due him from the assignor on an understanding that he would pay certain debts due from the assignor to other persons amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to nor named in the deed of assignment:—

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignor who had parted with all his property, they would be hindered and delayed in the recovery of their debts and the deed was, therefore, void under the statute of Elizabeth. *McDonald* v. *Cummings*, 24 S. C. R. 321.

Settlement by Debtor and other Members of Family—*Valuable Consideration.*]—A person, having entered into business, joined with his brothers and sisters in a settlement, the effect of which was to transfer all their undivided interest in their father's estate to trustees for the benefit of their mother, and subsequently became insolvent:—

Held, on the evidence, that there was no fraudulent intent, and per Boyd, C., and Armour, C.J., that the agreement to execute, and the execution, by the other members of the family was a valuable consideration for the settlement. *Randall* v. *Dopp*, 22 O. R. 422.

Service Out of Jurisdiction — *Fraudulent Conveyance of Land in Ontario—Fraudulent Transfer of Goods in Ontario.*]—*See Livingstone* v. *Sibbald*, 15 P. R. 315, *post* 484; and *Clarkson* v. *Dupré*, 16 P. R. 521, *ante* 77.

Surety.]—To avoid a transfer as a fraudulent preference under R. S. O. ch. 124, sec. 2, the person to whom it is made must be a creditor in respect of the transaction attacked; and a surety for an insolvent who has not paid the debt for which he is surety, is not a creditor within the meaning of the Act. *Hope* v. *Grant*, 20 O. R. 623. *See* now 55 Vict. ch. 25 (O.).

Winding-up Proceedings—*Master in Ordinary—Jurisdiction.*]—In the course of a reference made to the Master in Ordinary in winding-up proceedings under R. S. C. ch. 129, sec. 77, sub-sec. 2, as amended by 52 Vict. ch. 32, sec. 20 (D.), a claim was made for rent, and the liquidator contended that the conveyance under which the claimant assumed to be owner of the demised premises was a fraudulent preference, and further that the alleged lease was never executed:—

Held, that the Master had no jurisdiction to adjudicate upon this contention; and the liquidator should be left to proceed under R. S. C. ch. 129, sec. 31, by way of action. *In re Sun Lithographing Co., Farquhar's Claim*, 22 O. R. 57.

See, also, BANKRUPTCY AND INSOLVENCY, I.

FRAUDULENT SALE OF GOODS

See CRIMINAL LAW, IV.

FRAUDULENT TRANSFER OF GOODS.

See CRIMINAL LAW, IV.

FUTURE RIGHTS.

See SUPREME COURT OF CANADA, XII.

GAME.

Fishing and Shooting Rights — *Private Ownership—Navigable Private Waters—Waters made Navigable by Public Improvements.*]—Ownership of land or water, though not enclosed, gives to the proprietor under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot within the precincts of that private property, subject to game laws, if any; and this exclusive right is not diminished by the fact that the land may be covered by navigable water. In such cases the public can use the water solely for *bonâ fide* purposes of navigation, and must not unnecessarily disturb or interfere with the private rights of fishing and shooting.

Where such waters have become navigable owing to artificial public works, the private right to fishing and fowling of the owner of the soil must be exercised concurrently with the public servitude for passage. *Beatty* v. *Davis*, 29 O. R. 373.

Game Laws.—*Seizure of Furs Killed out of Season.*]—Under Article 1405 read in connection with Article 1409 R.S. (Q.), a game keeper is authorized to seize furs on view on board a schooner, without a search warrant, and to have them brought before a justice of the peace for examination. 2. A writ of prohibition will not lie against a magistrate acting under sections 1405-1409 R. S. (Q.) in examination of the furs so seized where he clearly has jurisdiction and the only complaint is irregularity in the seizure. *Company of Adventurers of England* v. *Joannette*, 23 S. C. R. 415.

Provincial Fisheries — *Prosecution for Penalty Exceeding $30.*]—The defendant was convicted before one justice of the peace on an information under 55 Viet. ch. 10, sec. 19 (O.), charging him with fishing in a certain stream without the permission of the proprietors, and of taking therefrom forty-five fish:—

Held, that the conviction must be quashed, for the penalty fixed for the offence charged exceeded $30, and, therefore, under sections 25 and 26 of the Act, the prosecution should have been before a stipendiary or police magistrate or two or more justices of the peace, or one justice and a fishery overseer.

Only one offence is created by section 19, that of fishing in prohibited waters, and that offence is complete though no fish be taken. *Regina* v. *Plows*, 26 O. R. 339.

GAMING.

Becoming Custodian of Wager—*Restriction to Events to take Place in Canada.*]—R. S. C. ch. 159, sec. 9, provides that "everyone who becomes the custodian or depositary of any money, property, or valuable thing staked, wagered, or pledged upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast, is guilty of a misdemeanour:—

Held, that this enactment does not extend to the result of any election, race, contest, etc., to take place outside of the Dominion of Canada. *Wells* v. *Porter*, 3 Scott 141, followed. *Regina* v. *Smiley*, 22 O. R. 686.

Betting—*Betting on Election—Stakeholder—Accessory.*]—R. S. C. ch. 159, sec. 9, provides *inter alia* that "everyone who becomes the custodian or depositary of any money . . staked, wagered or pledged upon the result of any political or municipal election . . is guilty of a misdemeanour" and a sub-section says that "nothing in this section shall apply to . . bets between individuals":—

Held, reversing the decision of the Court of Appeal, 21 A. R. 55, Taschereau, J., dissenting, that the sub-section is not to be construed as meaning that the main section does not apply to a depositary of money bet between individuals on the result of an election; such depositary is guilty of a misdemeanour, and the bettors are accessories to the offence and liable as principal offenders. R. S. C. ch. 145.

Regina v. *Dillon*, 10 P. R. 352, overruled.

After the election when the money has been paid to the winner of the bet, the loser cannot recover from the stakeholder the amount deposited by him, the parties being *in pari delicto* and the illegal act having been performed. *Walsh* v. *Trebilcock*, 23 S. C. R. 695.

Betting—*Keeping a Common Gaming House—Offence in United States.*]—In a betting game called "policy," the actual betting and payment of the money, if won, took place in the United States; all that was done in Canada being the happening of the chance, on which the bet was staked, by means of implements operated in the house of the defendant:—

Held, there was no offence under section 198 of the Criminal Code of 1892 of keeping a common gaming house within that section. *Regina* v. *Wettman*, 25 O. R. 459.

Betting—*Keeping Place Therefor—Horse-Race in Foreign Country.*]—The defendant occupied a tent in a village open to and frequented by the public, in which there was a telegraph wire to an incorporated race track in the United States, where horse-racing and betting were legalized. In the tent was a blackboard on which were the names of the horses and jockeys taking part in the race, with the weights and the track quotations, and as the race was being run, an operator called off the progress thereof, giving the name of the winner and of the second and third horses, and marked them on the board. Duplicate tickets were furnished in the tent to applicants, which requested defendant to telegraph one B. at the race track to place a certain amount of money on a horse named by the applicant at track quotations, and upon transmission thereof, the applicant agreed to pay defendant ten cents, and that all liability on defendant's part should cease. On the tickets being handed in, one of

them was stamped with the date of its receipt and returned to the applicant. The aggregate amount of money so received was notified by telegram to B. and placed by him before the race with bookmakers on the track, B. paying defendant a percentage on the moneys received for him and ten cents on each application. B. had an agent in another part of the village, whom he furnished with money to pay any winnings by remitting same to him or giving him orders on defendant for stated sums :—

Held, that the defendant was properly convicted under sections 197 and 198 of the Code, of keeping a common betting house, the place in question being opened and kept for the reception of money by defendant on behalf of B. as consideration for an undertaking to pay money thereafter to the depositor on the event of a horserace. *Regina* v. *Giles*, 26 O. R. 586.

Broker—*Civil Code, Article 1927—8 & 9 Vict. ch. 109 (Imp.).*]—Article 1927 of the Civil Code does not differ substantially from 8 & 9 Vict. ch. 109, sec. 18, and renders null and void all contracts by way of gaming and wagering.

A broker was employed to make actual contracts of purchase and sale, in each case completed by delivery and payment, on behalf of a principal whose object was not investment but speculation :—

Held, that these were not gaming contracts within the meaning of the Code. *Forget* v. *Ostigny*, [1895] A. C. 318.

GARNISHMENT.

See ATTACHMENT OF DEBTS—DIVISION COURT, I.

GAS COMPANY.

Taxation.]—*See Consumers' Gas Co. of Toronto* v. *City of Toronto*, 26 O. R. 722; *ante* 44.

GENERAL AVERAGE.

See INSURANCE, VI.

GENERAL SESSIONS.

See SESSIONS.

GIFT.

Conditional Gift—*Rideau Canal.*]—The Act 9 Vict. ch. 42, was passed with the object of removing doubts as to the application of section 29 of the Act 7 Vict. ch. 11 to certain lands set out and expropriated from one S. at Bytown. By the first section of the first mentioned Act it was enacted that the proviso contained in the 29th section of The Ordnance Vesting Act should be construed to apply to all the lands at Bytown set out and taken from S. under the provisions of The Rideau Canal Act, except (1) So much thereof as was actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers Bridge, and of the Basin and Bywash, as they stood at the passing of The Ordnance Vesting Act, and excepting also, (2) A tract of two hundred feet in breadth on each side of the said canal—the portion of the said land so excepted having been freely granted by the said Nicholas Sparks to the late Colonel By, of the Royal Engineers, for the purposes of the canal—and excepting also, (3) A tract of sixty feet round the said Basin and Bywash . . . which was then freely granted by the said Nicholas Sparks to the Principal Officers of Ordnance for the purposes of the said canal, provided that no buildings should be erected thereon. The site of the canal and the two hundred feet which were included within the limits of the land so set out and ascertained had been given by an instrument dated 17th November, 1826, under the hand of S. and B., who was acting for the Crown, by which it was agreed that such portion of the land so freely given as might be required for His Majesty's service, should be restored to S. when the canal was completed. The canal was completed in 1832. Subsequent to the passing of the Act 9 Vict. ch. 42, all the lands of S. so set out and ascertained were given up to him, except the portions above described, and deeds in the terms of the Act were exchanged between S. and the Principal Officers of Ordnance in regard to the land so given up and so retained, respectively :—

Held, that apart from the question of acquiescence and delay on the part of S., and those claiming under him, the Act 9 Vict. ch. 42, and the deeds of surrender so exchanged, were conclusive between the parties so far as the area and boundaries of the lands to be retained and restored respectively are concerned. 2. That the lands so retained are held by the Crown for the purposes of the canal, and that as to the tract of sixty feet around the Basin and Bywash there is attached a condition that no buildings are to be erected thereon. 3. That the proviso "that no buildings shall be erected on the said tract of sixty feet," does not create a condition subsequent, a breach of which would work a forfeiture and let in the heirs, nor would the use by the Crown of a portion of the lands in question for purposes other than the "purposes of the canal" work such a forfeiture. 4. The Court has no power to restrain the Crown from making any unauthorized use of the land, or to compel the Crown to remove any buildings erected thereon contrary to the terms of the grant.

Semble, that the Crown cannot alien the land held for the purposes of the canal or any portion thereof, and if it should do so the suppliants would have their action against the grantee. If the Crown should abandon the land or any portion of it, the land or such part of it would revert to the suppliants, and they might enter and possess it. *Magee* v. *The Queen*, 3 Ex. C. R. 304.

Donatio Mortis Causa—*Delivery of Keys of Box and Rooms Containing Valuables.*]—Shortly before his death the plaintiff's uncle delivered to her his watch and pocket-book, and also the keys of his cash-box, which was then in the actual possession of his solicitor, and of two

rooms, in which were contained securities for money and chattels, accompanying the delivery with words of gift, having reference to the articles actually delivered:—

Held, per Rose, J., 20 O. R. 168, upon the evidence, that the deceased intended to give to the plaintiff what the keys placed in her control, and to part with the possession and dominion of the cash-box and its contents, and of the rooms and their contents; and upon the law that the intention of the deceased should be given effect to, and a valid *donatio mortis causâ* declared:—

Held, on appeal, reversing the decision of Rose, J., 20 O. R. 168, that as regards the contents in the box and the property in the rooms, the alleged gift had not been made out, and no *donatio mortis causâ* was established, otherwise decision of Rose, J., affirmed. *Hall* v. *Hall*, 20 O. R. 684. Affirmed in appeal, 19 A. R. 292.

Husband and Wife—*Chose in Action—Knowledge of Transfer.*]—Since the Married Woman's Property Act of 1884, a husband may make a valid gift of a chose in action to his wife without the intervention of a trustee.

A gift to a person without his knowledge made in proper form vests the property in him at once, subject to his right to repudiate it when informed of it. *Sherratt* v. *Merchants' Bank of Canada*, 21 A. R. 473.

Husband and Wife—*Money in Savings Bank.*]—Subsequently to the coming into force of the Married Woman's Property Act, R. S. O. ch. 132, a married woman on the day of entering into a money bond, deposited in her own name in a savings bank a sum of money, which the evidence shewed had been given to her by her husband, but of which, as against him, she had the absolute disposal by his consent and wish:—

Held, that this was sufficient on which to found a proprietary judgment against her, though it was not shewn that the bond was not executed at an earlier hour than that at which the money was deposited. *Sweetland* v. *Neville*, 21 O. R. 412.

Title to Land—*Gift Inter Vivos—Subsequent Deed.*]—The parties to a gift *inter vivos* of certain real estate, with warranty by the donor, did not register it, but by a subsequent deed, which was registered, changed its nature from an apparently gratuitous donation to a deed of giving in payment (*dation en paiement*). In an action brought by the testamentary executors of the donor to set aside the donation for want of registration:—

Held, affirming the judgment of the Court below, that the forfeiture under Article 806 C. C. resulting from neglect to register, applies only to gratuitous donations, and as the deed in this case was in effect the giving of a thing in payment (*dation en paiement*) with warranty, which, under Article 1592, is equivalent to sale, the testamentary executors of the donor had no right of action against the donee, based on the absence of registration of the original deed of gift *inter vivos*. *Lacoste* v. *Wilson*, 20 S. C. R. 218.

GOVERNOR GENERAL

See CONSTITUTIONAL LAW, I., III.

GOVERNMENT RAILWAYS.

See CROWN.

GROWING CROPS.

See BILLS OF SALE, V.

GUARANTY AND INDEMNITY.

Bond to Indemnify — *Right of Action.*] — *See Boyd* v. *Robinson*, 20 O. R. 404, *ante* 115, and *Mewburn* v. *Mackelcan*, 19 A. R. 729, *ante* 115.

Construction.]—A., a wholesale merchant, had been supplying goods to C. & Co., when, becoming doubtful as to their credit, he insisted on their account being reduced to $5,000 and security for further credit. W., who had indorsed to secure a part of the existing debt, thereupon gave A. a guarantee in the form of a letter, as follows:—"I understand that you are prepared to furnish C. & Co. with stock to the extent of $5,000 as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand, but the total amount not to exceed eight thousand dollars including your own credit of five thousand, unless sanctioned by a further guarantee." . . A. then continued to supply C. & Co. with goods, and in an action by him on this guarantee:—

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there could be no liability on this guarantee unless the indebtedness of C. & Co. to A. should exceed the sum of $5,000, and at the time of action brought such indebtedness, having been reduced by payments from C. & Co. and dividends from their insolvent estate to less than such sum, A. had no cause of action. *Alexander* v. *Watson*, 23 S. C. R. 670.

Construction.]—A guarantee in the following words, "I hereby become responsible to H. M. for payment for goods sold to F. E. for feed store situate . . up to $400," was given at a time when the debt due by F. E. to H. M. was $280.85:—

Held, that the guarantee covered the amount then due and an additional indebtedness up to $400.

Chalmers v. *Victors*, 18 L. T. N. S. 481, followed. *Moyle* v. *Edmunds*, 24 O. R. 479.

Construction—*Condition.*] — *See Hathaway* v. *Chaplin*, 21 S. C. R. 23, *ante* 419.

Construction—*Floating Balance—Ultimate Balance.*]—The plaintiff's testator gave a guarantee in the following form: "In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so-

sold or to be sold; provided I shall not be called on in any event to pay a greater amount than $2,500."

M. made an assignment for the benefit of his creditors, being then indebted to the guaranteed creditors in the sum of $5,556.23. They filed their claim therefor with the assignee and afterwards received from the plaintiff the full amount covered by the testator's guarantee.

The plaintiff contended that he was entitled to rank upon the estate for so much of the debt as had been thus paid by him:—

Held, Osler, J. A., dissenting, that the guarantee was one of the whole debt incurred, or to be incurred, with a limitation of the liability to $2,500, and, therefore, that the plaintiff was not subrogated to the rights of the secured creditors or entitled to receive the dividends in respect of that part of the debt which he had paid off under the guarantee.

Per Osler, J. A., the guarantee was a continuing guarantee, limited in amount, to secure a floating balance, and so a guarantee of part of the debt only, the dividends on which, the surety having paid it, he was entitled to receive. *Ellis* v. *Emmanuel*, 1 Ex. D. 157, considered.

Judgment of the Queen's Bench Division, 20 O. R. 257, reversed, and that of Street, J., at the trial, 19 O. R. 230, restored. *Martin* v. *McMullen*, 18 A. R. 559.

Covenant to Indemnify—*Right of Assignee for Benefit of Creditors.*]—*See Ball* v. *Tennant*, 21 A. R. 602, *ante* 67.

Damages—*Action Quia Timet.*]—Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts and agreements of the firm no cause of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought against the firm.

Mewburn v. *Mackelcan*, 19 A. R. 729; and *Leith* v. *Freeland*, 24 U. C. R. 132, distinguished.

Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible. *Sutherland* v. *Webster*, 21 A. R. 228.

Employee's Guarantee Contract—*Condition—Misstatements.*]—By a contract in writing, made in 1890, the defendants agreed to guarantee the plaintiffs against pecuniary loss by reason of fraud or dishonesty on the part of an employee during one year from the date of the contract, or during any year thereafter in respect of which the defendants should consent to accept the premium which was the consideration for the contract. The defendants accepted the premium in respect of each of the three following years, and gave receipts entitled "renewal receipts," in which the premiums were referred to as "renewal premiums":—

Held, that the contract was a contract of insurance made or renewed after the commencement of the Ontario Insurance Corporations Act, 1882, within the meaning of section 33:—

Held, also, that upon the true construction of sub-section (2), the contract could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of the contract providing for the avoidance thereof for such misstatements was not, in stated terms, limited to cases in which such misstatements were material to the contract. *Village of London West* v. *London Guarantee and Accident Co.*, 26 O. R. 520.

Endorsement—*Commission.*]—*See McDonald* v. *Manning*, 19 S. C. R. 112, *ante* 203.

Endorsement—*Trust.*]—A promissory note, for value received, at three months, was made by one of the defendants to the order of the testator and of the plaintiffs. Some years afterwards the maker conveyed his farm to his son, the other defendant, on a verbal understanding, unknown to the payee, that the son was to pay the father's debts, including the note. After the conveyance, the payee having pressed the father for security, the son, without any endorsement of the note by the payee, wrote his name on the back of it, all parties supposing that he had thereby rendered himself liable as endorser. Subsequently he made a payment on account to the payee.

In an action against father and son:—

Held, that no liability attached to the son, either as endorser or guarantor, or as trustee of the property conveyed to him. *Robertson* v. *Lonsdale*, 21 O. R. 600.

Evidence to Satisfy Statute of Frauds.]—*See Thomson* v. *Eede*, 22 A. R. 105, *ante* 199.

Extension of Time—*Increase in Rate of Interest—Reservation of Rights against Surety.*]—A new agreement between the debtor and creditor extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract, and releases the surety.

And a provision in such agreement reserving the rights of the creditor against the surety, though effectual as regards the extension of time, is idle as regards the stipulation for an increased rate of interest, and notwithstanding such reservation, the surety is discharged. *Bristol and West of England Land Co.* v. *Taylor*, 24 O. R. 286.

Implied Indemnity Against Mortgage.]—Does not arise as against married woman purchasing land subject to mortgage. *McMichael* v. *Wilkie*, 18 A. R. 464.

Implied Indemnity Against Mortgage—*Agreement—Purchaser Trustee for Third Party.*]—L. F. agreed in writing to sell land to C. F. and others subject to mortgages thereon, C. F. to hold same in trust to pay half the proceeds to L. F. and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated and L. F. became a member receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property C. F. was brought in as third party to

indemnify L. F., his vendor, against a judgment in said action :—

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, and King, JJ., dissenting, that the evidence shewed that the sale was not to C. F. as a purchaser on his own behalf but for the company and the company and not C. F. was liable to indemnify the vendor. *Fraser* v. *Fairbanks*, 23 S. C. R. 79.

Implied Indemnity Against Mortgage—*Agreement to the Contrary — Assignment of Claim.*]—Although when a mortgagor conveys his equity of redemption, subject to the mortgage, there is an implied obligation on the part of the purchaser to indemnify the mortgagor against the mortgage debt, evidence is admissible of an express agreement between the parties to the contrary.

A claim against a purchaser of an equity of redemption for indemnification against the mortgage debt may be assigned by the mortgagor to the mortgagee, and is enforceable by the latter. *British Canadian Loan Co.* v. *Tear*, 23 O. R. 664.

Implied Indemnity Against Mortgage—*Application for Summary Judgment.*] — *See Wilkes* v. *Kennedy*, 16 P. R. 204, *post*, JUDGMENT; and *Davidson* v. *Gard*, 15 P. R. 31, *post*, JUDGMENT.

Implied Indemnity Against Mortgage—*Mesne Purchasers.*] — The equitable doctrine of right to indemnity of a vendor of land sold subject to a mortgage applies only as against a purchaser in fact, and therefore where at the request of the actual purchaser the land in question was conveyed to his nominee by deed absolute in form, but for the purpose of security only, this nominee was held not liable to indemnify the vendor.

It is not proper in an action for foreclosure to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title.

Application of Consol. Rules 328, 329, 330, 331, 332, 333, discussed.

Lockie v. *Tennant*, 5 O. R. 52, approved. *Walker* v. *Dickson*, 20 A. R. 96.

Implied Indemnity Against Mortgage—*Rebuttable Presumption.*]—When a mortgagor conveys his equity of redemption in the mortgaged property without any stipulation in the conveyance as to payment of the incumbrance, the right to indemnification against it does not arise from anything contained in the mortgage or conveyance, but from the facts, and this may be rebutted by parol evidence or otherwise. The right, where it exists, arises from implied contract. *Waring* v. *Ward*, 7 Ves. 332, explained. *Beatty* v. *Fitzsimmons*, 23 O. R. 245.

Notice of Defalcation—*Diligence.*]—A guarantee policy insuring the honesty of W., an employee, was granted upon the express conditions, (1) that the answers contained in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept, and (2) that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had become guilty of any criminal offence entailing or likely to entail loss to the employers and for which a claim was liable to be made under the policy. There was a defalcation in W.'s accounts, and the evidence shewed that no proper supervision had been exercised over W.'s books, and the guarantors were not notified until a week after employers had full knowledge of the defalcation and W. had left the country :—

Held, affirming the judgment of the Court below, that as the employers had not exercised the stipulated supervision over W., and had not given immediate notice of the defalcation, they were not entitled to recover under the policy. *Harbour Commissioners of Montreal* v. *Guarantee Co. of North America*, 22 S. C. R. 542.

Patent of Invention—*Agreement to Manufacture — Letter of Guaranty — Failure of Scheme.*]—The chief object of an agreement between A. and B. was the profitable manufacture and sale of wares under a patent of invention issued to A., and in consideration of advances by B. to an amount not exceeding $6,000, C. by a letter of guarantee "agreed to become a surety to B. for the repayment of the $6,000 within 12 months from the date of the agreement if it should transpire that, for the reasons incorporated in said agreement, it should not be carried out." On an action brought by B. against C. for $6,000 it was proved at the trial that the manufacturing scheme broke down through defects of the invention :—

Held, affirming the judgment of the Court below, that C. was liable for the amount guaranteed by his letter. *Argus* v. *Union Gas and Oil Store Co.*, 24 S. C. R. 104.

Ships and Shipping—*Disbursements.*]—On a ship under charter being loaded it was found that a sum of £173 was due the charterer for the difference between the actual freight and that in the charter party and, as agreed, a bill for the amount was drawn by the master on the agents of the ship, and, also, a bill of £753 for disbursements. These bills not being paid at maturity notice of dishonour was given to V., the managing owner, who sent his son to the solicitors who held the bills for collection to request that the matter should stand over until the ship arrived at St. John where V. lived. This was acceded to and V. signed an agreement in the form of a letter addressed to the solicitors, in which, after asking them to delay proceedings on the draft for £753, he guaranteed, on the vessel's arrival or in case of her loss, payment of the said draft and charges and also of the payment of the draft for £173 and charges. On the vessel's arrival, however, he refused to pay the smaller draft and to an action on his said guarantee he pleaded payment and that he was induced to sign the same by fraud. By order of a Judge the pleas of payment were struck out. On the trial the son of V. who had interviewed the solicitors swore that they told him that both bills were for disbursements, but it did not clearly appear that he repeated this to his father. V. himself contradicted his son and stated that he knew that the smaller bill was for difference in freight, and there was other evidence to the same effect. His counsel sought to get rid of the effect of V.'s evidence by shewing that from age and infirmity he was

incapable of remembering the circumstance, but a verdict was given against him :—

Held, affirming the decision of the Court below, that the defence of misrepresentation set up was not available to V. under the plea of fraud, and, therefore, was not pleaded ; that if available without plea it was not proved : that nothing could be gained by ordering another trial as, V. having died, his evidence would have to be read to the jury who, in view of his statement that he knew the bill was not for disbursements, could not do otherwise than find a verdict against him : —

Held, further, that the delay asked for by V. was sufficient consideration to make him liable on his guarantee, even assuming that he would not have been originally liable as owner of the ship. *Vaughan* v. *Richardson*, 21 S. C. R. 359.

Third Party Notice—*Action for Negligence.*]—The plaintiff sued for a personal injury, which by his statement of claim he alleged he had received, when acting as conductor of a street railway car operated by the defendants, by reason of the negligence of a servant of the defendants, who was driving a scavenger waggon used by the defendants. The company who had operated the railway before the defendants assumed it, were insured against all sums for which they should become liable to any employee in their service, while engaged in their work. The insurance policy was assigned to the defendants when they assumed the railway The defendants served on the insurance company a third party notice claiming indemnity :—

Held, that the policy did not cover injuries accruing by reason of the negligence of the defendants or their servants in other branches of their service ; and that the insurance company should not be kept before the Court on the chance of a different state of facts being developed at the trial from that which the plaintiff alleged.

An order was therefore made in Chambers setting aside the third party notice. *Ferguson* v. *City of Toronto*, 14 P. R. 358.

Third Party Notice—*Counterclaim.*]—In an action by the assignee of a mortgage against the mortgagor and the purchasers from him of the equity of redemption, the latter alleged that they had been induced by the mortgagee to purchase the lands by his promise to discharge the mortgage and accept in its place an assignment of another mortgage, which agreement he had failed to carry out and had afterwards assigned the mortgage to the plaintiff, his wife :—

Held, that the purchasers of the equity were not entitled to claim "indemnity" against the mortgagee, within the meaning of that word as used in Rule 328, as amended by Rule 1313 ; and a third party notice served upon him was set aside.

Semble, a proper case for a counterclaim against the plaintiff and the third party jointly to enforce the alleged agreement or for damages. *Moore* v. *Death*, 16 P. R. 296.

Trustee—*Personal Liability—Right of Mortgagee to Enforce Equities Between Trustee and Cestui que Trust.*]—Where lands held in trust are mortgaged by the trustee, the mortgagee is not entitled to the benefit of any equities and rights arising either under express contract or upon equitable principles, entitling the trustee to indemnity from his *cestui que trust*. Fournier, and Taschereau, JJ., dissenting. *Williams* v. *Balfour*, 18 S. C. R. 472.

GUARDIAN.

See INFANT, III.—LIMITATION OF ACTIONS, II.

HABEAS CORPUS.

Committal for Contempt.]—An application by the defendant committed for contempt for a fiat or order that he be brought before the Court for the purpose of moving in person for his discharge from custody was refused:—

Ford v. *Nassau*, 9 M. & W. 793, and *Ford* v. *Graham*, 10 C. B. 369, followed ;—

Semble, a *habeas corpus* for the purpose would be refused, and *a fortiori* a fiat or order; for the sheriff would not be bound to obey it, and if the party were removed from prison under it, he would not in the meantime be in proper and legal custody. *Roberts* v. *Donovan*, 16 P. R. 456.

Judge in Chambers—*Appeal to Court of Appeal.*]—Under R. S. O. ch. 70, sec. 1, the writ of *habeas corpus* may be made returnable before "the Judge awarding the same, or, before a Judge in Chambers for the time being, or before a Divisional Court ;" and by section 6 an appeal is given from the decision of the said Court or Judge to the Court of Appeal:—

Held, that the right of appeal must be exercised in the manner provided by the statute, and therefore an appeal from a Judge in Chambers must be to the Court of Appeal. *Re Harper*, 23 O. R. 63.

Order to Commit—*County Court — "Process."*]—An order made by a Judge of a County Court in Chambers for the commitment to close custody of a party to an action in that Court, for default of attendance to be re-examined as a judgment debtor, pursuant to a former order, is "process" in an action within the meaning of the exception in section 1 of the *Habeas Corpus* Act, R. S. O. ch. 70 ; and where such a party was confined under such an order, a writ of *habeas corpus* granted upon his complaint was quashed as having been improvidently issued. *Re Anderson* v. *Vanstone*, 16 P. R. 243.

Warrant Issued in Quebec—*Conspiracy—Locality of Offence.*]—A Judge cannot, upon the return to a *habeas corpus* where a warrant shews jurisdiction, try on affidavit evidence the question where the alleged offence was committed.

Sections 4 and 5, R. S. O. ch. 70, are not intended to apply to criminal cases where no preliminary examination has taken place.

Section 752 of the Criminal Code, 55-56 Vict. ch. 29 (D.), only applies where the Court or Judge making the direction as to further proceedings and enquiries mentioned therein has power to enforce it, and a Court or Judge in Ontario has no power over a Judge or Justice

in Quebec to compel him to "take any proceedings or hear such evidence," etc.

It is a crime under section 394 of the Code to conspire by any fraudulent means to defraud any person, and so a conspiracy to permit persons to travel free on a railroad as alleged in these cases would be a conspiracy against the railway company. *Regina* v. *Defries*, *Regina* v. *Tumblyn*, 25 O. R. 645.

HIGH COURT OF JUSTICE.

Breach of Contract.]—*See Offord* v. *Bresse*, 16 P. R. 332, *ante* 178, and *Bell* v. *Villeneuve*, 16 P. R. 413, *ante* 179.

Bicycle Race—*Protest—Award of Trophy—Private Tribunal.*]—Where a challenge cup, to be won in a bicycle race between competing clubs, was held by trustees under an instrument of trust by which all arrangements pertaining to the course, race, protests, and matters "connected with the welfare of the cup" were to be decided by the trustees according to certain rules, the Court, upon the mere allegation of fraud, and before any decision of the trustees, refused to exercise jurisdiction restraining the trustees from parting with the cup to an alleged winner under protest, upon the ground that one of the winning riders did not go round the course, that being a matter of fact for the decision of the trustees.

Brown v. *Overbury*, 11 Ex. 715; *Ellis* v. *Hopper*, 3 H. & N. 768; and *Newcomen* v. *Lynch*, Ir. R. 9 C. L. 1; Ir. R. 10 C. L. 248, followed. *Ross* v. *Orr*, 25 O. R. 595.

Chancery Division—*Criminal Matters.*]—On an appeal from an order for a *certiorari*, which the Judge (Ferguson, J.) granting it, refused to make returnable in the Chancery Division:—

Held, per Robertson, J.—That the Chancery Division of the High Court of Justice has no jurisdiction in criminal matters:—

Held, per Meredith, J.—That it has: and ought to exercise it.

Boyd, C.—While adhering to his view as expressed in *Regina* v. *Birchall*, 19 O. R. 697, that it has, thought that when there is an equally divided opinion for and against jurisdiction entertained by the individual Judges constituting the Division, it would be unseemly that by a mere accident, such as the constitution of the Court, jurisdiction should be affirmed on one day and negatived on the next; and as there was jurisdiction in the other Divisions of the High Court he agreed with Robertson J., that the motion be not entertained. *Regina* v. *Davis*, 22 O. R. 652.

Divisional Court — *Consent.*]—The words "other cases where all parties agree that the same may be heard before a Divisional Court" in Rule 219 do not include appeals from a Judge in Court; and the consent of all parties cannot give a Divisional Court jurisdiction to hear such an appeal.

Beatty v. *O'Connor*, 5 O. R. 731, 737, not followed. *Re Wilson and County of Elgin*, 16 P. R. 150.

Electoral Franchise Act.]—There is no jurisdiction in the High Court of Justice to issue a writ of prohibition to a revising officer to compel him to abstain from "performing any duty under the Electoral Franchise Act."

The legislation in regard to such matters does not trench upon nor is the question one of "property and civil rights in the Province."

Re Simmons and Dalton, 12 O. R. 505, not followed. *Re North Perth*, *Hessin* v. *Lloyd*, 21 O. R. 538.

Foreign Land — *Fraudulent Conveyance.*]—An action will not lie in this Province by a judgment creditor to set aside, as fraudulent, a conveyance made by his debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in this Province.

Although the Court will interfere where the parties are within the jurisdiction in some cases where fraud exists in respect to specific property out of the jurisdiction, by ordering conveyances to be made to the person entitled, it will not do so when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce. *Burns* v. *Davidson*, 21 O. R. 547.

Foreign Land — *Redemption.*]—A creditor who has recovered judgment in Manitoba, and who has by virtue of an Act of that Province a lien on the lands of the judgment debtor there, cannot maintain in the Courts of Ontario an action against a mortgagee, for redemption of a mortgage on lands in Manitoba, which are subject to the lien.

Judgment of the Queen's Bench Division, 23 O. R. 327, reversed. *Henderson* v. *Bank of Hamilton*, 20 A. R. 646. Affirmed by the Supreme Court, 23 S. C. R. 716.

Foreign Land — *Title.*]—The Courts in this Province have no jurisdiction to entertain an action for determining the title to lands in the North-West Territories, even though the parties be resident here.

Re Robertson, 22 Gr. 449, distinguished. *Ross* v. *Ross*, 23 O. R. 43.

Quo Warranto—*Information—High School Trustee.*]—A motion for an information in the nature of a *quo warranto* is the proper proceeding to take to inquire into the authority of a person to exercise the office of a High School trustee.

Askew v. *Manning*, 38 U. C. R. 345, 361, followed.

Such a proceeding is a civil, not a criminal, one; and is properly taken before a single Judge in Court, by way of motion, upon notice. *Regina* v. *Nagle*, 24 O. R. 507.

Restraining Arbitrator From Acting.]—The High Court has power to prevent a non-indifferent arbitrator from acting without waiting until the award is made, though perhaps the better course is to apply for leave to revoke the submission if another arbitrator be not substituted.

Malmesbury R. W. Co. v. *Budd*, 2 Ch. D. 113, and *Beddow* v. *Beddow*, 9 Ch. D. 89, followed. *Township of Burford* v. *Chambers*, 25 O. R. 663.

Revocation of Letters of Administration —*Surrogate Court.*]—The High Court of Justice

for Ontario has no jurisdiction to revoke the grant by a Surrogate Court of letters of administration. *McPherson* v. *Irvine*, 26 O. R. 438.

Service Out of Jurisdiction — *Alimony —Domicil.*]—In an action for alimony the writ of summons was served upon the defendant out of the jurisdiction, and upon a motion to set aside the service it appeared that the plaintiff and defendant were married in Ontario in 1889, where the defendant had resided for forty years prior to 1886; that in that year he had been appointed to a permanent position in the North-West Territories, and had then sold his dwelling-house in Ontario and gone to reside in the North West, where his daughter and her husband and children lived, and where he had ever since remained, only visiting Ontario on a few occasions. He swore that he had no intention of returning to Ontario to live. It also appeared that the plaintiff, shortly after the marriage, accompanied the defendant to his home in the North-West, and lived with him for about nine months, when she left him and proceeded to Ontario for business purposes; that she never returned to the defendant, and had since resided chiefly in the United States of America, and since the commencement of this action had stated on oath, in another case, that she resided in the United States:—

Held, that the defendant had acquired a domicil in the North-West Territories, and that the plaintiff had not acquired a distinct domicil in Ontario since she left her husband; and, therefore, it was not a case in which service of the writ of summons was permissible under Rule 271 (*c*) or (*e*). *Allen* v. *Allen*, 15 P. R. 458.

Service Out of Jurisdiction—*Appearance.*]—A defendant by entering an appearance in an action submits himself to the jurisdiction of the Court, and waives his right to move against an order permitting service of the writ of summons to be made upon him out of the jurisdiction.

But where a defendant does not really intend to waive his objection to the jurisdiction, he does not, by obtaining an order for security for costs and opposing a motion for speedy judgment, estop himself from so moving.

A Court is not bound by the decision of a Court of co-ordinate jurisdiction, where the matter is one of jurisdiction and involving the settling of a new practice.

The plaintiff, a foreigner, sued the defendant, also a foreigner, upon a foreign judgment, and, alleging that the defendant was the owner of lands in Ontario, also claimed relief by way of equitable execution against such lands and an interim injunction restraining the defendant from dealing therewith:—

Held, by the Master in Chambers, not a case in which service of the writ of summons out of the jurisdiction could be allowed under any of the provisions of Rule 271. *Sears* v. *Meyers*: *Heath* v. *Meyers*, 15 P. R. 381. *See* the next case.

Service Out of Jurisdiction—*Appearance.*]—Upon a motion by the defendant for leave to appeal from the decision of the Common Pleas Divisional Court, 15 P. R. 381:—

Held, that the defendant by appearing had submitted to the jurisdiction, and the justice of the case consisted in allowing him to remain in the position in which he had placed himself; and there was no reason for giving leave to appeal. *Sears* v. *Meyers*, 15 P. R. 456.

Service Out of Jurisdiction—*Fraudulent Conveyance.*]—Action by an alleged creditor of one of the defendants to set aside a conveyance of land in Ontario by that defendant to another, as fraudulent. The plaintiff claimed to be a creditor in respect of a promissory note made and payable, and the makers of which resided, out of the jurisdiction, but he did not seek judgment upon the promissory note:—

Held, a case in which, under Rule 271 (*b*), service of the writ of summons effected out of the jurisdiction was allowable.

The different sub-rules of Rule 271 are disjunctive; and under (*b*) it is not necessary that the whole subject matter of the action should come within its provisions.

Semble, also, that the case came within sub-rule (*g*); for, although the defendant alleged to be within the jurisdiction had not been served, it was not necessary (assuming that service within the jurisdiction is requisite to bring the case within the sub-rule), that she should be served first but only that the service without should not be allowed until the service within had been effected, and an adjournment for that purpose might be granted. *Livingstone* v. *Sibbald*, 15 P. R. 315.

Service Out of Jurisdiction — *Malicious Prosecution—Arrest in Ontario.*]—Criminal proceedings begun in the Province of Quebec, under which the plaintiff was arrested in the Province of Ontario and taken to Montreal, where he was discharged, constitute, in effect, one entire tort; and service of a writ out of this Province in an action therein for malicious prosecution, founded thereon, will not be allowed under Rule 1309, amending Rule 271 (*e*). *Oligny* v. *Beauchemin*, 16 P. R. 508.

Service Out of Jurisdiction — "*Tort*" — *Preferential Transfer of Goods.*]—An action by an assignee under R. S. O. ch. 124 against persons residing in the Province of Quebec to set aside a transfer of goods effected in this Province, as a fraudulent preference, which goods have afterwards been removed to Quebec, is founded on a "tort committed within the jurisdiction," within the meaning of Rule 271 (*e*), as amended by Rule 1309. *Clarkson* v. *Dupré*, 16 P. R. 521.

Special Appearance.]— Where there is a grave question as to jurisdiction of the Courts of this Province in an action on a contract entered into in a foreign country, a special appearance under protest or conditionally may be permitted under Con. Rule 286, and the defence of want of jurisdiction may be subsequently raised by the pleadings. *Howland* v. *Insurance Co. of North America*, 16 P. R. 514.

HIGH SCHOOLS.

See PUBLIC SCHOOLS.

HIRE OF GOODS.

Agister of Horses—*Bailee for Hire.*]—The plaintiff's mare, while in charge of the defendant under a contract of summer agistment, was killed by falling through the plank covering of a well in the defendant's yard, the existence of which was known to the defendant but not to the plaintiff, and to which yard the mare, with other horses of the defendant, had access from a field in which they were at pasture:—

Held, Meredith, J., dissenting, that the plaintiff had, on proof of these facts, given sufficient *prima facie* evidence of negligence to cast the onus on the defendant of shewing that reasonable care which an agister is bound to exercise; and a non-suit was set aside.

Per Boyd, C.—The test in such cases is not necessarily the care which the agister may exercise as to his own animals. It is, in general, not what any particular man does, but what men, as a class, would do with similar property as a class.

Per Meredith, J.—The agister is not an insurer. The onus of proof of neglect of his duty is on the plaintiff and had not been satisfied in this case. *Pearce* v. *Sheppard*, 24 O. R. 167.

Agreement to Return—*Damage Occasioned by Unforeseen Accident.*]—Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforeseen causes the performance has become unexpectedly burdensome or even impossible.

The defendants hired the plaintiff's scow and pile-driver, at a named price per day, they to be responsible for damage thereto, except to the engine, and ordinary wear and tear, until returned to the plaintiff. While in the defendants' custody, by reason of a storm of unusual force, the scow and pile-driver were driven from their moorings and damaged:—

Held, that the defendants were liable for the damages thus sustained, and for the rent during the period of repair.

Taylor v. *Caldwell*, 3 B. & S. 826, followed.

Harvey v. *Murray*, 136 Mass. 377, approved.

Grant v. *Armour*, 25 O. R. 7.

Damages—*Negligence—Liability for Damage to Tug.*]—The defendant hired a tug from the plaintiff by a contract signed by both parties in these words, "I agree to charter tug . . to tow two barges from . . for which I agree to pay . . owner to supply engineer and captain . ." The tug on the voyage was run on a rock through the negligence of the captain:—

Held, not a demise of the tug, but a contract of hiring, and that the defendant was not liable for the damage. *Thompson* v. *Fowler*, 23 O. R. 644.

HIRE RECEIPT.

See COLLATERAL SECURITY.

HORSES.

See AGISTMENT.

HUSBAND AND WIFE.

I. ALIMONY.

Condonation of Matrimonial Offences—*—Revival by Husband's Subsequent Adultery—Effect of Husband's Adultery—Evidence.*]—Condonation of matrimonial offences is always on the condition that there shall be no repetition of any matrimonial offence in the future: and the effect of a husband's subsequent adultery is to revive previously condoned acts of cruelty.

The evidence of one witness, by confession of loose character, is not sufficient to prove adultery unless corroborated.

Proof of grave misconduct, short of adultery, by a wife will not discentitle her to alimony.

A woman both in law and in morals is justified in leaving and in refusing to return to her husband who has committed adultery; but his act which breaks up the household does not relieve him from his duty to maintain her; and proof of that offence would be sufficient upon which to award alimony. *Aldrich* v. *Aldrich*, 21 O. R. 447.

Interim Alimony—*Separation Deed—Agreement not to Sue for Alimony.*]—The granting of interim alimony rests in the sound discretion of the Court in view of all the circumstances.

A husband and wife had executed a deed, reciting unhappy differences, and agreeing to live apart. The consideration was $800—a down payment of $100 and an annual provision of like amount for seven years. Stipulation by the wife not to sue for alimony or to seek restoration of conjugal rights. The deed was executed after advice given to the wife by a separate solicitor. After the expiration of seven years she brought an action for alimony, and in applying for interim alimony did not shew fraud or duress:—

Held, that the application must be refused.

Semble, that the wife's stipulation was not limited to the seven years, but extended to her future life, and a provision to arise *de anno in annum* was not essential to uphold the deed:—

Semble, also, that a husband and wife may validly agree *inter se* to live apart, and the wife's engagement not to sue for alimony nor to claim

restoration of marital intercourse, if founded on valuable consideration, will be enforceable against her and may be set up in bar of her action. *Atwood* v. *Atwood*, 15 P. R. 425. *See* the next case.

Interim Alimony and Disbursements—*Separation Deed—Agreement not to Sue for Alimony—Merits.*]—An appeal from the decision of Boyd, C., 15 P. R. 425, was dismissed by reason of a division of opinion of the Judges composing the Divisional Court.

Per Ferguson, J.—The order of the Chancellor was right.

Per Meredith, J.—The marriage being admitted, and need and refusal of support being proved, the plaintiff is *primâ facie* entitled to interim alimony and disbursements; upon a motion therefor there ought not to be any adjudication upon any of the issues or questions to be tried between the parties; and if the motion cannot be refused without determining such issues or questions, or without prejudicing a trial of them, the order should be made, unless the action is frivolous or vexatious. *Atwood* v. *Atwood*, 16 P. R. 50.

Judgment—*Assignments and Preferences.*]—A judgment for alimony is not affected by section 9 of the Assignments Act, R. S. O. ch. 124. *Abraham* v. *Abraham*, 19 O. R. 256. Affirmed in appeal, 18 A. R. 436.

Master's Report — *Execution.*] — Where a reference is directed to the Master to ascertain and state the amount of alimony which the defendant should pay, execution may be issued for the amount found by his report before confirmation thereof. *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P. R. 15, approved and followed. *Boeck* v. *Boeck*, 16 P. R. 313.

Restitution of Conjugal Rights—*Cohabitation.*]—The only bar, under section 29 of R. S. O. ch. 44, to an action for alimony against a husband who is living separately from his wife, is cruelty or adultery on the part of the applicant.

Where a husband who has been insane for years, at intervals, and during such periods of insanity had been confined in an asylum, afterwards declined to live with his wife, being under the suspicion that by doing so he might again be confined in an asylum:—

Held, that she was entitled to alimony, as, upon the evidence, he was living separate from her without any sufficient cause, and under such circumstances as would have entitled her by the law of England, as it stood on 10th June, 1857, to a decree for restitution of conjugal rights.

Judgment of Boyd, C., reversed. *Nelligan* v. *Nelligan*, 26 O. R. 8.

Service Out of Jurisdiction — *Action for Alimony.*]—*See Allen* v. *Allen*, 15 P. R. 458, *ante* 483.

II. Ante-nuptial Contract.

Ante-nuptial Contract by Letters—*Post-nuptial Conveyance of Lands.*]—A young man under twenty-one made an offer of marriage by letter to a young woman, and in the letter promised that if she would marry him he would, after the marriage, give her all the property he had (meaning real property), describing it as "my farm in Osprey," and "my property in Elmvale." She accepted the offer unconditionally, also by letter; the marriage took place; and he afterwards conveyed the two properties to her. After the conveyances the parties, voluntarily and without any evil intent, destroyed the letters, believing that they had no longer any use for them:—

Held, that the letters formed a pre-nuptial contract, enforceable in spite of their destruction, upon satisfactory evidence of their contents being given.

Gilchrist v. *Herbert*, 20 W. R. 348, followed:—

Held, also, that the description of the properties in the man's letter was sufficient, he having no other properties in the places mentioned:—

Held, lastly, that there was a duty on the part of the husband to convey to his wife, which negatived the existence of an intent to defeat creditors. *Stuart* v. *Thomson*, 23 O. R. 563.

Foreign Law—*Conflict of Laws—Present and Future Property—Matrimonial Domicil—Lex rei sitæ.*]—The plaintiff's husband entered into an ante-nuptial contract in the Province of Quebec with her concerning their rights and property, present and future. He subsequently moved to this Province and died there intestate:—

Held, that this contract must govern all his property movable and immovable, though situate in this Province, provided that the laws of this Province relating to real property had been complied with; and that it made no difference whether the matrimonial domicil of the parties at the time of the contract and marriage was in Ontario or Quebec.

The ante-nuptial contract in question was not signed by the parties but by the notaries in their own names, they having full authority from the parties to do so:—

Held, that this was a sufficient signature within the Statute of Frauds to bind the parties. *Taillifer* v. *Taillifer*, 21 O.R. 337.

III. Criminal Conversation and Alienation of Affections.

Adultery of Husband—*Alienation of Husband's Affections—Support of Wife.*]—When a husband leaves his wife to live in adultery with another woman by her procurement, and lives and continues by such procurement to live in adultery with her, whereby his affections are alienated from his wife and she is deprived of her means of support, an action lies at common law by the wife against such woman.

The Married Woman's Property Act, R.S.O. ch. 132, by allowing a wife to sue without her husband and by making the damages recovered the separate property of the wife, removes the former difficulty in enforcing such a cause of action.

Review of English and American decisions. *Quick* v. *Church*, 23 O. R. 262.

Criminal Conversation—*Particulars—Affidavit of Denial—Examination of Plaintiff's*

Wife.]—In an action of criminal conversation, after pleading and examination of the plaintiff for discovery, particulars of the matters complained of should not be ordered except upon a full and satisfactory affidavit of the defendant shewing his innocence and ignorance of the ground of complaint.

Keenan v. *Pringle*, 28 L. R. Ir. 135, followed.

In such an action there is no power, having regard to R. S. O. ch. 61, sec. 7, to order the examination of the wife for discovery as to the alleged acts of adultery. *Murray* v. *Brown*, 16 P. R. 125.

Taking Away Wife From Husband—*Parents.*]—An action will lie by a husband against his father-in-law when the latter has, without sufficient cause, by a display of force taken the wife away from the house of her husband against his will, she continuing absent, whereby he has lost the comfort and help of her society; and substantial damages may be awarded in such a case.

The mere harbouring, by her parents, of a wife who has left her husband, without any evidence of influence or persuasion on their part, is not sufficient to sustain an action against the parents.

Review of English and American decisions. *Metcalf* v. *Roberts*, 23 O. R. 130.

IV. Dealings Between Husband and Wife.

Conveyance of Land to Wife Direct—*Equitable Estate in Wife—Husband Trustee of Legal Estate—Devise of Land by Wife to Infant Children — Possession by Husband — Natural Guardian—Statute of Limitations.*]—A husband who was married in 1854, made a conveyance of lands direct to his wife in 1870, which was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered:—

Held, affirming the decision of Boyd, C., 20 O. R. 158, that the conveyance had the effect of conveying the equitable estate in the lands to the wife, leaving the legal estate in the husband as trustee thereof for the wife.

A gift from a husband to a wife is not an incomplete gift by reasons of the incapacity of the wife at law to take a gift from her husband. *Re Breton's Estate*, 17 Ch. D. 416, commented upon.

The wife died in 1872, having made a will leaving her real estate to the two daughters of herself and husband, who were then aged respectively seventeen and twelve. The husband remained in possession during the wife's life, and from her death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder to recover possession from the devisee of the husband:—

Held, reversing the decision of Boyd, C., 20 O. R. 158, that the Real Property Limitation Act did not apply so as to extinguish the right of the plaintiffs to recover; the presumption being that the husband, after conveying to his wife, was in possession of the lands and in receipt of the rents and profits, for and on behalf of his wife; and that, upon his wife's death, he entered into possession and receipt for and on behalf of his infant children and as their natural guardian; and this being so his possession and receipt were the possession and receipt of his wife, and after her death, of his children and those claiming under them; and the statute, therefore, never began to run.

Wall v. *Stanwick*, 34 Ch. D. 763; *In re Hobbs*, 36 Ch. D. 553; *Lyell* v. *Kennedy*, 14 App. Cas. 437, followed.

Hickey v. *Storer*, 11 O. R. 106; *Clark* v. *McDonnell*, 20 O. R. 584, not followed. *Kent* v. *Kent*, 20 O. R. 445. *See* the next case.

Conveyance Direct—*Separate Use—Curtesy—Limitations.*]—A man, married in 1854, conveyed in 1870 certain lands to his wife by deed under the Short Forms Act, with the usual covenants, for the expressed consideration of "respect and of one dollar." The husband and wife remained in possession of the lands until the wife died in 1872, leaving a will by which she devised her real estate to two daughters of herself and this husband, aged respectively seventeen and twelve. The husband remained in possession till his death in 1890. This action was then brought by the younger daughter and the son of the elder daughter to recover possession from the devisee of the husband:—

Held, that there had been a valid transfer of the equitable estate in the property to the separate use of the wife, and that the husband must be held to have been in possession after her death as guardian for the children or as trustee of the legal estate for them, so that there was no bar under the Statute of Limitations.

Judgment of the Queen's Bench Division, 20 O. R. 445, affirmed, Burton, J.A., dissenting. *Kent* v. *Kent*, 19 A. R. 352.

Creditors' Rights.]—*See* Fraudulent Conveyance.

Gift—*Chose in Action—Knowledge of Transfer.*]—Since the Married Woman's Property Act of 1884, a husband may make a valid gift of a chose in action to his wife without the intervention of a trustee.

A gift to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of it. *Sherratt* v. *Merchants' Bank of Canada*, 21 A. R. 473.

Purchase of Land by Wife—*Re-sale—Garnishment of Purchase Money — Debt of Husband.*]—D. having entered into an agreement to purchase land, had the conveyance made to his wife, who paid the purchase money and obtained a certificate of ownership from the registrar of deeds, D. having transferred to her all his interest by deed. She sold the land to M. and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not, in fact, paid. M.'s solicitors were also solicitors of certain judgment creditors of D., and judgment having been obtained on their debts, the purchase money of said transfer was garnished in the hands of M. and an issue was directed as between the judgment creditors

and the wife of D. to determine the title to the money under the garnishee order, and the money was, by consent, paid into Court. The judgment creditors claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the statute of Elizabeth, and that she therefore held the land and was entitled to the purchase money on the re-sale as trustee for D. :—

Held, reversing the decision of the Supreme Court of the North-West Territories, that under the evidence given in the case, the original transfer to the wife of D. was *bonâ fide*; that she paid for the land with her own money and bought it for her own use; and that if it was not *bonâ fide* the Supreme Court of the Territories, though exercising the functions and possessing the powers formerly exercised and possessed by Courts of equity, could not, in these statutory proceedings, grant the relief that could have been obtained in a suit in equity :—

Held, further, also reversing the judgment appealed from, that even if the proceedings were not *bonâ fide*, the garnishee proceedings were not properly taken; that the purchase money was to have been paid by M. on delivery of deed of transfer, and the vendor never undertook to treat him as a debtor; that if there was a debt, it was not one which D., the judgment debtor as against whom the garnishee proceedings were taken, could maintain an action on in his own right and for his own exclusive benefit; that D.'s wife was not precluded, by having assented to the issue and to the money being paid into Court, from claiming that it could not be attached in these proceedings; and that the only relief possible was by an independent suit. *Donohoe* v. *Hull*, 24 S. C. R. 683.

Transfer from Husband to Wife—"*Actual and Continued Change of Possession.*"]—A sale of chattels, consisting of household furniture in their residence, between a married woman and her husband, living and continuing to live together, without a duly registered bill of sale, is void as against creditors, for in such a case there cannot be said to be an actual and continued change of possession open and reasonably sufficient to afford public notice thereof, as required by the Bills of Sale Act. *Hogaboom* v. *Graydon*, 26 O. R. 298.

Voluntary Conveyance.]—A voluntary conveyance of a large portion of his property by a husband to his wife, a woman of good business ability and having great influence over him, executed without competent and independent advice, when his physical and mental condition were greatly impaired, he subsequently becoming an incurable lunatic, was set aside.

The doctrine of undue influence and fiduciary relationship discussed.

Distinction between undue influence in cases of gifts *inter vivos* and testamentary gifts referred to.

Judgment of Rose, J., reversed, Hagarty, C.J.O, dissenting. *McCaffrey* v. *McCaffrey*, 18 A. R. 599.

V. Life Insurance.

See Insurance, V.

VI. Marriage.

Bigamy—*Proof of First Marriage.*]—Upon an indictment for bigamy the first marriage must be strictly proved as a marriage *de jure*.

Evidence of a confession by the prisoner of his first marriage is not evidence upon which he can be convicted. *Regina* v. *Ray*, 20 O. R. 212.

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

Held, that, apart from the Indian marriage, there was evidence from which a legal marriage according to the recognized form amongst Christians could be presumed, and that the daughter was therefore his legitimate child and "legal heir." *Robb* v. *Robb*, 20 O. R. 591.

VII. Proceedings by and Against Married Women.

Co-contractor.]—A married woman having separate estate may enter into a contract along with others.

Semble, if she having no separate estate is not liable under such a contract, the other contractors are liable without her. *Dingman* v. *Harris*, 26 O. R. 84.

Judgment Debtor—*Refusal to Attend for Examination—Committment.*]—An order may be made for the commitment of a married woman to gaol for refusal to attend for examination as a judgment debtor.

Rules 926 and 932, and R. S. O. ch. 67, sec. 7, considered.

Metropolitan L. & S. Co. v. *Mara*, 8 P. R. 355, followed. *Watson* v. *Ontario Supply Co.*, 14 P. R. 96.

Mortgage — *Wife of Mortgagor—Dower.*]—The wife of a mortgagor who has joined in a mortgage, made after 11th March, 1879, only for the purpose of barring her dower, is properly made a defendant to an action of foreclosure, in order that she may either redeem or protect her interest by asking for a sale; and being so made a defendant, and submitting to a foreclosure, no question can arise as to her dower being effectually extinguished. *Ayrst* v. *McClean*, 14 P. R. 15.

Mortgage—*Wife of Mortgagor—Dower.*]—The wife of a mortgagor, who has joined in the mortgage for the purpose of barring her dower, to the extent of the mortgage only, has the right to redeem during her husband's lifetime, and is a necessary party to an action of foreclosure in the first instance.

And where she was not so made a party, and judgment of foreclosure was recovered in her absence, she was, after judgment and report, added as a defendant upon her own petition, and permitted to redeem or pay off and obtain an assignment of the mortgage. *Blong* v. *Fitzgerald*, 15 P. R. 467.

Next Friend—*Married Woman—Inspector of Prisons and Public Charities.*]—An action was brought in the name of the plaintiff, a lunatic not so found, confined in a public asylum, by his wife as next friend, to set aside a conveyance of land made by him as improvident, etc. :—

Held, that the action, being for the protection of the lunatic's property, not for the disposal of it, was properly brought by a next friend; and, although a married woman cannot fill such an office, the fact that in this case she did so did not make her proceedings void; and the defendants' only remedy was to apply to remove her and to stay proceedings until a proper next friend should be appointed :—

Held, also, that the objection that the action should have been brought by the inspector of prisons and public charities could not prevail, for it was discretionary with him to institute proceedings or not. *Maslin* v. *Maslin*, 15 P. R. 177.

Summary Judgment — *Untaxed Bill of Costs—Retainer.*]—Summary proceedings upon specially indorsed writs do not apply where, the defendant being a married woman, the judgment can be only of a proprietary nature.

Where a solicitor sued a married woman and her husband upon an untaxed bill of costs, and, in default of appearance, signed judgment against both defendants personally for the amount of the bill and interest :—

Held, that the judgment was irregular and might have been set aside with costs if the defendants had applied promptly; and, under the circumstances, the judgment was amended by limiting it as to the married woman to her separate estate, by disallowing interest, and by directing that the amount should abide the result of taxation, with leave to the husband to dispute the retainer. *Cameron* v. *Heighs*, 14 P. R. 56.

Summary Judgment.]—Where it is shewn that a married woman defendant has separate estate, judgment may be entered against her as to such separate estate, upon default or by order under Rule 739.

And where the writ of summons did not shew that one of the defendants was a married woman having separate estate, but the plaintiff's affidavit filed on a motion for summary judgment under Rule 739 did shew it, the plaintiff was allowed to amend his writ, and to enter a proprietary judgment against her. *Nesbitt* v. *Armstrong*, 14 P. R. 366.

VIII. Separate Estate.

Agreement to Charge.]—A husband agreed to purchase certain land, and his wife, who was married to him in 1866 without any marriage settlement, and had acquired real estate in 1879 under a deed to her, her heirs and assigns "to and for her and their sole and only use forever," joined in the agreement for the purpose of securing its being carried out and charged her land with a portion of the purchase money :—

Held, that the wife's land was separate estate and was properly charged. *Dame* v. *Slater*, 21 O. R. 375.

Contract by Implication.]—Held, reversing the decision of the Common Pleas Division, 19 O. R. 739, that a power of attorney to the husband of the married woman defendant, authorizing him to sell her lands, did not authorize him to exchange such lands for others or to bind her to assume payment of a mortgage on the land given in exchange, and that on the evidence she was not bound thereby :—

Held, also, by Osler, and Maclennan, JJ.A., that the implied obligation to pay off the encumbrance which in the case of a conveyance of land to a person *sui juris* is imposed by a Court of Equity, is not enforceable against a married woman. It cannot be said to be a contract or promise in respect of separate property. *McMichael* v. *Wilkie*, 18 A. R. 464.

Contract.]—The effect of R. S. O. (1877) ch. 125, sec. 3 (now R. S. O. ch. 132, sec. 4, sub-sec. 5) is to deprive the husband of any estate, by the curtesy or otherwise, during the life of the wife, in the lands to which the section applies, being those acquired before or after marriage by a woman married between 5th May, 1859, and 2nd March, 1872.

By section 5 of 47 Vict. ch. 19 (now R. S. O. ch. 132, sec. 7), the *jus disponendi* was given to the married woman, and by it lands acquired by her after the 1st July, 1884, became her separate estate.

The amendment made by section 22 of 47 Vict. ch. 19 (now embodied in R. S. O. ch. 134, sec. 3), enabled the married woman to dispose of her real estate without regard to the date of her marriage or of the acquisition of the property; but under it she can convey her own estate only and not any estate to which her husband may be entitled by the curtesy after her death; while under section 7 of chapter 132 she can convey free from his estate by the curtesy.

Where a woman married in 1869 acquired by conveyances from strangers, lands in Etobicoke in 1879 and 1882 and lands in Parkdale in March, 1887, and was in the lifetime of her husband sued upon promissory notes made after March, 1887 :—

Held, that all the lands were her separate estate liable for her debts; but the Etobicoke lands were subject to the possible right of her husband to hold them after her death, she dying seized intestate, for his life, in case he survived her, as tenant by the curtesy, and that subject to this possible estate of her husband they were liable to be seized and sold for the satisfaction of the plaintiff's claim. *Moore* v. *Jackson*, 20 O. R. 652. *See* the next two cases.

Contract.]—A woman married in 1869, without any marriage settlement, acquired in 1879

and 1882 certain lands by conveyances from strangers, her husband then being living. This action was brought in September, 1889, her husband being still living, to recover the amount of certain promissory notes made by her in 1887:—

Held, reversing the judgment of the Queen's Bench Division, and restoring that of Armour, C.J., 20 O. R. 652, that the lands in question were not the separate property of the married woman and were not subject to her debts. *Moore* v. *Jackson*, 19 A. R. 383. *See* the next case.

Contract.] — A woman married between 1859 and 1872 acquired, in 1879 and 1882, lands in Ontario as her separate property, and in 1887, before the Married Woman's Property Act of that year, R. S. O. ch. 132, came into force, she became liable on certain promissory notes made by her :—

Held, reversing the decision of the Court of Appeal, 19 A. R. 383, that the liability of her separate property to satisfy a judgment on said promissory notes depended on the construction of the Married Woman's Real Estate Acts of 1887, R. S. O. chs. 125, 127, and the Married Woman's Property Act, 1884, 47 Vict. ch. 19, read in the light furnished by certain clauses of C. S. U. C. ch. 73 ; and that her capacity to sue and be sued in respect thereof carried with it a corresponding right on the part of her creditors to obtain the fruits of a judgment against her by execution on such separate property. *Moore* v. *Jackson*, 22 S. C. R. 210.

Contract.]—A married woman having been informed by a relative that he had made his will in her favour, signed a promissory note three days after his death, before she had seen the will, and some weeks before it was proved. The will gave her a vested interest in the property bequeathed. She also owned a promissory note of her husband :—

Held, that she was possessed of separate estate, and had contracted with respect to it.

Decision of Street, J., 24 O. R. 441, affirmed. *Mulcahy* v. *Collins*, 25 O. R. 241.

Marriage Settlement—*Don Mutuel — Property Excluded from, but Acquired after Marriage — Resiliation for Value.*]—Where by the terms of a *don mutuel* by marriage contract a farm in the possession of one of the sons of the husband under a deed of donation was excluded from the *don mutuel*, and subsequently the farm in question became the absolute property of the father, the deed of donation having been resiliated for value, it was held that by reason of the resiliation the husband had acquired an independent title to the farm and it thereby became charged for the amount due under the *don mutuel* by marriage contract, viz. $5,000, and that after the husband's death the wife (the respondent in this case) was entitled, until a proper inventory had been made of the deceased's estate, to retain possession of the farm. Taschereau, and Gwynne, JJ., dissenting. *Martindale* v. *Powers*, 23 S. C. R. 597.

Money in Savings Bank—*Gift by Husband.*] —Subsequently to the coming into force of the "Married Woman's Property Act," R. S. O. ch. 132, a married woman on the day of entering into a money bond deposited in her own name in a savings bank a sum of money, which the evidence shewed had been given to her by her husband, but of which as against him, she had the absolute disposal by his consent and wish :—

Held, that this was sufficient on which to found a proprietary judgment against her, though it was not shewn that the bond was not executed at an earlier hour than that at which the money was deposited. *Sweetland* v. *Neville*, 21 O.R. 412.

Title to Goods—*Execution Against Husband.*] —In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act, R. S. N. S. 5th ser. ch. 74, the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was claimed that the husband's name was Daniel. The jury found that he was well known by both names and that A.'s right to the goods seized was acquired from her husband after marriage which would not make it her separate property under the Act :—

Held, reversing the judgment of the Court below, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without shewing the judgment ; *Hannon* v. *McLean*, 3 S. C. R. 706, followed ; and that under the findings of the jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband which was a complete answer to the action. *Crowe* v. *Adams*, 21 S. C. R. 342.

IX. Miscellaneous Cases.

Distribution of Intestate Estate—*Feme Coverte—Husband's Right to Residuum—Next of Kin.*]—The Legislature of New Brunswick, by 26 Geo. 3, ch. 11, secs. 14 and 17, re-enacted the Imperial Act 22 & 23 Car. 2 ch. 10 (Statute of Distributions) as explained by section 25 of 29 Car. 2 ch. 3 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of *femes coverts* dying intestate, but that their husbands should enjoy their personal estates as theretofore. When the statutes of New Brunswick were revised in 1854 the Act 26 Geo. 3 ch. 11 was re enacted, but section 17, corresponding to section 25 of the Statute of Frauds, was omitted. In the admininistration of the estate of a *feme coverte* her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission :—

Held, that the personal property passed to the husband and not to the next of kin of the wife.

Per Strong, J.—The repeal by the Revised Statutes of 26 Geo. 3 ch. 11, which was passed in the affirmance of the Imperial Acts, operated to restore section 25 of the Statute of Frauds as part of the common law of New Brunswick.

Per Gwynne, J.—When a colonial legislature re-enacts an Imperial Act it enacts it as interpreted by the Imperial Courts, and *a fortiori*

by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. 3 ch. 11 (N.B.), it was not necessary to enact the interpretation section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole Act:—

Held, per Ritchie, C.J., Fournier, Gwynne, and Patterson, JJ., that the Married Woman's Property Act of New Brunswick, C. S. N. B. ch. 72, which exempts the separate property of a married woman from liability for her husband's debts, and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed.

The Supreme Court of New Brunswick while deciding against the next of kin on his claim to the residue of the estate of *feme covert*, directed that his costs should be paid out of the estate. On appeal the decree was varied by striking out such direction. *Lamb* v. *Cleveland*, 19 S. C. R. 78.

Liquor License Act—*Sale by Wife.*]—The defendant was a married woman, and the sale of the liquor took place in the presence of her husband; but the evidence shewed that she was the mere active party, and she was the occupant of the premises on which the sale took place. :—

Held, having regard to R. S. O. ch. 194, sec. 112, sub-sec. 2, that, even if the presumption that the sale was made through the compulsion of the husband had not been removed by section 13 of the Code, it would have been rebutted by the circumstances.

Regina v. *Williams*, 42 U. C. R. 462, distinguished. *Regina* v. *McGregor*, 26 O. R. 115.

Tenants in Common—*Conveyance to Husband and Wife in 1874—Devolution of Estates Act—Conveyance of Land by Administrator—Debts.*]—Land was conveyed in 1874 to a husband and wife, who were married in 1864:—

Held that they took like strangers, not by entireties, but as tenants in common:—

Held, also, that the husband could by virtue of the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole of the land, although there were no debts of the wife to pay.

Martin v. *Mayee*, 19 O. R. 705, distinguished. *Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O. R. 397.

Tort of Wife—*Marriage Prior to 1884—Joinder of Husband as Defendant.*]—Action against a husband and wife alleged to have been married before 1884, for a tort committed by the wife:—

Held, on demurrer, that the husband was properly joined as a party.

Amer v. *Rogers*, 31 C. P. 195, and *Seroka* v. *Kattenburg*, 17 Q. B. D. 177, considered. *Lee* v. *Hopkins*, 20 O. R. 666.

ICE.

Damages—*Loss of Business—Declaration of Right.*]—The defendant, the owner of certain water lots upon the lake front, subject to the usual reservation in favour of the Crown of free passage over all navigable waters thereon, refused to allow the plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless the plaintiff paid toll, which he refused to do:—

Held, that the water over the defendant's lot was a highway, and the plaintiff had the right without payment to cross the lot, whether the water upon it was fluid or frozen; and, having a cause of complaint, and a right of action for his personal loss, he was entitled to come to the Court for a declaration of right.

Gooderham v. *City of Toronto*, 21 O. R. 120, 19 A. R. 64, and *City of Toronto* v. *Lorsch*, 24 O. R. 229, followed:—

Held, also, that the defendant was liable for such reasonable damages as flowed directly from the wrong done by his refusal; but, as he had acted without malice and under a *bona fide* mistake as to his rights, and as the plaintiff might have paid toll under protest, the defendant was not liable for the plaintiff's loss of business consequent on his failure to ship the ice. *Culverton* v. *Miller*, 26 O. R. 36.

ILLEGALITY.

See CONTRACT—MORTGAGE, VI.

ILLEGITIMATE CHILD.

See BASTARD.

IMPLIED COVENANT.

See CROWN LANDS, VI.—GUARANTY AND INDEMNITY.

IMPRISONMENT.

See ARREST—CONTEMPT—INTOXICATING LIQUORS—JUSTICE OF THE PEACE.

IMPROVEMENTS.

Improvements—"*Buildings and Erections*"—*Earth-filling.*]—A covenant by the lessor in a lease of a parcel of land covered by water to pay, at the end of the term, for "the buildings and erections that shall or may then be on the demised premises," does not bind him to pay for crib-work and earth-filling done upon the parcel in question, by which it was raised to the level of the adjoining dry land, and made available as a site for warehouses. *Adamson* v. *Rogers*, 22 A. R. 415. Affirmed by the Supreme Court.

Improvements Under Mistake of Title—*Compensation — Occupation Rent — Crown.*]—

The defendants, owners of land adjoining the bank of the Niagara River, built at great expense stairways and elevators, and made paths from the top of the bank to the water's edge of the river to enable visitors to descend to see the view, and large sums were received for the use of these facilities. Expensive repairs to the stairways, elevators and paths were from time to time necessary, owing to their exposed condition, and the defendants knew that they had no title to the bank, which was vested in the Crown:—

Held, that works of this kind were not lasting improvements within the meaning of section 30 of R. S. O. ch. 100, and that both on this ground, and on the ground that they knew they had no title, the defendants could not recover compensation.

Semble: The section would not affect the Crown, and the title being in the Crown when the improvements were made, the Crown's grantee would take the land free from any lien.

In cases coming within the section the amount by which the value of the land has been enhanced is to be allowed, and the cost or value of the improvements is not the test:—

Held, also, that the defendants were not chargeable with the profits made by them, but only with a fair occupation rent for the land. *Commissioners for the Queen Victoria Niagara Falls Park* v. *Colt*, 22 A. R. 1.

Rival Applicants for Patent of Land—*Payment for Improvements.*]—*See Boulton* v. *Shea*, 22 S. C. R. 742.

Tenancy in Common—*Improvements made before Accrual of Tenancy.*]—The right of a tenant in common, in an action for partition of the property, to be paid for improvements executed by him thereon, is restricted to such as are made by him after his tenancy in common has commenced in fact.

And where a tenant in common, in remainder, by an agreement with the tenant for life, went into possession of the property, and during the life tenancy expended a large sum of money in permanent improvements at the request of the tenant for life:—

Held, that he was not entitled to the value of such improvements. *Lasby* v. *Crewson*, 21 O. R. 255.

See LANDLORD AND TENANT, IX.

INDEMNITY.

See GUARANTY AND INDEMNITY.

INDIAN.

Will—*Male or Female Indian.*]—An Indian, male or female, may make a will, and may by such will dispose of real or personal property, subject to the provisions of the Indian Act, R. S. C. ch. 43, or other statute.

Quere, whether the last part of section 20 of the Indian Act, R. S. C. ch 43, does not leave all questions arising in reference to the distribution of the property of a deceased Indian, male, or female, to the Superintendent-General, so that his decision, and not that of the Court, should determine such questions. *Johnson* v. *Jones*, 26 O. R. 109.

INDICTMENT.

See CRIMINAL LAW, III.

INFANT.

I. CUSTODY.

British Subjects Married in this Province — *Removal to the United States — Husband Naturalized—Divorce Obtained by Wife.*]—The parents of a child seven years old, British subjects and married in this Province, where the child was born, removed to the United States, where the husband took out naturalization papers. In consequence of the husband's alleged intemperance and adultery the wife left him, and on the ground of such adultery, she applied to the Court there and obtained a decree granting her a divorce, and the custody of the child. Shortly before the decree was pronounced, and with the object of escaping its effect, the husband returned to this Province, bringing the child with him.

On an application by the wife for the custody of the child an order was made granting her such custody. *Re Davis*, 25 O. R. 579.

Discretion of Court.]—On the application of a husband against his wife for a writ of *habeas corpus* in respect of their three children, two of them being above twelve years of age, and therefore not within the discretion as to custody given by a local statute framed on the principle of Talfourd's Act, it appeared that the wife had twice left him, taking her children with her, on account of his habitual drunkenness; that on each occasion he agreed that she should maintain and educate the children apart from him; that after the second separation he publicly and falsely alleged on oath against his wife charges so injurious that she could not be expected ever to live with him again; that the wife had ample means, while the husband had only a narrow income:—

Held, that the Courts below exercised a right discretion in discharging the writ and remanding the children to the custody of their mother.

The father's legal power was controlled, as to the youngest child by a statute which gave absolute authority to the Court; it was materially affected as regards the other two by breach of marital duty, by consideration with respect

to their welfare, and the objection to separating them from each other. *Smart* v. *Smart*, [1892] A. C. 425.

Religious Faith of Father—*Testamentary Guardian.*]—Orphan children having been clandestinely taken from the custody of their uncle, the testamentary guardian under the will of their father, who had predeceased his wife, by their aunt, a Roman Catholic, claiming guardianship under an invalid instrument in her favour, signed by the mother of the children, and it appearing that their father, a Protestant, had desired the children to be brought up in his own faith, an order was made for their delivery to the custody of their uncle as testamentary guardian. *Re Chillman*, 25 O. R. 268.

II. Estate.

Life Insurance—*Payment to Executors.*]—Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed under sections 11 and 12 of R. S. O. ch. 136, be paid to the executors of the will of the insured, as provided by section 12, without security being given by them, and payment to them is a good discharge to the insurers. *Dodds* v. *Ancient Order of United Workmen*, 25 O. R. 570.

Money in Court—*Payment Out—Administratrix.*]—The administratrix of a person who had died before the Devolution of Estates Act came into force was allowed to take out of Court a sum of $240, which was part of the personal estate of the deceased, notwithstanding that two infants were among the next of kin who would be entitled to share in the estate after payments of debts, etc.

Hanrahan v. *Hanrahan*, 19 O. R. 396, followed. *Re Parsons, Jones* v. *Kelland*, 14 P. R. 144.

Money in Court—*Payment Out—Administrator.*]—Money in Court belonging at the time of her death to an intestate was paid out to her administrator notwithstanding that infants might be or might become entitled to it or a share of it.

Semble, if the money belonged specifically to infants, the disposition might be otherwise. *Stewart* v. *Whitney*, 14 P. R. 147.

Money in Court—*Payment Out—Marriage—Foreign Law.*]—Where a female was entitled at majority to payment out of Court of a sum of money, and it appeared that, although only nineteen years of age, she was married and domiciled in a foreign country, by the laws of which a female is entitled upon marriage to receive money due her, an order was made for immediate payment out. *Kavanagh* v. *Lennon*, 16 P. R. 229.

Sale of Land—*Benefit of Parent.*]—The statute R. S. O. ch. 137, sec. 3, cannot be used to sell an infant's estate for a parent's benefit.

Origin of the enactment. *Re Hibbard*, 14 P. R. 177.

Sale of Land—*Estate Tail.*]—On an application for a ruling as to whether the estate of an infant being an estate tail in possession could be sold under R. S. O. ch. 137;—

Held, that the Act applies to an estate tail. *In re Gray*, 26 O. R. 355.

Sale of Land—*Official Guardian.*]—Under 54 Vict. ch. 18, sec. 2 (O.), the approval of the official guardian to a sale of land by executors or administrators is now required only where the sale is for the purpose of distribution simply, and then only where there are infants interested, or heirs or devisees who do not concur.

Where administrators in contracting to sell lands under circumstances not requiring the consent of the official guardian, nevertheless made the contract of sale subject to his approval, and, as was alleged, lost the sale by having through negligence and delay failed to obtain such approval within the time required by the contract, but had acted throughout with good faith and to the best of their judgment:—

Held, that they were not liable to make good to the estate the deficiency resulting from a resale.

Under the above Acts, executors and administrators are not in all respects in the same position as a trustee for sale of lands. Upon the latter is cast a duty to sell, upon the former a mere discretion to be exercised only for certain purposes and in certain events.

Semble, where the approval of the official guardian is not required, notice need not be given to him under Rule 1095. *In re Fletcher's Estate*, 26 O. R. 499.

See the cases under the next sub-title.

III. Guardian.

Foreign Guardian—*Security.*]—An infant was entitled to share in certain insurance moneys accruing under a policy upon the life of her deceased father. The infant lived with her mother in a foreign state, and the mother had there been appointed by a Surrogate Court guardian of the infant, and had given security to the satisfaction of that Court. The mother petitioned the High Court to be appointed trustee under R. S. O. ch. 136, sec. 12, to receive the infant's share of the insurance moneys without security:—

Held, that the security given by the petitioner in the foreign Court would not attach to her appointment as trustee under the Act; and the Court declined to appoint her unless she furnished the necessary security here.

Re Thin, 10 P. R. 490, followed. *Re Andrews*, 11 P. R. 199, not followed. *Re Slosson*, 15 P. R. 156.

Surrogate Guardian — *Power to Lease Lands.*]—A guardian of an infant appointed under the Surrogate Court Act, R. S. O. ch. 137, has power to lease the lands of the infant during the latter's minority, but not beyond that period.

Switzer v. *McMillan*, 23 Gr. 533, not followed.

During such minority the guardian is a trustee of the lands for the infant and cannot acquire a title to them by possession, but after the majority of the infant the possession of the

guardian changes its character and becomes that of a stranger, and the Statute of Limitations runs in favour of the guardian or those claiming under him.

Hickey v. *Storer*, 11 O. R. 106, followed. *Clarke* v. *Macdonell*,, 20 O. R. 564.

Testamentary Guardian — *Insurance for Benefit of Children.*]—A testatrix having insured her life and made the polices payable to her two daughters, by her will requested her executors, the defendants, to place the amount thereof in some thoroughly safe investment until her daughters' majority or marriage, when the amounts and their accumulated interest should be divided equally between her daughters, and appointed her husband, the plaintiff, their guardian.

In an action brought by the guardian to have the proceeds of the policies handed over to him by the executors :—

Held, that the insurance moneys being made payable to the daughters were by 53 Vict. ch. 39, sec. 4 (O.), severed from her estate at her death and her testamentary directions could not affect the fund beyond what was permitted by that statute, and R. S. O. ch. 136 :—

Held, also, that during the minority of the daughters the trustees appointed by the will as provided for by section 11, R. S. O. ch. 136, might by section 13, invest in manner authorized by the will; but while the insured could give directions as to the investment, she was not to control the discretion of the lawful custodian of the fund and child, in case the income was needed for maintenance or education, or the corpus for advancement :—

Held, also, that the guardian was the custodian of the daughters with the incident of determining to a large extent what should be expended in their bringing up, and that the executors had charge of the preservation and utilization of the fund :—

Held, also, that section 12 of R. S. O. ch. 136, does not justify an Insurance Company in paying the amount of a policy to a testamentary guardian; the guardian there named being one who has given security and that the Court should not transfer the moneys from the executors to the father as testamentary guardian, as his right to handle any part of the fund was subject to the trusts specified in the will, the execution of which was vested in the executors. *Campbell* v. *Dunn*, 22 O. R. 98.

Trustee and Guardian—*Life Insurance.*]—The mother of an infant to whom insurance moneys were payable, having been appointed guardian and having given security, was appointed trustee under R. S. O. ch. 136, sec. 11. *Scott* v. *Scott*, 20 O. R. 313.

Tutor.]—Where a father, acting generally in the interest of his minor child, but without having been appointed tutor, and being indebted to the estate of his deceased wife, of whom the minor was sole heir, subscribed for certain shares in a commercial or joint stock company on behalf of the minor and caused the shares to be entered in the books of the company as held "in trust," this created a valid trust in favour of the minor without any acceptance by or on behalf of the minor being necessary. Such shares could not be sold or disposed of without complying with the requirements of Articles 297, 298 and 299 of the Civil Code; and a purchaser of the shares having full knowledge of the trust upon which the shares were held, although paying valuable consideration, was bound to account to the tutor subsequently appointed for the value of such shares. The fact of the shares being entered in the books of the company and in the transfer as held "in trust" was sufficient of itself to shew that the title of the seller was not absolute and to put the purchaser on inquiry as to the right to sell the shares. *Sweeny* v. *Bank of Montreal*, 12 S. C. R. 661; 12 App. Cas. 617, referred to and followed. Taschereau, J., dissenting. *Raphael* v. *McFarlane*, 18 S. C. R. 183.

IV. Maintenance.

Fund in Hands of Administrator.]—Where an infant's fund is in Court, or under the control of the Court, a summary order may be granted for the application of it in maintenance, upon a simple notice of motion.

But if the money is outstanding in the hands of trustees or others, unless they submit to the jurisdiction, summary proceedings are inappropriate.

And a summary application by the guardian of infants for payment to him or into Court, by the administrator of the estate of the infants' father, of a fund in his hands, was dismissed, where it was opposed by the administrator.

Re Wilson, 14 P. R. 261, distinguished.

Re Lofthouse, 29 Ch. D. 921, followed. *Re Coutts*, 15 P. R. 162.

Interest on Fund in Hands of Trustees.]—Under the will of their father two infants were entitled each to a vested legacy of $500, which trustees were directed to invest at interest until the infants should be of full age, and then pay to them :—

Held, that a Judge in Chambers had jurisdiction, upon a summary application, to make an order authorizing the trustees to apply the interest for the maintenance of the infants; but such an order should not be made except upon the clearest and most satisfactory evidence; as much evidence, at least, as is required upon an application for the sale of infants' lands for their maintenance should be required, and the like safeguards against deception and mistake should be [illegible] upon. *Re Wilson*, 14 P. R. 260.

Past Maintenance—*Special Circumstances.*]—Applications for past maintenance of infants rest in the discretion of the Court.

Where the infants' brother-in-law, a farmer, had lodged and fed them, but expended nothing for their clothes or education, during a period of two years and a half previous to applying for maintenance, knowing all the time that they were entitled to money in Court, and a Judge in Chambers refused to allow anything for past maintenance, but made a more liberal allowance for the future than he would otherwise have done :—

Held, that, dealing with the case on its special circumstances, and having regard to the discretion exercised, the Judge's order should not be disturbed. *Re Blair*, 14 P. R. 229.

Past Maintenance—*Special Circumstances.*]—Where applications for past maintenance of infants are made, and especially where the only fund for payment is the corpus of the estate, the applicant should come on petition before a Judge in Chambers, shewing and proving the special circumstances relied on to overcome the general rule that arrears of past maintenance are not given, which rule applies whether the claimant is father, mother, or other relative, a step-parent or a stranger.

And where it appeared that a person making a claim for the past maintenance of his infant step-children, against the proceeds of the sale of their father's farm realized in administration proceedings, had not maintained the infants on the basis of being compensated therefor, but that his claim was an after-thought, a Judge refused to confirm the Master's recommendation of an allowance. *In re Renwick, Renwick v. Crooks*, 14 P. R. 361.

Will—"*He who Seeks Equity must do Equity*"—*Receiver.*]—Under a devise of land to a father "during his life, for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body, or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from and independently of their father, but the children being in needy circumstances will be entitled as against the father's execution creditor, who has been appointed receiver of his interest, to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. *Allen* v. *Jackson*, 20 A. R. 34.

V. Proceedings by and Against.

Action Without Next Friend—*Laches.*]—An infant was a part owner of a patent right and engaged in business transactions with respect to it. Along with other part owners he signed a retainer to solicitors to take proceedings to stop the infringement of the patent, and the solicitors, not knowing that he was an infant, brought an action for that purpose, using his name as a plaintiff, without a next friend. The action was prosecuted for a time with the result that the infringement ceased but it was subsequently dismissed with costs against the plaintiffs for want of prosecution. More than a year after he came of age, he moved to set aside all proceedings in the action:—

Held, that, under the circumstances mentioned, he was not entitled to relief on the ground of infancy. *Millson* v. *Smale*, 25 O. R. 144.

Contributory Negligence.]—A woman went went with her child two and a-half years old to the defendants' shop to buy clothing for both. While there a mirror fixed to the wall, and in front of which the child was, fell and injured him:—

Held, that it was a question for the jury whether the mirror fell without any active interferenee on the child's part; if so, that in itself was evidence of negligenee; but if not, the question for the jury would be whether the defendants were negligent in having the mirror so insecurely placed that it could be overturned by a child; and if that question were answered in the affirmative, the child, having come upon the defendants' premises by their invitation and for their benefit, would not be debarred from recovering by reason of his having directly brought the injury upon himself.

Hughes v. *Macfie*, 2 H. & C. 744; *Mangan* v. *Atherton*, 4 H. & C. 388; and *Bailey* v. *Neal*, 5 Times L. R. 20, commented on and distinguished.

Semble, that the doctrine of contributory negligence is not applicable to a child of tender years.

Gardner v. *Grace*, 1 F. & F. 359, approved of.

Semble, also, that if the mother was not taking reasonably proper care of the child at the time of the accident, her negligence in this respect would not prevent the recovery by the child. *Sangster* v. *Eaton*, 25 O. R. 78. Affirmed in appeal, 21 A. R. 624; and by the Supreme Court, 24 S. C. R. 708.

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

Malpractice—*Medical Practitioner—Limitation of Actions.*]—An action for malpractice against a registered member of the College of Physicians and Surgeons of Ontario was brought within one year from the time when the alleged ill effects of the treatment developed, but more than a year from the date when the professional services terminated:—

Held, that the action was barred under the Ontario Medical Act, R. S. O. ch. 148, sec. 40.

Infancy does not prevent the running of the statute. *Miller* v. *Ryerson*, 22 O. R. 369.

Mortgage.]—In a mortgage action for foreclosure, although it may be that since the Devolution of Estates Act, as a matter of title, the record is complete with the general administrator of the deceased owner of the equity of redemption as the sole defendant; yet, as a matter of procedure, the infant children of the deceased are proper parties, and as such should appear as original defendants, unless some good reason exists for excluding them.

Rules 309 and 1005 considered. *Keen* v. *Codd*, 14 P. R. 182.

Mortgage.]—In a mortgage action, where possession is claimed, the writ of summons need not be served personally on the infant heirs of the mortgagor, if they are not personally in possession. *Sparks* v. *Purdy*, 15 P. R. 1.

Mortgage.]—Infants are bound by a judgment for possession against executors in a mortgage action. *Keen* v. *Codd*, 14 P. R. 182, distinguished. *Emerson* v. *Humphries*, 15 P. R. 84.

Next Friend — *Foreigner — Security for Costs.*]—Infants having a *bonâ fide* cause of action are privileged suitors; and the same rule as to security for costs should not be applied as in the case of adults.

If the next friend of the infant plaintiffs, being the natural guardian, is within the jurisdiction when the action is begun, and so continues *pendente lite*, the Court will not too anxiously scrutinize the tenure of his residence.

And where the infant plaintiffs and their natural guardian and next friend were foreigners, and came within the jurisdiction merely for the purpose of bringing the actions, but continued therein up to the time of an application for security for costs, and it appeared that they had a *bond fide* cause of action, an order staying proceedings until a new next friend within the jurisdiction should be found, was reversed. *Scott* v. *Niagara Navigation Co.*, 15 P. R. 460. Affirmed by the Divisional Court, 15 P. R. 455.

Next Friend—*Retirement of—Direction to Solicitors not to Proceed.*]—Upon application to the Court therefor the next friend of an infant plaintiff may be allowed to withdraw, upon such terms as the circumstances of the case and the welfare of the infant may require.

Solicitors began an action in the name of an infant as plaintiff by her mother as next friend, with the consent of the latter. After the action had been some time in progress, the mother wrote a letter to the solicitor revoking the authority to use her name, to which they replied that proceedings would not be stayed unless she paid costs up to date, and that if she did not do so they would assume that she intended them to continue the action. She took no notice of this and they went on with some proceedings, whereupon the defendant, instructed by the mother, moved to dismiss the action on the ground that it was being prosecuted without authority, and asked for costs against the solicitors :—

Held, in staying the proceedings, that there was nothing to prevent the mother from renouncing her character of next friend and withdrawing from the litigation, subject to her remaining amenable to the jurisdiction of the Court as to liability for costs theretofore incurred.

As to costs :—

Held, that the Court reaches the solicitors of a plaintiff directly for the benefit of the defendant only where the plaintiff as client has a right to be recouped by the solicitor, and to the extent of that recoupment. The next friend here was liable to the solicitor for costs up to her letter, and the solicitor was liable to the next friend for costs subsequent thereto ; and as the former costs exceeded the latter, and, as between the next friend and the defendant, the former was liable for costs so long as she did not make a direct application against the solicitors, no order could be made in favour of the defendant ; but the next friend was entitled to be indemnified by the solicitors for costs incurred after her letter :—

Held, also, that it was competent for the defendant to move to stay the proceedings, although the normal practice is for the next friend to move. *Taylor* v. *Wood*, 14 P. R. 445.

Will—*Disclaimer — Possession of Land.*]—A son of the testator and one of the executors and trustees named in a will was a minor when his father died, and after coming of age he never applied for probate, though he knew of the will and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate and remained in possession over twenty years, and until the period of distribution under the clause above set out arrived, and then claimed to have a title under the statute of limitations :—

Held, affirming the decision of the Court of Appeal, *sub nom. Wright* v. *Bell*, 18 A. R. 25, that as he held under an express trust by the terms of the will the rights of the other devisees could not be barred by the statute. *Houghton* v. *Bell*, 23 S. C. R. 498.

Will—*Executor.*]—A grant of probate to an infant executor along with an adult is not a nullity. *Canadian* v. *Landed Banking and Loan Co.*, 20 C. L. 382, *ante* 442.

See Limitation of Actions, II., III.

INFORMATION.

Information by Attorney-General under Civil Code.] — *See Casgrain* v. *Atlantic and North-West R. W. Co.*, [1895] A. C. 282, *ante* 63, and *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada*, 21 S. C. R. 72, *ante* 63.

Information of Intrusion—*Order to Reconvey — Appropriate Remedies to be Asked for Therein.*]—An order directing the defendant to reconvey the land is not an appropriate part of the remedy to be given upon an information of intrusion. *The Queen* v. *Farwell*, 3 Ex. C. R. 271.

See, also, The Queen v. *Fisher*, 2 Ex. C. R. 365, *ante* 424.

INFRINGEMENT.

See Patent for Invention.

INJUNCTION.

Costs of Unnecessary Injunction Motion.] —*See Sklitzsky* v. *Cranston*, 22 O. R. 590, *ante* 239.

Damages in Lieu of.]—The plaintiff having failed to prove actual damage for the diversion of a watercourse, was allowed nominal damages for the wrong ; and instead of granting a mandatory injunction to compel the restoration of the watercourse, the Court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict. ch. 29, sec. 90, sub-sec. h (D.). *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

Damages in Lieu of.]—The mode of computing damages to be allowed in lieu of an injunction considered.

Judgment of the Queen's Bench Division, 25 O. R. 37, affirmed. *Arthur* v. *Grand Trunk R. W. Co.*, 22 A. R. 89.

Damages—*Undertaking—Dismissal of Action at Trial—Refusal of Reference as to Damages.*]—

The jurisdiction to award an enquiry as to, or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages given, is a discretionary one, to be exercised judiciously and not capriciously.

Where, in an action to set aside a sale of goods as fraudulent, a claim for damages by reason of an injunction was set up in the defence, and the trial judge was, on the evidence, of opinion that no damage was proved occasioned by the injunction as distinct from the detriment arising from the litigation, and no additional evidence having been given, the Divisional Court, under the circumstances of this case, where the defendant was given his costs, although his conduct had been such as properly to provoke legal enquiry, refused to award a reference as to damages. *Gault* v. *Murray*, 21 O. R. 458.

Duration of—*Undertaking*—"*Final Disposition of the Action*"—*Judgment after Trial.*]—Where an injunction is granted "until the trial or other final disposition of the action, or until further order," or an undertaking is given to that effect, it remains in force until the action is finally disposed of or until some other order is made with regard to the injunction or undertaking. The action is not finally disposed of until final judgment is entered, because until then it cannot be certain what the final judgment will be.

And where an interim injunction was obtained by the plaintiffs restraining the defendants from doing certain acts until the trial or other final disposition of the action or until further order, and by the judgment pronounced after the trial the action was dismissed, but the entry of the judgment was stayed until the fifth day of the next sittings of a Divisional Court:—

Held, that the effect of the stay was to leave the whole matter *in statu quo* until the defendants should become entitled to enter judgment, and by so doing put an end to the injunction in accordance with its terms. *Carroll* v. *Provincial Natural Gas Co.*, 16 P. R. 518.

Proceedings in Quebec Court—*Winding-up Proceedings.*]—Injunctions granted to restrain proceedings in a Montreal Court against a bank in process of being wound up in Ontario, under the Dominion Winding-up Act, and also such proceedings against the liquidators appointed in the winding-up for things done in their official capacity, and from attacking the validity of their appointment. *Re Central Bank, Baxter* v. *Central Bank*, 20 O. R. 214.

Running of Street Cars on Sunday.]—*See Attorney-General* v. *Niagara Falls, Wesley Park and Clifton Tramway Co.*, 18 A. R. 453, *ante* 63.

INN-KEEPER.

See Intoxicating Liquors.

INSOLVENCY.

See Bankruptcy and Insolvency.

INSPECTOR OF PRISONS.

See Lunatic.

INSURANCE.

I. Insurance Companies.

Assessment of Insurances Companies.]—*See Peters* v. *City of St. John*, 21 S. C. R. 674; and *Confederation Life Association* v. *City of Toronto*, 24 O. R. 643, 22 A. R. 166, *ante* 45.

Discovery in Actions Against Insurance Companies.]—*See Graham* v. *Temperance and General Life Assurance Co.*, 16 P. R. 536; and *Ferguson* v. *Provincial Provident Institution*, 15 P. R. 366, *ante* 416.

Fraternal Societies.]—The defendant with the alleged object of starting a branch of a society, called the "International Fraternal Alliance, having its head office in the United States, while in this Province induced a number of persons to make application for membership therein, and to pay a joining fee of $5, which in addition to certain alleged social benefits entitled a member on application therefor, and on payment of certain fees, to pecuniary benefits, namely, a certificate entitling the member to a weekly payment in case of sickness or accident and certain other sums in case of death or after a stated period. The defendant gave the applicants a receipt acknowledging the payment of the $5 for, as stated, the purposes mentioned in an agreement written thereunder, namely, to forward to the head office the application on signature thereof, and if declined to return amount paid; but, if accepted, the payer was constituted a member, etc., entitled to the full benefits of all social, etc., advantages; and thereafter might secure all the pecuniary benefits on application therefor:—

Held, that the defendant was carrying on the business of accident insurance without having obtained the necessary license therefor contrary to section 49 of the Insurance Act, R. S. C. ch. 124; and that no protection was afforded by section 43 relating to fraternal, etc., societies, the scheme not being an insurance of the lives of the members exclusively; and the conviction

therefor of the defendant for carrying on such business was therefore affirmed. *Regina* v. *Stapleton*, 21 O. R. 679.

Insurance Corporations Act, 1892—*Interim Receiver—Security.*]—A Master of the High Court has no authority under the provisions of "The Insurance Corporations Act, 1892," to direct security to be given by an officer of a company being wound up, in place of an insufficient security already given by such officer. Section 54, sub-sections 5 and 7, merely provide for the giving of security as interim receiver, which may be made a condition of retention in that office, but default in giving which cannot be punished by imprisonment for contempt. *Re Dominion Provident, Benevolent, and Endowment Association*, 24 O. R. 416.

Insurance Corporations Act, 1892—*Powers of Master—Creditors' Schedules—Contributories' Schedules.*]—The Ontario Legislature has power to confer upon the Master the powers given by "The Insurance Corporations Act, 1892."

The Master has power under that Act to settle schedules of creditors, which implies power to adjudicate upon the claims of officials of a company for services to ascertain whether they shall appear as creditors in the schedules; but he cannot adjudicate upon the question whether they have been guilty of such conduct as deprives them of their right to claim as creditors.

He has also power to settle schedules of contributories, but cannot adjudicate upon the question whether officials of the company have been guilty of such a breach of duty as to make them liable for any loss by reason thereof. Such matters can only be determined by action. *Re Dominion Provident, Benevolent, and Endowment Association*, 25 O. R. 619.

Issue of Policy.]—*See Buck* v. *Knowlton*, 21 S. C. R. 371, *ante* 6.

II. Accident Insurance.

Employer's Liability Policy—*Construction—Indemnity.*]—The plaintiff sued for a personal injury, which by his statement of claim he alleged he had received, when acting as conductor of a street railway car operated by the defendants, by reason of the negligence of a servant of the defendants, who was driving a scavenger waggon used by the defendants. The company who had operated the railway before the defendants assumed it, were insured against all sums for which they should become liable to any employee in their service, while engaged in their work. The insurance policy was assigned to the defendants when they assumed the railway. The defendants served on the insurance company a third party notice claiming indemnity:—

Held, that the policy did not cover injuries accruing by reason of the negligence of the defendants or their servants in other branches of their service; and that the insurance company should not be kept before the Court on the chance of a different state of facts being developed at the trial from that which the plaintiff alleged.

An order was therefore made in Chambers setting aside the third party notice. *Ferguson* v. *City of Toronto*, 14 P. R. 358.

Employer's Liability Policy—*Construction—Condition—Defence of Actions brought by Employees.*]—In an action upon an employer's liability policy, whereby the defendants agreed to pay the plaintiff all sums up to a certain limit and full costs of suit, if any, in respect of which the plaintiff should become liable to his employees for injuries received whilst in his service, subject to the condition, amongst others, that "if any proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefor:"—

Held, that the plaintiff was not entitled, in the face of such a stipulation, to claim from the defendants the amount of a judgment obtained against him by an employee in an action defended by the plaintiff through his own solicitor and counsel, leaving the defendants to shew as a defence or by way of counterclaim that they could have done better by defending it themselves; nor was an offer by the plaintiff, at a time when the action was at issue and on the peremptory list for trial the following day, to hand over the defence to the defendant's solicitors, a sufficient compliance with the condition. *Wythe* v. *Manufacturers' Accident Insurance Co.* 26 O. R. 153.

Immediate Notice of Death—*Waiver—External Injuries Producing Erysipelas—Proximate or Sole Cause of Death.*]—An accident policy issued by the appellants, was payable in case, *inter alia*, "the bodily injuries alone shall have occasioned death within ninety days from the happening thereof, and provided that the insurance should not extend to hernia, etc., nor to any bodily injury happening directly or indirectly in consequence of disease, or to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death." The policy also provided that in the event of any accident or injury for which claim may be made under the policy, immediate notice must be given in writing, addressed to the manager of the company at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice, shall invalidate all claims under the policy. On the 21st March, 1886, the insured was accidently wounded in the leg by falling from a verandah and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued on the 13th of April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on the 29th April, and the notice was only received at Montreal on the 1st of May. The manager of the company

acknowledged receipt of proofs of death which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognize their liability. At the trial there was conflicting evidence as to whether the erysipelas resulted solely from the wound but the Court found on the facts that the erysipelas followed as a direct result from the external injury. On appeal to the Supreme Court :—

Held, reversing the judgment of the Court below, Fournier and Patterson, JJ., dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this regard.

Per Strong, Fournier, and Patterson, JJ., that the external injury was the proximate or sole cause of death within the meaning of the policy. *Accident Ins. Co. of North America* v. *Young*, 20 S. C. R. 280.

III. Fire Insurance.

Ascertainment of Loss.]—Proceedings under R. S. O. ch. 167, sec. 114 (16), for the ascertainment of the amount of a loss under a fire policy, are proceedings in the nature of an arbitration and not of a valuation merely.

Arbitrators must be indifferent, and an award made by arbitrators, one of whom was at the time of arbitration sub-agent for an agent of the defendants in obtaining insurance risks, though he had acted as such to only a very small extent, was held void.

Race v. *Anderson*, 14 A. R. 213, followed. *Vinchery* v. *Guardian Fire and Life Assurance Co.*, 19 A. R. 293.

Assignment of Part of Insured Property.]—Where a policy of insurance in one sum covers buildings and chattels, and the land upon which the buildings stand is conveyed by deed without the consent of the insurers in breach of the fourth statutory condition, the policy is avoided *in toto* and does not remain in force as to the chattels.

Distinction between the breach of that condition and the first condition pointed out.

Gore District Mutual Fire Ins. Co. v. *Samo* 2 S. C. R. 411, applied.

Dunlop v. *Usborne and Hibbert Farmers Mutual Fire Ins. Co.*, 22 A. R. 364.

Assignment of Policy—*Breach of Condition.*]—A condition in a policy of insurance against fire provided that if the policy or any interest therein should be assigned, parted with or in any way incumbered, the insurance should be absolutely void, unless the consent of the company thereto was obtained and indorsed on the policy. S. the insured under said policy assigned, by way of chattel mortgage, all the property insured and all policies of insurance thereon and all renewals thereof to a creditor. At the time of such assignment S. had other insurance on said property, the policies of which did not prohibit their assignment. The consent of the company to the transfer was not obtained and indorsed on the policy :—

Held, affirming the decision of the Supreme Court of Nova Scotia, that the mortgage of the policy by S., without such consent, made it void and he could not recover the amount insured in case of loss. *Salterio* v. *City of London Fire Ins. Co.*, 23 S. C. R. 32.

Attachment of Insurance Moneys.]—*See Simpson* v. *Chase*, 14 P. R. 280 *ante* 59.

Change of Interest—*Partnership Turned into Company—Avoidance of Policy.*]—Where the business of a partnership is taken over by a limited liability company formed for that purpose there is such a change of interest as to invalidate insurances held by the firm in the absence of notification of the change to, and assent by, the insurance company, though the members of the partnership hold nearly all the stock in the limited liability company.

Peuchen v. *City Mutual Fire Ins. Co.*, 18 A. R. 446.

Change of Title — *Change Material to the Risk.*]—Where in a contract for the rebuilding of a church, the contractors for the work agreed with the churchwardens to take the old materials at a fixed sum as a first payment on the contract, and before the date fixed for the commencement of the work the church was destroyed by fire, and the contractors before the time for the commencement of the work received from the churchwardens a smaller sum than the amount agreed on as a first payment in place of the materials deliverable to them under the contract :—

Held, that upon the construction of the building contract, the church was to remain the property of the plaintiffs until the date fixed for beginning the work, and that, under the statutory conditions, at the time of the fire there had been no assignment, alienation, sale or transfer, or change of title to the property, or change material to the risk ; and that the plaintiffs were therefore entitled to recover from the defendants the amount of the loss. *Ardill* v. *Citizens' Ins. Co. Ardill* v. *Ætna Ins. Co.*, 22 O. R. 529. *See* the next case.

Change of Title — *Change Material to the Risk.*]—The fact that the owners of an insured building have entered into an executory contract for the pulling down of the building in question and for the sale of the materials to the contractors at a sum very much less than the amount of the insurance is no bar to their right to recover the full amount of the insurance when the building is burnt down before the time fixed by the contract for the transfer of possession.

Judgment of MacMahon, J., 22 O. R. 529, affirmed. *Ardill* v. *Citizens' Ins. Co.; Ardill* v. *Ætna Ins. Co.*, 20 A. R. 605.

Change of Title — *Chattel Mortgage.*] — A policy of insurance against fire provided that in the event of any sale, transfer or change of title in the property insured the liability of the company should thenceforth cease ; that the policy should not be assignable without the consent of the company indorsed thereon ; and that all encumbrances effected by the

assu[illegible] t[illegible]tified within fifteen days the[illegible]rout.

Held, reversing the decision of the Supreme Court of Nova Scotia, that giving a chattel mortgage on the property insured was not a sale or transfer within the meaning of this condition, but it was a "change of title" which avoided the policy.

Sovereign Ins. Co. v. *Peters*, 12 S. C. R. 33, distinguished:—

Held, further, that [illegible] was an incumbrance even if the condition meant an incumbrance on the policy. *Citizens' Ins. Co.* v. *Saltorio*, 23 S. C. R. 155.

Description—*Main Building—Annex.*]—The asylum for the insane, London, consists of a centre building containing all necessary accommodation for patients, etc., and a kitchen, laundry and engine-room, built of brick and roofed with slate, situate some fifty feet to the rear of the middle of the centre building, and connected with it by a passage or covered way, with brick walls about ten feet high, and also roofed with slate and with a tramway to convey food from the kitchen to the southern portion of the centre building. A policy of insurance against fire insured the "main building":—

Held, affirming the judgment of the Court of Appeal and of the Divisional Court, that the policy covered the kitchen, laundry and engine-room. *Ætna Ins. Co.* v. *Attorney-General of Ontario*, 18 S. C. R. 707.

Description — *Reference to Plan—Variance—Falsa Demonstratio non Nocet — Canvasser — Agency.*] — An insurance policy described the goods insured as stock, consisting of dry goods, etc., while contained in that one and a half story frame building [illegible]cupied as a store house, said building shew[illegible]on plan on back of application as "feed hous[illegible]situate attached to wood-shed of assured's dwelling-house. The plan referred to had been made by a canvasser for insurance, who had obtained the application, and the building on said plan marked "feed house, did not in any respect conform to the description in the policy, but another building thereon answered the description in every way except as to the designation "feed house." The goods insured were stored in this latter building and were burnt. The company refused to pay, alleging breach of a condition in the policy that [illegible]dangerable materials should be stored on [illegible]said [illegible]mises, as well as misdescription of the building containing the goods insured.

In an action on the policy it appeared that a barrel of oil was in the building marked "feed house" at the time of the fire.

The jury found a verdict for the plaintiff and a non-suit, moved for pursuant to leave reserved, was refused by the full Court:—

Held, that the non-suit was rightly refused; that it was evident that the building in which the goods were stored was that intended to be described in the policy; that the building marked "feed house" being detached from that in which the goods were was a suitable place for storing oil, which, therefore, was not a breach of the condition; that the case was a proper one for the application of the maxim *falsa demonstratio non nocet*, but if not, the matter was one for the jury who had pronounced upon it:—

Held, further, that the canvasser who secured the application could not be regarded as agent of the assured, but was the agent of the company which was bound by his acts. *Guardian Ins. Co.* v. *Connely*, 20 S. C. R. 208.

Divided Risk—*Proportion of Loss.*]—Statutory condition 9 of the Ontario Insurance Act, provides that in the event of there being other insurances on the property, the company shall only be liable for the payment of a ratable proportion of the loss or damage.

Plaintiff had insured his building against fire in two different companies in separate amounts for the front and rear portions, and the whole building, without division, in a third company. A fire took place, damaging both front and rear, nearly all the injury being done to the rear:—

Held, that the proper method of ascertaining the relative amounts payable by the different companies was to add the amount of all the policies together without reference to the division of the risks, and that each company was liable for its relative proportion to the whole amount insured. *McCausland* v. *Quebec Fire Ins. Co.*, 25 O. R. 330.

Incendiarism.] — *See Royal Ins. Co.* v. *Duffus*, 18 S. C. R. 711, *ante* 28.

Insurable Interest—*Condition in Policy—Transfer by Insurer—Insurance by Other Parties.*]—An agreement by which M. undertook to cut and store ice, provided:—That [illegible]ice houses and all implements were to be the property of P., who after the completion of the contract was to convey same to M., and that M. was to deliver said ice to vessels to be sent by P., who was to be obliged to accept only good merchantable ice so delivered and stored. The ice was cut and stored, and M. effected insurance thereon and on the buildings and tools. In the application for insurance, in answer to the question "Does the property to be insured belong exclusively to the applicant, or is it held in trust, or on commission, or as mortgagee?" the written reply was "Yes, to applicant." At the end of the application was a declaration "that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value and risk of property to be insured so far as the same are known to the applicant, and are material to the risk." The property was destroyed by fire, and payment of the insurance was refused on the ground that the property belonged to P., and not to M. the insured. On the trial of an action on the policy the defendants also sought to prove that P. had effected insurance on the ice, and that under a condition of the policy the amount of M.'s damages, if he was entitled to recover, should be reduced by such insurance by P. This defence was not pleaded. The policies to P. were not produced at the trial, and verbal evidence of the contents was received subject to objection. A verdict was given in favour of M. for the full amount of his policy:—

Held, affirming the judgment of the Court below, that the property in the ice was in M.; that it was the buildings and implements only which were to be the property of P. under the

agreement, and not the ice, which was at M.'s risk until shipped :—

Held, further, Gwynne, J., dissenting, that the insurance to P. and the condition of the policy should have been pleaded, but if it had been, the evidence as to it was improperly received, and must be disregarded :—

Held, per Ritchie, C.J., that the application of M. for insurance not being made part of the policy by insertion or reference, the statements in it were not warranties, but mere collateral representations, which would not avoid the policy unless the facts misstated were material to the risk. If materiality was a question of law, the non-communication of the agreement with P. could not affect the risk ; if a question of fact, it was passed upon by the jury.

Per Strong, J.—The application, being properly connected with it by verbal testimony, formed part of the policy, and the statements in it were warranties, but as M. only pledged himself to the truth of his answers "so far as known to him and material to the risk," and as such knowledge and materiality were for the jury to pass upon, the result was the same whether they were warranties or collateral representations. *North British and Mercantile Ins. Co.* v. *McLellan*, 21 S. C. R. 288.

Interim Contract.]—The plaintiff's testator applied to the defendants in writing for an insurance against loss by fire, and undertook in writing to hold himself liable to pay to the defendants such amounts as might be required, not to exceed $46.50, and signed a promissory note, in favour of the defendants, for $15.25. The defendants' agent gave him a written provisional receipt for his undertaking for $46.50, "being the premium for an insurance," etc.

The receipt contained a condition to the effect that unless the insured received a policy within fifty days, with or without a written notice of cancellation, the insurance and all liability of the defendants should absolutely be determined. No policy was sent within the time limited, nor was any notice of cancellation given within that time, nor until, by letter, two days before a fire occurred on the insured premises :—

Held, that the application, undertaking, note, and receipt constituted a contract of fire insurance within the provisions of R. S. O. ch. 167, which could be terminated only in the manner prescribed by the nineteenth of the conditions set forth in section 114, that is, when by post, by giving seven days' notice, and thus the contract was still subsisting at the time of the fire. *Barnes* v. *Dominion Grange Mutual Fire Ins. Association*, 25 O. R. 109. *See* the next case.

Interim Contract.]—Upon an application for insurance for four years and the giving of his note for the premium, the applicant received an interim receipt providing, among other things, that the insurance was subject to the approval of the directors, who should have power to cancel the contract within fifty days by letter, and that unless the receipt was followed by a policy within fifty days the contract of insurance should wholly cease and determine. No notice of cancellation was given, and no policy was issued :—

Held, per Hagarty, C. J. O.—That this was a contract of insurance that could be terminated only in accordance with the nineteenth statutory condition, and that at any rate there had been a waiver of the provision as to cessation of the risk.

Per Burton, and Osler, JJ. A.—That this was a mere incomplete or provisional contract of insurance for four years, and also an actual contract for fifty days, which came to an end by effluxion of time, and that the nineteenth statutory condition did not apply to the provisional contract.

Per Maclennan, J. A.—That there was a contract of insurance, and that the provision for determination by effluxion of time was a variation from the statutory conditions, which was not binding, not being printed in the required mode.

In the result, the judgment of the Queen's Bench Division, 25 O. R. 109, in favour of the insured, was affirmed. *Barnes* v. *Dominion Grange Mutual Fire Ins. Association*, 22 A. R. 68. Affirmed by the Supreme Court, 25 S. C. R. 154, *sub nom. Dominion Grange Mutual Fire Ins. Association* v. *Brault*.

Mortgage—*Insurance by Mortgagee—Interest Insured—Payment to Mortgagee—Subrogation.*]—Mortgagees of real estate insured the mortgaged property to the extent of their claim thereon under a clause in the mortgage by which the mortgagor agreed to keep the property insured in a sum not less than the amount of the mortgage, and if he failed to do so that the mortgagees might insure it and add the premiums paid to their mortgage debt. The policy was issued in the name of the mortgagor who paid the premiums, and attached to it was a condition that whenever the company should pay the mortgagees for any loss thereunder, and should claim that as to the mortgagor no liability therefor existed, said company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment. A loss having occurred, the company paid the mortgagees the sum insured, and the mortgagor claimed that his mortgage was discharged by such payment. The company disputed this, and insisted that they were subrogated to the rights of the mortgagees under the said condition. In an action to compel the company to give a discharge of the mortgage :—

Held, per Fournier, Taschereau, and Gwynne, JJ.—That the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause, which was inserted in the policy without the knowledge and consent of the mortgagor, could not have the effect of converting the policy into one insuring the interest of the mortgagees alone ; that the interest of the mortgagees in the policy was the same as if they were assignees of a policy effected with the mortgagor ; and that the payment to the mortgagees discharged the mortgage :—

Held, also, that the company was not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing their indemnity from liability to him ; not having done so they could not, in the present action, raise any question which might have afforded them a defence in an action against them on the policy. The result of the decision of the Court of Appeal, 15 A. R. 421, and of the

Divisional Court, 14 O. R. 322, was affirmed. *Imperial Fire Ins. Co.* v. *Bull*, 18 S. C. R. 697.

Mortgage—*Application of Insurance Moneys.*]—Where insurance moneys are received by a mortgagee under a policy effected by the mortgagor pursuant to a covenant to insure, contained in a mortgage made under the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid; nor, though he applies part upon overdue principal, is he bound to apply the balance in discharge of overdue interest. *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

Mortgage — *Loss Payable to Mortgagees — Consolidation.*]—The owner of a parcel of land mortgaged the same, and subsequently mortgaged it to the same person again, the second mortgage containing other lands on which were buildings, and also a covenant to insure. The mortgagor subsequently made an assignment for the benefit of his creditors, and the equity of redemption was sold by his assignee, the purchaser covenanting to pay off the mortgages. The purchaser then insured the buildings included in the second mortgage in his own name, "loss, if any, payable to the mortgagees as their interest might appear," subject to the conditions of the mortgage clause. A fire took place by which the buildings in the second mortgage were destroyed, the insurance moneys payable being more than sufficient to pay the balance due on the second mortgage, which was in default, and the mortgagees claimed the right to apply the surplus in payment of the first mortgage, which was also in default:—

Held, that the mortgagees were not entitled to consolidate their mortgages so as to be paid the whole of the insurance moneys, but were restricted to the right to recover the amount remaining unpaid on the second mortgage. *Re Union Assurance Co.*, 23 O. R. 627.

Negligence Causing Fire.]—An insurance company by whom a fire loss has been paid has no *locus standi* as co-plaintiff in an action by the assured against the wrong-doer whose negligence has caused the fire. *Wealleans* v. *Canada Southern R. W. Co.*, 21 A. R. 297. Reversed in the Supreme Court on another point. 24 S. C. R. 309.

Proof of Loss—*Failure to Furnish.*]—A policy of insurance against fire required that in case of loss the insured should, within fourteen days, furnish as particular an account of the property destroyed, etc., as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire, and in lieu of the required account he delivered to the agent of the insurers an affidavit in which, after stating the general character of the property insured, he swore that his invoice book had been burned, and he had no adequate means of estimating the exact amount of his loss, but that he had made as careful an estimate as the nature and circumstances of the case would admit of, and found the loss to be between $3,000 and $4,000. An action on the policy was defended on the ground of non-compliance with said condition. On the trial the jury answered all the questions submitted to them, except two, in favour of N. These two questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account, etc. (as in the conditions), were not answered. The trial Judge gave judgment in favour of N., which the Court *en banc* reversed, and ordered judgment to be entered for the company:—

Held, affirming the decision of the Court *en banc*, that as the evidence conclusively showed that N., with the assistance of his clerk, could have made a tolerably correct list of the goods lost, the condition was not complied with:—

Held, further, that as, under the evidence, the jury could not have answered the questions they refused to answer in favour of N., a new trial was unnecessary, and judgment was properly entered for the company. *Nixon* v. *Queen Ins. Co.*, 23 S. C. R. 26.

Statutory Conditions—*Other Conditions—Variations—Representations in Application—Moral Risk—Apprehension of Incendiarism.*]—Where a fire insurance policy does not contain the statutory conditions, but contains other conditions not printed as variations, it must be read as containing the statutory conditions and no others.

Citizens' Ins. Co. v. *Parsons*, 7 App. Cas. 96, followed.

And the law in this respect has not been altered by 55 Vict. ch. 39, sec. 33 (O.).

Where the policy is based upon an application containing statements or representations relating to matters as to which the insurers have required information, the first of the statutory conditions in section 114 of R. S. O. ch. 167, must be taken to refer to such statements and representations, whether the risk they relate to is physical or moral.

Reddick v. *Saugeen Mutual Fire Ins. Co.*, 15 A. R. 363, followed.

And where, in the application, the insured was asked whether any incendiary danger to the property was threatened or apprehended, and untruly answered "No":—

Held, that the policy was avoided. *Findley* v. *Fire Insurance Company of North America*, 25 O. R. 515.

Warranty—*Fire Occurring to other Properties.*]—In a form of application for fire insurance, the questions were asked: "Have you ever had any property destroyed or damaged by fire? If so, when and where?" also, "Has this risk been refused by any other company, or has any company cancelled a policy or receipt on it?" To both which questions the applicant answered "No"; and signed a memorandum at the foot of the application form, whereby he covenanted and agreed with the company that the foregoing was a just, true, and full exposition of all the facts and circumstances in regard to the situation, condition, value, and risk *of the property to be insured*, and that it should be held to form the basis of the liability of the company and form a part and be a condition of the insurance contract.

As a matter of fact, the insured had had other properties, but unconnected with the property now in question, destroyed by fire:—

Held, however, that the answer to the first of the above questions was immaterial to the risk:—

Held, also, that the answer to the second question was clearly a warranty, having reference as it had to the property to be insured, and the only point for the jury's decision was as to its truth. *Stott* v. *London and Lancashire Fire Ins. Co.*, 21 O. R. 312.

IV. Guaranty Insurance.

Employee's Guarantee Contract—*Renewal—Condition—Misstatements.*]—By a contract in writing made in 1890, the defendants agreed to guarantee the plaintiffs against pecuniary loss by reason of fraud or dishonesty on the part of an employee during one year from the date of the contract, or during any year thereafter in respect of which the defendants should consent to accept the premium which was the consideration for the contract. The defendants accepted the premium in respect of each of the three following years, and gave receipts entitled "renewal receipts," in which the premiums were referred to as "renewal premiums":—

Held, that the contract was a contract of insurance made or renewed after the commencement of the Ontario Insurance Corporations Act, 1892, within the meaning of section 33:—

Held, also, that upon the true construction of sub-section (2), the contract could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of the contract providing for the avoidance thereof for such misstatements was not, in stated terms, limited to cases in which such misstatements were material to the contract. *Village of London West* v. *London Guarantee and Accident Co.*, 26 O. R. 520.

V. Life Insurance.

1. *Avoidance and Forfeiture.*

Assessments—*Forfeiture—Waiver.*]—Where a mutual insurance company have without objection received payment of assessments after the proper date for their payment, they are not thereby debarred from insisting on a subsequent occasion upon the strict observance of the conditions of the company as to payment when they give notice that they intend so to insist, and there is no conduct on their part tending to mislead the insured. *Redmond* v. *Canadian Mutual Aid Association*, 18 A. R. 335.

Payment of Premium—*Condition—Credit—Authority of Manager.*]—By an application for life insurance, the interim receipt and the policy, it was provided that no policy was to be in force until actual payment of the first premium to an authorized agent and the delivery of the necessary receipt signed by the general manager of the company. The general manager, who was paid by commission, made an agreement with an applicant for a policy that work done by the applicant for himself personally would be taken in payment of the first premium, and gave him a receipt for it without, however, paying the company:—

Held, that the company was not bound. *Tiernan* v. *People's Life Ins. Co.*, 20 O. R. 595. Affirmed in appeal, 23 A. R.

Premium Note—*Non-payment—Election—Waiver.*]—Under a policy of life insurance with a condition that if any note given for a premium should not be paid at maturity the policy should be void, but the note should nevertheless be payable, the insurers are not bound on non-payment of the note to do any act to determine the risk. In the absence of an election to continue the risk, it comes to an end and mere demands for payment of the note and a refusal during the currency of the note to accede to the insured's request for cancellation of the policy are not sufficient evidence of such election.

Judgment of the Queen's Bench Division, 22 O. R. 151, reversed, and that of Street, J., at the trial, restored. *McGeachie* v. *North American Life Assurance Co.*, 20 A. R. 187. Affirmed by the Supreme Court, 23 S. C. R. 148.

Premium Note—*Non-payment—Forfeiture—Condition—Month.*]—Under a life policy providing that "a grace of one month will be allowed in payment of premiums, at the expiration of which time, if said premium remain unpaid, this policy shall thereupon become void," and also that "if any note given on account of the premium be not paid when due this policy shall be void and all payments made upon it shall be forfeited to the company," the insurance comes to an end upon default in payment of a premium note, unless the insurers elect to keep it in force, and proceedings by the insurers to collect a note given for a premium are not sufficient evidence of such election. Nor are equivocal acts such as carrying the policy in the books of the insurers as an existing policy and including the amount in their official returns of insurance in force any evidence of waiver of the forfeiture, these acts not being known to the insured or intended to influence his conduct.

McGeachie v. *North American Life Assurance Co.*, 20 A. R. 187, applied and followed. *Manufacturers' Life Ins. Co.* v. *Gordon*, 20 A. R. 309.

Premium Note—*Non-payment—Forfeiture—Conditions.*]—The assured gave to the company, to cover the first annual premium payable under a policy of life assurance containing no condition as to forfeiture for non-payment of premiums, two instruments in the form of promissory notes payable at 90 days and 180 days from the date of the application, each containing a provision that if payment were not made at maturity the policy should be void. The first note was not paid at maturity, and while it was unpaid and before maturity of the second note the assured died:—

Held, Hagarty, C. J. O., dissenting, that without any election or declaration of forfeiture on the part of the company the contract came to an end upon non-payment of the first note and was not kept alive by the currency of the other note.

McGeachie v. *North American Life Assurance Co.*, 20 A. R. 187, and *Manufacturers' Life Insurance Co.* v. *Gordon*, 20 A. R. 309, applied. *Frank* v. *Sun Life Assurance Co.*, 20 A. R. 564. Affirmed by the Supreme Court.

Untrue Statements—*Materiality—Production.*]—It is provided by sub-sec. 2 of sec. 33 of the Insurance Corporations Act, 55 Vict. ch. 39 (O.), that no untrue statement in an application for insurance shall vitiate the contract unless material thereto: and by sub-sec. 3, that the question of materiality is for the jury, or if there is no jury, for the Court.

Where, therefore, a benevolent and provident institution refused to recognize a certificate of membership issued to the plaintiff, under which he was entitled to certain insurance benefits, on the ground that he had untruly stated in the application that he was not, and never had been, subject to asthma, in an action to have it declared that the contract was a subsisting contract, production by the defendants was ordered of all applications and medical examinations in which the answer as to asthma had been in the affirmative, and upon which certificates had issued. *Ferguson* v. *Provincial Provident Institution*, 15 P. R. 366.

Winding-up—*Cancellation of Policy—Assessment.*]—A resolution for the voluntary liquidation of a mutual insurance company under the Ontario Winding-up Act was adopted at a general meeting on a report of directors, which contained a recommendation that policies be sent in to the liquidator, and that members seek insurance elsewhere. One of the policy holders sent in his policy accordingly, but no notice of actual cancellation was given to him, nor was anything further done in reference to cancellation. Afterwards an assessment was made upon the policy by the directors with the concurrence of the liquidator:—

Held, that the policy had not been cancelled, and the assessment was good. *In re City Mutual Insurance Co., Steifelmeyer's Case*, 24 O. R. 100.

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2. *For Benefit of Wives and Children.*

Change of Beneficiary — *Trust — Revocation.*]—A person whose life was insured in a benefit society, incorporated under R. S. O. (1877) ch. 167, as amended by 41 Vict. ch. 8, sec. 18 (O.), now R. S. O. (1887) ch. 172, on the 28th January, 1888, his first wife being then dead, caused to be issued to him a certificate making the insurance money payable to his children. After this he married again, and on the 1st June, 1889, at his request, a change was made, and a new certificate issued, making the money payable to his second wife. He died on the 19th November, 1889:—

Held, reversing the judgment of Street, J., that the effect of 51 Vict. ch. 22 (O.), was to make the certificate of the 28th January, 1888, subject to the provisions of R. S. O. ch. 136, and that the rules of the society, in so far as they were inconsistent with such provisions, were modified and controlled by them; and such certificate became a trust for the children, under section 5 of R. S. O. ch. 136, and ceased, so long as the objects of the trusts remained, to be under the control of the deceased, except only in accordance with sections 5 and 6, which did not authorize him to revoke the certificate and replace it by the subsequent one. *Mingaud* v. *Packer*, 21 O. R. 267.

An appeal to the Court of Appeal was dismissed, the Judges being divided in opinion: 19 A. R. 290.

Change of Beneficiary — *Trust — Revocation—Will.*]—In October, 1886, an endowment certificate upon the life of a widower with one child was issued to him by a benefit society, the sum secured thereby being designated by a clause therein as payable to the child. In February, 1888, the insured, having married again, indorsed on the certificate a writing revoking the original designation and directing payment to his wife. In November, 1890, his wife having died, he endorsed on the certificate a direction that payment should be made to his executors, administrators, and assigns. He died in March, 1893, a widower, leaving two children, the one first mentioned, and one born in May, 1888. By his will, dated in July, 1888, he left all his estate to his children in equal shares:—

Held, that under the powers conferred by R. S. O. ch. 136, even as amended by 51 Vict. ch. 22, the insured had only a limited authority to vary the terms of the certificate; and he could not revoke the direction for payment to his daughter and make a direction for payment to his wife.

Mingaud v. *Packer*, 21 O. R. 267; 19 A. R. 290, followed.

By virtue of 53 Vict. ch. 39, sec. 6, he might, when he made the endorsement of November, 1890, have transferred or limited the benefits of the certificate in any manner or proportion he saw fit between his children; but he could not destroy the trust created by the certificate and declare a new trust which might, by making the fund applicable to the payment of debts, deprive his children of all benefit in it, and so render the Act nugatory. *Neilson* v. *Trusts Corporation of Ontario*, 24 O. R. 517.

Change of Beneficiary.]—An endowment certificate issued in 1889 by a benevolent society to a member, and payable on his death, half to his father and to his mother, contained a provision that should there be any change in the name of the payee, the secretary should be notified, and an indorsement thereof made on the certificate. The member subsequently married, when he informed his wife that he would have the certificate changed, as he intended it for her, giving her the certificate, which she deposited in a trunk used by both in common, he continuing to pay the premium:—

Held, that this was not sufficient to displace the terms of the contract, as manifested on the face of the certificate; and, further, so far as the mother was concerned, she was amply protected, 53 Vict. ch. 39, sec. 5 (O.), which applied to the certificate in question, creating a trust in her favour.

That statute is retrospective as to current policies, issued before it came into force. *Simmons* v. *Simmons*, 24 O. R. 662.

Gift—*Will.*]—A person insured his life and signed a document directed to the managers of the insurance company, in these words:—"I give and bequeath to . . the amount stated on the policy given on my life by the S— Life Insurance Co. To be paid to none other unless at my request, dated later." After shewing or

reading the policy which he retained, he handed the document to the plaintiff, remarking:—"There, that is as good as a will":—

Held, that on account of its incompleteness, the transaction was not a gift or a declaration of trust, as the trust intended was not irrevocable, nor could the paper take effect as a will. *Krch* v. *Moses*, 22 O. R. 307.

Guardianship—*Certificate of Foreign Court.*]—Where certain infants living with their mother in the Province of Nova Scotia were entitled to insurance moneys payable in Ontario, and their mother petitioned to be appointed trustee, without security, under R. S. O. ch. 136, sec. 12, as amended by 56 Vict. ch. 32, sec. 7, to receive such moneys, letters of guardianship having been issued to her by a Probate Court of the Province of Nova Scotia, a certificate of the Judge of that Court shewing the facts necessary to bring the case within the proviso to the amending section, was received as evidence in support of the petition. *Re Daniel*, 16 P. R. 304.

Payable to "Children" — *Representative of Deceased Child—Exclusion of Grandchildren.*]—By a policy of life insurance the insurers agreed to pay the amount of the insurance, after the death of the insured, to his wife, or her legal representatives; or, if she should not then be living, to her children, or to their guardian if under age. The wife predeceased the insured. Two of her children died before her, one of them leaving a child:—

Held, that only the children who survived the wife were entitled to share in the insurance moneys payable under the policy. *Murray* v. *Macdonald*, 22 O. R. 557.

Payable to "Legal Heirs"—*Children of First Marriage and Second Wife.*]—A widower, having two children, insured in a benevolent society and took out his certificate payable "to his legal heirs" and subsequently married a second time, and died without having altered the certificate, leaving his wife surviving with the two children of the first marriage:—

Held, that the two children took the whole fund payable under the certificate to the exclusion of the wife. *Mearns* v. *Ancient Order of United Workmen*, 22 O. R. 34.

Payable to Wife—*Assignment by Wife.*]—The interest of a wife in a policy effected by her husband on his own life, and which has been declared by him to be for her benefit, under section 5 of the Act, to secure to wives and children the benefit of life insurance, is her separate estate, and may, in her husband's lifetime, be assigned by her. The assignee, under such an assignment, will be entitled to claim thereunder, subject to the exercise by the husband of the powers conferred on him by section 6 of the Acts and amendments. *Graham* v. *Canada Life Assurance Co. Proctor* v. *Graham*, 24 O. R. 607.

Payable to Wife and Children—*Devise to Executors—Creditors' Rights.*]—Two policies on his life were bequeathed by a testator to his executors to be invested by them as a provision for his wife and children:—

Held, that the testator had declared the insurance to be for the benefit of his wife and children within the meaning of R. S. O. ch. 136, and therefore the proceeds were exempt from the claims of creditors.

Re Lynn, Lynn v. *Toronto General Trusts Co.*, 20 O. R. 475, followed. *Beam* v. *Beam*, 24 O. R. 189.

Payable to Wife, "Her Executors, Administrators or Assigns" — *Predecease of Wife.*]—A married man insured his life, the policy being made payable "to his wife, Sarah, her executors, administrators, or assigns." The wife died before her husband, who married again, and died leaving a widow and children without having assigned the policy or altered the direction as to payment in it:—

Held, that the policy fell under the provisions of the Act to secure to wives and children the benefit of life insurance, and was for the benefit of the wife absolutely, the words of limitation having no effect; that the provision for payment lapsed by the death of the wife, and that the policy moneys belonged to the personal estate of the husband. *In re Eaton*, 23 O. R. 593.

Receiver—*Order to Sell Interest of Debtor in Insurance on His Life—Subsequent Declaration by Insured for Benefit of Wife and Children.*]—*See Weekes* v. *Frawley*, 23 O. R. 235, *ante* 429.

Will.]—A testator insured his life in a benevolent society, the policy being payable to his "widow and orphans and personal representatives," and afterwards endorsed on the policy a direction that the same should be paid to his infant daughter. Subsequently by his will he devised the proceeds of the policy with other moneys to his executors upon certain trusts:—

Held, that the will was inoperative so far as it assumed to deal with the policy which was by the endorsement clothed with a statutory trust under section 5 of R. S. O. ch. 136, in favour of the daughter, and that as the devise to the executors was repugnant to the trust they were not competent trustees within the meaning of section 11 of the above mentioned Act.

The mother of the infant having being appointed guardian and having given security for the proper application of the policy moneys was appointed trustee. *Scott* v. *Scott*, 20 O. R. 313.

Will.]—A testator by his will devised an insurance certificate or policy to the defendants as his executors for the benefit of his wife and children:—

Held, that the will was a sufficient declaration under R. S. O. ch. 136, sec. 5, and that creditors were not entitled to the proceeds. *Re Lynn, Lynn* v. *Toronto General Trusts Co.*, 20 O. R. 475.

Will.]—A bequest of a policy of life insurance to the testator's wife is a valid declaration of trust within the meaning of R. S. O. ch. 136, sec. 5.

Re Lynn, Lynn v. *Toronto General Trusts Co.*, 20 O. R. 475, and *Beam* v. *Beam*, 24 O. R. 189, approved.

Judgment of the County Court of Prince Edward on this point affirmed, Osler, J. A., dissenting. *McKibbon* v. *Feegan*, 21 A. R. 87.

Will — *Apportionment.*] — Before the coming into force of 53 Vict. ch. 39, a testator insured his life in a benefit society, payable to his wife if she survived him, if not, to his children; and also subsequently insured his life in another similar society, payable to his wife and children. After the coming into force of the above Act, he made his will, bequeathing to his wife one-half of his life policies, for her life and widowhood; and, after her decease, to his children in equal proportions :—

Held, that R. S. O. ch. 136, sec. 6, the "Act to Secure to Wives and Children the Benefit of Life Insurance," as amended by 51 Vict. ch. 22, sec. 3, and 53 Vict. ch. 39, sec. 6, applied: and that the wife was entitled to one-half of the sum payable under the policy first mentioned for life, and the other moiety, being untouched by the will, went to her absolutely; while as to the other insurance, she was entitled to one-half for life or widowhood by virtue of the will. *Re Cameron, Mason* v. *Cameron*, 21 O. R. 634.

Will — *Apportionment.*] — Under section 6 (1) of the Act to secure to wives and children the benefit of life insurance, R. S. O. ch. 136, as amended by 51 Vict. ch. 22, sec. 3, and 53 Vict. ch. 39, sec. 6, the insured has no power to declare by his will that others than those for whose benefit he has effected the policy or declared it to be, shall be entitled to the insurance money, nor to apportion it among others than those for whose benefit he has effected the policy or declared it to be. *Re Grant*, 26 O. R. 120 and 485. *See* now, 58 Vict. ch. 34, sec. 12 (O.), and 59 Vict. ch. 45 (O.).

Will—*Foreign Benevolent Society—Rules of Society.*]—A policy upon the life of the plaintiff's deceased husband was issued before his marriage by a foreign benevolent society not incorporated or registered under any Act of this Province, payable to his mother, who predeceased him, or his executors. By one of the by-laws of the society it was provided that where the insured married after the date of the policy, it *ipso facto* became payable to the widow, "unless otherwise ordered after date of such marriage." Under another by-law the policy could be made payable only to a wife, an affianced wife, a blood relation, or a person dependent on the assured, and was not to be willed or transferred to any other person. By his will the deceased purported to give to his wife the amount of this and another insurance, subject, however, to the payment of his debts :—

Held, that the policy was capable of being controlled by conditions not set out upon its face, because section 4 of 52 Vict. ch. 32 (O.), amending the Ontario Insurance Act, R. S. O. ch. 167, applies only to the companies to which the latter Act applies; and as the insurance and the rights of the parties under it did not depend upon anything contained in the Act to secure to wives and children the benefit of life insurance, R. S. O. ch. 136, it was not necessary to consider whether it was brought within the scope of that Act by its amendment by 51 Vict. ch. 22, sec. 2, (O.); and, therefore, the binding terms of the contract were to be found upon its face and in the rules of the society, which formed part of the contract :—

Held, also, that under the terms upon which the society agreed to pay this money, the insured had no power to bequeath any part of it to his executors or his creditors; and the society had the right to say that their contract was to pay the money only within a certain class; that the insured had no right to substitute a beneficiary outside that class; and therefore the money belonged to the widow free from the obligation to pay debts. *Morgan* v. *Hunt*, 26 O. R. 568.

Will — *Payment to Executors or Testamentary Guardian.*]—A testatrix having insured her life and made the policies payable to her two daughters, by her will requested her executors, the defendants, to place the amount thereof, in some thoroughly safe investment until her daughters' majority or marriage, when the amounts and their accumulated interest should be divided equally between her daughters, and appointed her husband, the plaintiff, their guardian.

In an action brought by the guardian to have the proceeds of the policies handed over to him by the executors :—

Held, that the insurance moneys being made payable to the daughters were by 53 Vict. ch. 39, sec. 4 (O.), severed from her estate at her death and her testamentary directions could not affect the fund beyond what was permitted by that statute, and R. S. O. ch. 136 :—

Held, also, that during the minority of the daughters the trustees appointed by the will as provided for by section 11, R. S. O. ch. 136, might by section 13, invest in manner authorized by the will; but while the insured could give directions as to the investment she was not to control the discretion of the lawful custodian of the fund and child, in case the income was needed for maintenance or education, or the *corpus* for advancement :—

Held, also, that the guardian was the custodian of the daughters with the incident of determining to a large extent what should be expended in their bringing up, and that the executors had charge of the preservation and utilization of the fund :—

Held, also that section 12 of R. S. O. ch. 136, does not justify an Insurance Company in paying the amount of a policy to a testamentary guardian; the guardian there named being one who has given security and that the Court should not transfer the moneys from the executors to the father as testamentary guardian, as his right to handle any part of the fund was subject to the trusts specified in the will, the execution of which was vested in the executors. *Campbell* v. *Dunn*, 22 O. R. 98.

Will — *Payment to Executors—Security—Discharge.*]—Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed under sections 11 and 12 of R. S. O. ch. 136, be paid to the executors of the will of the insured, as provided by section 12, without security being given by them, and payment to them is a good discharge to the insurers. *Dodds* v. *Ancient Order of United Workmen*, 25 O. R. 570.

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3. *Miscellaneous Cases.*

Apportionment—*Annuity Bond.*]—In consideration of $12,000, paid by plaintiff's testator

to defendants, they, by an instrument in writing, agreed to pay him $1,800 every year during his natural life, in equal quarterly payments of $450 each. The terms "policy" and "annuity bond" were both used in the document itself as descriptive of its nature. The consideration was stated to be not only the $12,000, but "the application for this policy, and the statements and agreements therein contained, hereby made a part of this contract;" and it was provided that upon certain conditions "this policy shall be void":—

Held, in an action by his executors, that the instrument was not a policy of assurance within the exception in R. S. O. ch. 143, sec. 5, but an annuity bond; and that the money payable by the defendants under it was apportionable within section 2; and therefore the plaintiffs were entitled to recover a part of a quarterly instalment in proportion to the period between the last quarter day and the death of the testator. *Cuthbert* v. *North American Life Assurance Co.*, 24 O. R. 511.

Benefit Society—*Expulsion of Member—Fair Trial—Report of Committee—Evidence not before Committee—Absence of Member.*]—The plaintiff, as executor of his deceased son, sued the defendants, an incorporated benefit society, to recover the money benefit accruing upon the death of a member. Before the death the defendants had passed a resolution removing the son from the list of members, on the ground that he had given untruthful answers to questions as to his state of health put to him upon his admission. The complaints against him had been referred to the committee of management, who had reported in his favour, but the society, at a meeting, refused to adopt the report, and, in the absence of the deceased, without any notice to him or opportunity of appearing, accepted an *ex parte* statement made by a member present at the meeting, which had not been before the committee, and acted upon it by forthwith passing the resolution referred to. By the rules of the society it was provided that if it should be established that a new member had not answered truthfully, he should *ipso facto* be excluded from the society; and also, that if it was proved after his admission that he had not answered truthfully, he should, by reason thereof, be struck off the list of members. The committee of management was the body appointed, under the rules, to take the evidence and find the facts, their report being subject to confirmation or rejection by the society:—

Held, that upon the principles governing such an inquiry, the person accused should not be condemned without a fair chance of hearing the evidence against him, and of being heard in his own defence; that the action of the defendants was contrary to these principles and to their own rules; and, therefore, the expulsion was not legally accomplished, and the plaintiff was entitled to recover. *Gravel* v. *L'Union St. Thomas*, 24 O. R. 1.

Benefit Society.]—*See* RAILWAYS, IX.

Divisible Surplus — *Discretion of Actuary and Directors—Statements of Company in Letters and Pamphlets.*]—The plaintiff insured with the defendants upon their "endowment participating plan," and by the contract of insurance the defendants agreed to pay him at the end of a specified period, if he survived, a certain sum, together with his share of the profits made in that branch of the business during the period.

The plaintiff, being dissatisfied with the share allotted to him, claimed an account and payment of his share of all the profits. The defendants claimed a right to hold a portion of their apparent surplus to ensure the future stability of the company:—

Held, that the plaintiff was bound to acquiesce in the discretion of the actuary and directors of the company, *bonâ fide* exercised, and to take his share of what was apportioned as divisible surplus; and that being so, that his case was not advanced by statements made by officers of the company in letters or pamphlets as to the course pursued by them in dividing the surplus. *Bain* v. *Ætna Life Ins. Co.*, 20 O. R. 6. *See* the next case.

Divisible Surplus — *"Divisible Profits"—Discretion of Directors of Company to Retain Profits to Provide for Contingencies.*]—On an appeal to the Divisional Court, the judgment of Falconbridge, J., reported 20 O. R. 6, was affirmed.

Per Boyd, C.—The representation made that participating policies "would receive their equitable share of the divisible surplus," points to the exercise of the discretion of the managers of the company, and the expression "divisible surplus" is one that refers to nothing less than the entire profits claimed by the plaintiff. Before divisible profits can be ascertained, it would seem to be essential for the security of policy-holders to keep such resources in hand as would cover the whole liabilities of the company having regard to the uncertain chances of mortality, rate of interest, expenses, etc.

Per Meredith, J.—There is no express covenant in the policy to pay the plaintiff any profits. "Divisible profits" are the profits which the company, after making, in good faith, all reasonable and proper provision for its safety and prosperity, divide among policy-holders. *Bain* v. *Ætna Life Ins. Co.*, 21 O. R. 233.

Medical Examiner—*Breach of Contract—Authority of Agent.*]—The medical staff of the Equitable Life Assurance Society at Montreal consists of a medical referee, a chief medical examiner and two or more alternate medical examiners. In 1888 L. was appointed an alternate examiner in pursuance of a suggestion to the manager by local agents that it was advisable to have a French Canadian on the staff. By his commission L. was entitled to the privilege of such examinations as should be assigned to him by, or required during the absence, disability or unavailability of, the chief examiner. After L. had served for four years it was found that his methods in holding examinations were not acceptable to applicants, and he was requested to resign which he refused to do, and another French Canadian was appointed as an additional alternate examiner, and most of the applicants thereafter went to the latter. L. then brought an action against the company for damages by loss of the business and injury to his professional reputation by refusal to employ him, claiming that on his appointment the general manager had promised him all the examinations of French Canadian applicants for insur-

ance. He also alleged that he had been induced to insure his own life with the company on the understanding that the examination fees would be more than sufficient to pay the premiums, and he asked for repayment of amounts paid by him for such insurance ;—

Held, affirming the decision of the Court of Queen's Bench, that by the contract made with L. the company were only to send him such cases as they saw fit, and could dismiss him or appoint other examiners at their pleasure ; that the manager had no authority to contract with L. for any employment other than that specified in his commission ; and that he had no right of action for repayment of his premiums, it being no condition of his employment that he should insure his life, and there being no connection between the contract for insurance and that for employment. *Laberge* v. *Equitable Life Assurance Society*, 24 S. C. R. 595.

Mutual Insurance Company — *Policy — Winding-up — Cancellation — Assessment.*]— A resolution for the voluntary liquidation of a Mutual Insurance Company under the Ontario Winding-up Act was adopted at a general meeting on a report of directors, which contained a recommendation that policies be sent in to the liquidator, and that members seek insurance elsewhere. One of the policy-holders sent in his policy accordingly, but no notice of actual cancellation was given to him, nor was anything further done in reference to cancellation. Afterwards an assessment was made upon the policy by the directors with the concurrence of the liquidator ;—

Held, that the policy had not been cancelled, and the assessment was good. *In re City Mutual Insurance Co., Stiefelmeyer's Case*, 24 O. R. 100.

Premium—*Time for Payment.*]—"Month" in an insurance policy in the form here in question, with provisions for payment of semi-annual premiums on named days of specific calendar months means a calendar month.

Per Hagarty, C.J.O., and Osler, J.A.—*Semble.* Payment must be made during the life of the insured, and if the life drop before the expiration of the time of grace and before payment the risk comes to an end.

Per Burton and Maclennan, JJ.A.—Payment may be made at any time before the expiration of the time of grace, whether the life has dropped or not.

Judgment of MacMahon, J., reversed. *Manufacturers' Life Ins. Co.* v. *Gordon*, 20 A. R. 309.

Rights of Insured and of Beneficiaries—*Assignment of Policy to Secure Debt—Judgment for Debt.*]—Where an insurance was effected upon the life of a person for the benefit of her father, brothers and sisters, the plaintiffs :—

Held, that the beneficial interest in the policy, as soon as it was issued, vested in the plaintiffs, and the contract of the insurers being to pay them the moneys payable under the policy, the insured could not, by any act of hers, deprive them of the interest so vested in them or of their right to call upon the insurers for payment : and an assignment made by her and her father to a stranger to secure a debt had no effect upon such interest or right of the plaintiffs, except that of the father ; and the assignee, under the circumstances in evidence, became the mortgagee of such interest and right ; and the recovery of a judgment by the assignee against the father for the amount of the debt did not prejudicially affect the security. *Dolen* v. *Metropolitan Life Ins. Co.*, 26 O. R. 67.

Surrender of Policy—*Contract—Absence of Deceit—Evidence of Fraud.*]—The rules which govern the purchase and sale of policies of life insurance are the same as those which govern the purchase and sale of any other species of personal property.

A contract for the surrender of a life policy, unlike a contract for life insurance, is not *uberrimæ fidei*.

The insured in a life policy, having no surrender value, applied to the insurers to purchase it, which they did for a small sum, he being at the time, to their knowledge as well as his own, seriously ill with heart disease. The insurers in no way misled the insured, who died shortly after the sale.

In an action by his executors to set aside the transaction :—

Held, that there was no evidence of fraud to submit to a jury.

Hill v. *Gray*, 1 Stark. 434, explained and distinguished. *Smith* v. *Hughes*, L. R. 6 Q. B. 597, followed. *Jones* v. *Keene*, 2 Moo. & R. 348, distinguished. *Potts* v. *Temperance Life Assurance Co.*, 23 O. R. 73.

VI. Marine Insurance.

Abandonment—*Salvage.*]—A vessel, partly insured, was wrecked and the ship's husband abandoned her to the underwriters, who sold her and her outfit to one K. The sale was afterwards abandoned and the underwriters notified the ship's husband that she was not a total loss and requested him to take possession. He paid no attention to the notice and the vessel was libelled by K. for salvage and sold under decree of Court. The uninsured owner brought an action against the underwriters for conversion of her interest :—

Held, affirming the decision of the Supreme Court of New Brunswick, that the ship's husband was agent of the uninsured owner in respect of the vessel and his conduct precluded her from bringing the action ; that he might have taken possession before the vessel was libelled ; and that the insured owner was not deprived of her interest by any action of the underwriters but by the decree of the Court under which she was sold for salvage. *Rourke* v. *Union Ins. Co.*, 23 S. C. R. 344.

Application—*Promissory Representation.*]—An application for insurance on a vessel in a foreign port, in answer to the questions :—Where is the vessel? When to sail? contained the following :—Was at "Buenos Ayres or near port 3rd February bound up river ; would tow up and back." The vessel was damaged in coming down the river not in tow. On the trial of an action on the policy it was admitted that towing up and down the river was a matter material to the risk :—

Held, affirming the judgment of the Court below, that the words "would tow up and back"

in the application did not express a mere expectation or belief on the part of the assured, but amounted to a promissory representation that the vessel would be towed up and down, and this representation not having been carried out the policy was void. *Bailey* v. *Ocean Mutual Marine Ins. Co.*, 19 S. C. R. 153.

General Average—*Insurance on Hull—Cost of Saving Cargo—Average Bond.*]—A vessel loaded with coal stranded and was abandoned. Notice of abandonment was given to the underwriters on the hull. The cargo was not insured. The owners of the cargo offered to take it out of the vessel but the underwriters preferred to do it themselves and an average bond was executed by the underwriters and owners by which they respectively agreed to pay the said loss according to their several shares in the vessel, her earnings as freight and her cargo, the same to be stated and apportioned in accordance with the established usage and law of the Province in similar cases by a named adjuster. Efforts having been made to save both vessel and cargo, resulting in a portion of the latter being taken out but the remainder and the vessel being abandoned, the adjuster apportioned the loss making the greater part payable by the owners of the cargo. In an action on the bond to recover this amount :—

Held, affirming the decisions below, 19 A. R. 41 : 20 O. R. 295 ; and 19 O. R. 462 ; that the owners of the cargo were only liable, under the bond, to pay such amount as would be legally due according to the principles of the law relating to general average ; that the cargo and vessel were never in that common peril which is the foundation of the right to claim for general average ; that the money expended, beyond what was the actual cost of the salvage of the cargo saved, was in no sense expended for the benefit of the cargo owners ; and the defendants having paid into Court a sum sufficient to cover such actual cost the underwriters were not entitled to a greater amount. *Western Assurance Co.* v. *Ontario Coal Co.*, 21 S. C. R. 383.

Insurance on Advances—*Wording of Policy—Insurable Interest.*]—A policy of marine insurance provided that L. & Co., on account of owners, in case of loss to be paid to L. & Co., do cause to be insured, lost or not lost, the sum of $2,000, on advances, upon the barly, etc., of the Lizzie Perry. The rest of the policy was applicable to insurance on the ship only. L. & Co. were managing owners who had expended considerable money in repairs on the vessel. In an action on the policy the insurers claimed that the insurance was on advances by the owners which were not insurable :—

Held, affirming the judgment of the Court below that the instrument must, if possible, be construed as valid and effectual, and to do so the words "on advances" might be treated as surplusage or as merely a reference to the inducement which led the owners to insure the ship. *British America Assurance Co.* v. *Law*, 21 S. C. R. 325.

Misrepresentation—*Repairs to Old Vessel—Change of Name.*]—Where payment of an insurance risk is resisted on the ground of misrepresentation it ought to be made very clear that such misrepresentation was made. Misrepresentation made with intent to deceive vitiates a policy however trivial or immaterial to the risk it may be ; if honestly made it only vitiates when materially and substantially incorrect. Representation in a marine policy that the vessel insured was built in 1890, when the fact was that it was an old vessel, extensively repaired and given a new name and register, but containing the original engine, boiler and machinery, with some of the old material, is a misrepresentation and avoids the policy, whether made with intent to deceive or not. Taschereau, J., dissenting. *Nova Scotia Marine Co.* v. *Stevenson*, 23 S. C. R. 137.

Partial Loss—*Total Loss.*]—A vessel insured for a voyage from Newfoundland to Cape Breton went ashore on October 30th at a place where there were no habitations, and the master had to travel several miles to communicate with the owners. On November 2nd a tug came to the place where the vessel was, the master of which, after examining the situation, refused to try to get her off the rocks. On November 16th one of the owners and the captain went to the vessel and caused a survey to be had, and the following day the vessel was sold for a small amount, the purchaser eventually stripping her and taking out the sails and rigging. No notice of abandonment was given to the underwriters, and the owners brought an action on the policy, claiming a total loss. The only evidence of loss given at the trial was that of the captain, who related what the tug had done, and swore that, in his opinion, the vessel was too high on the rocks to be got off. The jury found, in answer to questions submitted, that the vessel was a total wreck in the position she was in and that a notice of abandonment would not have benefited the underwriters. On appeal from a judgment refusing to set aside a verdict for the plaintiff and order a nonsuit or new trial :—

Held, per Ritchie, C.J., and Strong, J. That there was evidence to justify the trial Judge in leaving to the jury the question whether or not the vessel was a total loss, and the finding of the jury that she was a total loss, being one which reasonable men might have arrived at, should not be disturbed.

Per Taschereau, Gwynne, and Patterson, JJ. That the vessel having been stranded only, and there being no satisfactory proof that she could not have been rescued and repaired, the owners could not claim a total loss :—

Held, Gwynne, J., dissenting, that there being evidence of some loss under the policy, and the owner being entitled, in his action for a total loss, to recover damages for a partial loss, a non-suit could not be entered, but there should be a new trial, unless the parties agreed on a reference to ascertain the amount of such damages.

Per Gwynne, J. That the plaintiff could not recover damages for a partial loss of which he offered no evidence at the trial, but rested his claim wholly upon a total loss. *Phœnix Ins. Co.* v. *McGhee*, 18 S. C. R. 61.

Salvage — *Adjustment of Claim—Power of Attorney.*]—A crew of a fishing schooner had performed certain salvage services in respect of a derelict ship, and gave the following power of attorney respecting the claim for such services to the agent of the owner of the schooner : "We, the undersigned, being all the crew of the

schooner *Iolanthe* at the time said schooner rendered salvage services to the barque *Quebec*, do hereby irrevocably constitute and appoint Joseph O. Proctor our true and lawful attorney, with power of substitution, for us, and in our name and behalf as crew of the said schooner, to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec* recently towed into the port of Halifax, Nova Scotia, by said schooner *Iolanthe;* hereby granting unto our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and also power at his discretion to constitute and appoint, from time to time, as occasion may require, one or more agents under him or to substitute an attorney for us in his place, and the authority of all such agents or attorneys at pleasure to revoke" :—

Held, that this instrument did not authorize the agent to receive the salvage payable to the crew or to release their lien upon the ship in respect of which the salvage services were performed. (2.) That payment of a sum agreed upon between the owners of such ship and the agent, and the latter's receipt therefor, did not bar salvors from maintaining an action for their services. *The Ship Quebec*, 3 Ex. C. R. 33.

Salvage—*Collision — Salvage Services Performed by one Vessel to the Other where Both at Fault.*]—Where two vessels in collision are both at fault, and one vessel renders salvage services to the other, when the value of such services are determined it should be divided and the salved vessel only be required to pay one-half of the amount. *The Zambesi and The Fanny Dutard*, 3 Ex. C. R. 67.

Salvage—*Government Vessel—Special Contract.*]—A steamship belonging to the Dominion Government went ashore on the Island of Anticosti, and suppliants rendered assistance with their wrecking steamer in getting her afloat. The service rendered consisted in carrying out one of the stranded steamship's anchors, and in taking a hawser and pulling on it until she came off. For carrying out the anchor it was admitted that the suppliants had bargained for compensation at the rate of fifty dollars an hour, but whether the bargain included the other part of the service rendered or not, was in dispute. The service was continuous,—no circumstances of sudden risk or danger having arisen to render one part of the work more difficult or dangerous than the other :—

Held, that the rate of compensation admittedly agreed upon in respect of carrying out the anchor must, under the circumstances, be taken as affording a fair measure of compensation for the entire service.

(2.) A petition of right will not lie for salvage services rendered to a steamship belonging to the Dominion Government. *Couette* v. *The Queen*, 3 Ex. C. R. 82.

Salvage — *Ordinary Service—Jurisdiction of Vice-Admiralty Court.*]—A ship was stranded on a rocky shore with a point of rock protruding through her hull. H. was employed to blast it away and so free the ship :—

Held, that this was not a salvage service. (2.) That the Vice-Admiralty Court had jurisdiction to award reasonable remuneration in respect to the same. *The Watt*, 2 W. Rob. 70, referred to. *The Costa Rica*, 3 Ex. C. R. 23.

Salvage — *Towage — Express Agreement for Reward—Successful Result—Amount of Salvage Award—Costs.*]—A stranded vessel, abandoned by the owners to the underwriters and sold by them, was saved, and was brought by the purchasers to a shipwright for repairs :—

Held, that the towage of the vessel from the place where stranded to the dry-dock was a salvage service.

(2.) Claim for use of anchor, chains, etc., used in saving vessel :—Held, a salvage service.

(3.) Claim for personal services not performed on vessel :—Held, not a salvage service.

(4.) Claim for services of tug in an unsuccessful attempt to remove vessel :—Held, not a salvage service. Salvage is a reward for benefits actually conferred :—

(5.) Held, following the usual rule, that not more than a moiety of the value of the *res* at the time when saved should be awarded to salvors, there being no exceptional feature except the small value of the *res*.

Costs of salvors awarded out of other moiety. Costs of arrest and sale and of bringing fund into Court paid in priority to claims out of fund, in proportion to the value of the *res* at the time of delivery to the Dry Dock Company, and balance of the proceeds of sale, which was not sufficient to pay claim of possessory lien-holder. *The Gleniffer*, 3 Ex. C. R. 57.

Salvage—*Towage—Professional and Volunteer Services—Rate of Compensation.*]—Salvage means rescue from threatened loss or injury. No danger, no salvage. If the ship be in danger, then the rescuers can earn a salvage reward, which, on the grounds of public policy, is to be liberal, but yet varies according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the salvors on the other hand.

(2.) A small packet steamer, while performing one of her regular trips between certain points in thick weather, discovered a large steamship lying at anchor in such a position as to be in imminent danger of becoming a total loss. The latter signalled the former and asked to be towed into port. This the packet steamer refused to do, wishing to prosecute her voyage, but agreed to tow the ship out of her dangerous position to the open sea, and there give her captain directions to enable him to reach his port of destination. This offer was accepted and acted upon. In conducting the ship to the open sea the packet steamer performed the services both of a pilot and tug, and shewed skill and enterprise, and incurred appreciable risk, while so engaged :—

Held, to be a salvage, and not a mere towage service.

Semble, while the Court is disposed to confine the claims of professional pilots and tugs to the tariff scale for such professional services, a volunteer ought to be allowed a more liberal rate of compensation. *Canadian Pacific Navigation Co.* v. *Ship C. F. Sargent*, 3 Ex. C. R. 332.

INTERCOLONIAL RAILWAY.

See CROWN, II.

INTEREST.

Award.]—Under the law of the Province of Quebec, where interest has been allowed on an award by the Official Arbitrators a claim for loss of profits or rent cannot be entertained by the Court on appeal, as such interest must be regarded as representing the profits. *Re Foucher —Lepelletier*, Dalloz 84, 3, 69, and *Re Pechwerty*, Dalloz 84, 5, 485, No. 42, referred to. *Paradis v. The Queen*, 1 Ex. C. R. 191.

Bond — *Interest Post Diem — Damages.*]—Upon a bond for the payment of money on a certain day, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest cannot be implied, and thereafter interest is not recoverable as interest but as damages. *Goodchap v. Roberts*, 14 Ch. D. 49 referred to.

(2.) In assessing damages in the nature of interest on a bond payable at a particular place reference should, in general, be had to the rules in force at the place where the same is so payable. *The Queen v. Grand Trunk R. W. Co.*, 2 Ex. C. R. 132.

British North America Act — *Provincial Subsidies—Half-yearly Payments.*]—By section 111 of the British North America Act Canada is made liable for the debt of each Province existing at the union. By 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the Province of Canada at the time of the union over $62,500,000 and chargeable with 5 per cent. interest thereon; sections 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding eight and seven millions respectively; and by 116, if the debts of those Provinces should be less than said amounts they are entitled to receive, by half-yearly payments in advance, interest at the rate of 5 per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several Provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada and shall be paid half-yearly in advance to each Province, but the government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the public debt of that Province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the union exceeded the sum mentioned in section 112, and on appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec:—

Held, affirming said award, that the subsidy of the Provinces under section 118 was payable from the 1st of July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance on the excess of debt under section 118. By 36 Vict. ch. 39 (D.), passed in 1873, it was declared that the debt of the Province of Canada at the union was then ascertained to be $73,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 47 Vict. ch. 4, in 1884, it was provided that the accounts between the Dominion and the Provinces should be calculated as if the last mentioned Acts had directed that such increase should be allowed from the coming into force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from July 1st, 1867, to January 1st, 1873, with interest at 5 per cent. from the day on which it would have been so paid to July 1st, 1884, should be deemed capital owing to the respective Provinces bearing interest at 5 per cent. and payable after July 1st, 1884, as part of the yearly subsidies:—

Held, affirming the said award, Gwynne, J., dissenting, that the last mentioned Acts did not authorize the Dominion to deduct interest in advance from the subsidies payable to the Provinces half-yearly but leaves such deduction as it was under the British North America Act. *Dominion of Canada v. Provinces of Ontario and Quebec*, 24 S. C. R. 498.

Contract—*Certificate.*]—In an action for balance of contract and extra work interest was allowed from the date of the final certificate. *Peters v. Quebec Harbour Commissioners*, 19 S. C. R. 685.

Costs.]—In the absence of special agreement, interest cannot be recovered upon an untaxed bill of costs. *Cameron v. Heighs*, 14 P. R. 56.

Expropriation.]—Land must, from the date of the passing of the by-law, be deemed to have been "taken" by the city corporation, and interest is payable on the whole sum from that date.

Rhys v. Dare Valley R. W. Co., L. R. 19 Eq. 93, and *In re Shaw and Birmingham*, 27 Ch. D. 614, followed.

An arbitrator has jurisdiction in such case to award interest. *Re Macpherson and City of Toronto*, 26 O. R. 558.

Foreign Judgment.]—Interest included in the amount of a foreign judgment is an integral part thereof.

Johnson v. Bland, 2 Burr., at p. 1083, followed.

Interest upon the amount of such a judgment cannot, under sections 85 and 86 of the Judicature Act, R. S. O. ch. 44, be recovered except as unliquidated damages. *Solmes v. Stafford*, 16 P. R. 78. Affirmed in appeal on these points, 16 P. R. 264.

Foreign Judgment—*Summary Judgment.*]—Where a writ of summons was indorsed to recover the amount of a foreign judgment, together with interest from the date thereof until judgment:—

Held, that the claim for interest was for an unliquidated amount, and the two claims together did not constitute a good special indorsement within Rule 245:—

Held, also, that the plaintiff was not entitled upon such indorsement to a summary judgment under Rule 739 for the amount of the foreign judgment only, with liberty to proceed for the interest; for that Rule is not applicable where there is a claim for a liquidated demand joined to one for unliquidated damages.

Rules 245, 705, 711, and 739, considered.
Solmes v. *Stafford*, 16 P. R. 78, followed.
Hay v. *Johnston*, 12 P. R. 596, not followed.
Hollender v. *Fjeulkes*, 16 P. R. 175.

Mortgage.]—Under ordinary circumstances a mortgagee can claim interest only from the time the money is advanced. *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

Mortgage—*Arrears of Interest.*]—R. S. O. ch. 111, sec. 17, which provides that no more than six years' arrears of interest upon money charged upon land shall be recoverable, only applies where a mortgagee is seeking to enforce payment, out of the lands, of his mortgage money and interest, and does not apply to an action for redemption or to actions similar in principle.

In this action the mortgagee was held entitled to interest at the rate fixed by the mortgages up to the maturity thereof, and afterwards at the rate of six per cent.; in all for about sixteen years. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

Mortgage—*Interest post diem.*]—A mortgage of real estate provided for payment of the principal money secured on or before a fixed date "with interest thereon at the rate of ten per centum per annum until such principal money and interest shall be fully paid and satisfied":—

Held, affirming the judgment of the Court of Appeal for Ontario, 17 A. R. 85, that the mortgage carried interest at the rate of ten per cent. to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of six per cent. on the unpaid principal. *St. John* v. *Rykert*, 10 S. C. R. 278, followed. *People's Loan and Deposit Co.* v. *Grant*, 18 S. C. R. 262.

Mortgage — *Interest on Interest — Special Endorsement.*]—In an action to recover the amount due under a mortgage, the plaintiff indorsed upon his writ of summons particulars of his claim, shewing the date of the mortgage, the parties, the amount of principal and interest claimed, and the date when the interest fell due; also a statement that, by the terms of the mortgage, on default in payment of interest the principal became due, and that default in payment of interest had been made. Interest on overdue interest was also claimed, but no contract therefor was alleged:—

Held, that the indorsement was not a sufficient special indorsement to support a summary judgment under Rule 739, in that it omitted the dates from which interest was claimed, and did not state a contract to pay interest upon interest; and that the affidavit in support of the motion could not be read with the indorsement so as to make it good.

Gold Ores Reduction Co. v. *Parr*, [1892] 2 Q. B. 14, followed. *Munro* v. *Pike*, 15 P. R. 164.

Mortgage for Purchase Money—*Right to Discharge.*]—Under a mortgage given to secure the balance of purchase money, and in which the principal is payable by instalments extending beyond five years, the mortgagor is at any time after such last named period, entitled to a discharge under section 7 of R. S. C. ch. 127, an Act respecting interest, upon payment of the principal and interest together with three months' additional interest. *In re Parker, Parker* v. *Parker*, 24 O. R. 373.

Prohibition Quousque.]—Where a Division Court has jurisdiction at the time of the institution of an action, but, by the addition of interest accruing during its pendency, judgment is given for an amount beyond the jurisdiction of the Court, prohibition will be granted until the Judge amends the judgment by striking out the excess; or a partial prohibition will be issued to prevent the enforcement of judgment for the excess. *Re Elliott* v. *Bittle*, 21 O. R. 595.

Promissory Note—*Special Indorsement.*]—By sections 57 and 88 of the Bills of Exchange Act, the interest accruing due after the date of maturity of a promissory note is recoverable by statute as liquidated damages and it is to be calculated at the rate of six per cent. per annum, in the absence of a special contract for a different rate.

And where, in an action upon two promissory notes, the plaintiff by the indorsement on the writ of summons claimed the principal and a definite sum for interest, without specifying the rate or the dates from which it was calculated, such sum being less than interest at six per cent. from the dates of maturity:—

Held, a good special indorsement.

London, etc., Bank v. *Clancarty*, [1892] 1 Q.B. 689, and *Lawrence* v. *Willcocks*, *ib.* 696, followed.

Ryley v. *Master*, *ib.* 674, and *Wilks* v. *Wood*, *ib.* 684, distinguished. *McVicar* v. *McLaughlin*, 16 P. R. 450.

Sale of Land—*Assumption of Encumbrance —Rate of Interest.*]—In an agreement for the exchange of land it was stated that the property "was subject to a mortgage incumbrance of $750, bearing interest at the rate of 7 per cent. per annum." The property was one of four houses and lots, mortgaged for $3,000 with interest at ten per cent. payable half-yearly, to be reduced, if punctually paid, to seven per cent., with an agreement to release each house on payment of $750:—

Held, that the agreement did not convey an accurate statement as to the nature of the incumbrance. *Re Booth and McLean*, 21 O. R. 452.

Sale of Land—*Interest Payable by Purchaser —Delay—Default of Vendor.*]—Under a contract of purchase of real estate providing that "if from any cause whatever" the purchase money was not paid at a specified time, interest should be paid from the date of the contract, the purchaser is relieved from payment of such interest while the delay in payment is caused by the wilful default of the vendor in performing the obligations imposed upon him.

A contract containing such provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor. A conveyance was tendered which the vendee would not accept, whereupon the vendor brought suit for rescission of the contract, which the Court refused on the ground that the conveyance tendered was defective.

He then refused to accept the purchase money unless interest from the date of the contract was paid. In an action by the vendee for specific performance :—

Held, affirming the decision of the Court of Appeal, 19 A. R. 291, that the vendee was not obliged to pay interest from the time the suit for rescission was begun, as, until it was decided, the vendor was asserting the failure of the contract, and insisting that he had ceased to be bound by it, and after the decision in that suit, he was claiming interest to which he was not entitled, and in both cases the vendee was relieved from obligation to tender the purchase money.

By the terms of the contract the vendor was to remain in possession until the purchase money was paid and receive the rents and profits :—

Held, that up to the time the vendor became in default, the vendee, by his agreement, was precluded from claiming rents and profits, and was not entitled to them after that time, as he had been relieved from payment of interest, and the purchase money had not been paid. *Hayes* v. *Elmsley*, 23 S. C. R. 623.

Sale of Land—*Interest Payable by Purchaser—Delay—Duty to Prepare Conveyance.*]—A person in possession of land under a contract for purchase, by which he agreed to pay the purchase money as soon as the conveyances were ready for delivery, and interest thereon from the date of the contract, is not relieved from liability for such interest, unless the vendor is in wilful default in carrying out his part of the agreement, and the purchase money is deposited by the vendee in a bank or other place of deposit, in an account separate from his general current account. The vendor is not in wilful default where delay is caused by the necessity to perfect the title, owing to some of the vendors being infants, nor by tendering a conveyance to which the vendee took exception, but which was altered to his satisfaction while still in the hands of the vendors' agent as an escrow, and before it was delivered. Fournier, and Taschereau, JJ., dissenting. A provision that the purchase money is to be paid as soon as the conveyance is ready for delivery, does not alter the rule that the conveyance should be prepared by the purchaser. *Stevenson* v. *Davis*, 23 S. C. R. 629, reversing *S. C.*, 19 A. R. 591; 21 O. R. 642.

Surety—*Increase in Rate of Interest.*]—A new agreement between the debtor and creditor extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract, and releases the surety.

And a provision in such agreement, reserving the rights of the creditor against the surety, though effectual as regards the extension of time, is idle as regards the stipulation for an increased rate of interest, and, notwithstanding such reservation, the surety is discharged. *Bristol and West of England Land Co.* v. *Taylor*, 24 O. R. 286.

Surety—*Giving Time for Payment of Interest.*]—*See Land Security Co.* v. *Wilson*, 22 A. R. 151.

Trade Agreement—*Net Profits.*]—In an action brought in 1891, upon a written agreement —silent as to interest—to recover the amount of net profits of a certain business for a period ending 1st May, 1885, as ascertained in the manner provided for in the agreement, but not so ascertained until after the time fixed thereby, it was adjudged at the trial that the ascertainment was void, and a reference was directed to a Master to take an account.

Upon appeal from the report :—

Held, that the mode of computation provided by the contract being departed from, no certainty remained as to the amount payable or the time of payment, to ascertain which something more than an arithmetical computation was required; and therefore interest could not be allowed under section 86, sub-section 1, of the Judicature Act, R. S. O. ch. 44.

Merchant Shipping Co. v. *Armitage*, L. R. 9 Q. B. 99, and *London, Chatham, and Dover R. W. Co.* v. *South-Eastern R. W. Co.*, [1892] 1 Ch. 120, [1893] A. C. 429, followed.

Spartali v. *Constantinidi*, 20 W. R. 823, considered.

Nor could interest be allowed under section 85, as in a case in which it had been usual for a jury to allow interest; for no debt existed which was payable until it was ascertained, either in the manner provided by the agreement, or by the account taken in the action.

Smart v. *Niagara and Detroit Rivers R. W. Co.*, 12 C. P. 404, and *Michie* v. *Reynolds*, 24 U. C. R. 303, distinguished.

Nor could equitable damages, in the nature of interest, for delay, be allowed to the plaintiffs, having regard to their own delay in bringing the action, and to the fact that the omission to ascertain the amount within the time fixed by the agreement was not by the fault of the defendant. *McCullough* v. *Clemow*, 26 O. R. 467.

Verdict—*Interest between Verdict and Judgment.*]—The interest which a verdict or judgment bears by virtue of R. S. O. ch. 44, sec. 88, is no part of the claim; and the question as to the scale upon which costs are to be taxed is to be determined by the amount of the verdict or judgment irrespective of such interest.

Malcolm v. *Leys*, 15 P. R. 75, distinguished.

Semble, interest is to be allowed between the date of the verdict and the judgment. *Sproule* v. *Wilson*, 15 P. R. 349.

Will—*Legacy.*]—A testatrix by her will directed that a legacy should be paid out of the proceeds of the sale of lands, and that the lands should be sold at any time within two years after her death :—

Held, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale. *Re Robinson, McDonell* v. *Robinson*, 22 O. R. 438.

Will—*Legacy.*]—Where land was directed to be sold within three years from the testator's death, it was held that legacies bore interest from the date when the lands should have been sold. *McMylor* v. *Lynch*, 24 O. R. 632.

Will—*Over-payment of Interest on Legacy.*]—Where a testator bequeathed a legacy to be paid by the devisee of certain lands through the executor in twenty semi-annual instalments, with interest at the rate of six per cent., pay-

able at the time of each instalment on the amount of such payment to be computed from the time of his decease; and by mutual error, interest was paid with each instalment upon the whole amount of principal then remaining unpaid, which payments of interest were consumed by the legatee as income, while he invested the instalments of principal, and the legatee now brought this action against the executor and devisee, claiming an instalment as still due, the defendants alleging that he had been overpaid, and asking an account:—

Held, by Meredith, J., that the over-payments of interest were made under mistake of fact, and could be recovered or set off; and that the plaintiff, by reason of the over-payments, was enabled to, and did, invest just so much of the *corpus*, at interest, and so in effect, got, and should be charged with interest upon the over-payments; and it being admitted that upon this footing the plaintiff was fully paid, dismissed the action:—

Held, by the Divisional Court, affirming that judgment: that the over-payments were made under a mistake of fact, and might be recovered or set off; but varying it: that an account should be taken, and that all the payments made should be brought into account and applied, but without addition of interest, to the aggregate of the amounts properly due and payable under the will, and any balance due to plaintiff ascertained.

Cobham v. *Kingston*, 17 O. R. 432, and *United States* v. *Sanborn*, 135 U. S. R. 271, specially referred to. *Barber* v. *Clark*, 20 O. R. 592. Affirmed in appeal, 18 A. R. 435.

INTERIM RECEIPT.

See INSURANCE, III.

INTERNATIONAL LAW.

Foreign Judgment— *Penal Action — Distinction Between Public and Private Penalties.*]— To an action by the appellant in an Ontario Court upon a judgment of a New York Court against the respondent under section 21 of New York State Laws of 1875, ch. 611, which imposes liability in respect of false representations, the latter pleaded that the judgment was for a penalty inflicted by the municipal law of New York, and that the action, being of a penal character, ought not to be entertained by a foreign Court:—

Held, reversing the judgments below, 18 A. R. 136; 17 O. R. 245, that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights, was remedial and not penal in the sense pleaded. It was not within the rule of international law which prohibits the Courts of one country from executing the penal laws of another or enforcing penalties recoverable in favour of the State:—

Held, further, that it was the duty of the Ontario Court to decide whether the statute in question was penal within the meaning of the international rule so as to oust its jurisdiction, and that such Court was not bound by the interpretation thereof adopted by the Courts of New York. *Huntington* v. *Attrill*, [1893] A. C. 150. *See* S. C. 19 A. R. (Appendix.)

International Law—*Bill of Sale in Foreign Country of Goods in Ontario.*]—*See Marthinson* v. *Patterson*, 20 O. R. 720, *ante* 108.

International Law—*Foreign Creditors.*]—*See Milne* v. *Moore*, 24 O. R. 456, *ante* 13, as to rights of foreign creditors in administration proceedings.

See FOREIGN LAW.

INTERPLEADER.

Assignments Act— "*Proceeding.*"] — *See Cole* v. *Portenus*, 19 A. R. 111, *ante* 82.

Costs—*Discontinuance.*] — An interpleader proceeding is not an action; and Rule 641 (c), which enables the Court to "order the action to be discontinued," upon terms as to costs, does not apply to interpleader issues.

Hamlyn v. *Betteley*, 6 Q. B. D. 63, and *Re Dyson*, 65 L. T. N. S. 48, followed.

Semble, that the execution creditors can abandon the seizure or the prosecution of the issue, but only on the terms of answering all costs. *Hogaboom* v. *Gillies*, 16 P. R. 402.

Costs—*Reservation.*]—The costs of an interpleader issue should not be reserved by the interpleader order to be disposed of in Chambers, but should be left to be dealt with by the trial Judge. *Grothe* v. *Pearce*, 15 P. R. 432.

Costs—*Security.*]—Security for costs may be ordered in interpleader proceedings.

Swain v. *Stoddart*, 12 P. R. 590, approved and followed.

Belmont v. *Aynard*, 4 C. P. D. 221, 352, distinguished.

The party substantially and in fact moving the proceedings, whether plaintiff or defendant in the interpleader issue, should, if resident out of the jurisdiction, give security to the opposite party. *Re Ancient Order of Foresters and Costner*, 14 P. R. 47.

Entitling of Order—*Husband and Wife—Onus — Plaintiff in Issue.*]— Where an interpleader order is entitled in two actions, in different Divisions of the High Court, there being two executions in the sheriff's hands, an appeal from the order may be entertained in either Division, although one of the execution creditors has been barred by the order, from which there is no appeal on that ground.

Where husband and wife live together in the same house, the husband being owner or tenant, and the sheriff, under an execution against the husband, seizes the household furniture, which is claimed by the wife as her own, the onus is on her, and she must be plaintiff in the issue directed where the sheriff interpleads. *Hogaboom* v. *Grundy*, 16 P. R. 47.

Execution — *Exemptions.*] — An execution debtor can do what he pleases with the statutory exemptions and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor.

Where in an interpleader issue the claimant alleges that the goods seized include the statutory exemptions, that is a question for trial in the issue and is not to be left to the sheriff to deal with. *Field* v. *Hart*, 22 A. R. 449.

Sheriff—*Claim for Rent.*]—The express statutory provision giving sheriffs the right to interplead where a claim against the goods seized is made by a landlord for rent, was omitted in the Revised Statutes of 1887, it being stated in the appendix thereto that it was *superseded* by Con. Rule 1141, which provides that the sheriff, etc., may interplead where a claim is made, etc., to any money, goods, or chattels, etc., taken in execution, etc., by any person other than the person against whom the process issued :—

Held, that the right to interplead, where a claim for rent is made, still exists. *McLaughl*[illegible] v. *Hammill*, 22 O. R. 493.

Sheriff — *County Court — Exemptions.*] — A sheriff sued in the County Court by an execution debtor for $100 damages, the value of implements seized and sold by the sheriff without any special direction from the execution creditor and alleged to be exempt, cannot obtain in that Court an interpleader order directing the trial of an issue between the execution debtor and the execution creditor, to settle whether the implements were exempt or not. The sheriff acts at his own peril in granting or refusing the exemption.

Prohibition granted, the County Court having no jurisdiction to make such an order.

Judgment of the Queen's Bench Division, 21 O. R. 624, reversed. Maclennan, J.A., dissenting. *In re Gould* v. *Hope*, 20 A. R. 347.

Sheriff –*Fees and Costs—Issue between Execution Creditors and Claimant—Divided Success.*] —Where an interpleader issue, ordered upon the application of a sheriff who had seized certain goods under the direction of the execution creditors, was determined as to part of the goods in favour of the claimant and as to the remainder in favour of the execution creditors, and no costs of the issue were given to either party to it :—

Held, that the execution creditors should pay the sheriff his fees and poundage on the value of the part of the goods they were found entitled to, and his costs of the interpleader application and of a subsequent application to dispose of the costs, etc.; and that the execution creditors should have an order over against the claimant for one-half of such costs. *Ontario Silver Co.* v. *Tasker*, 15 P. R. 180.

Sheriff—*Form of Issue—Jus Tertii.*]—An interpleader issue as to goods seized by a sheriff was directed to be tried between the claimants, as plaintiffs, and the execution creditor, as defendant. The form of the issue was whether the goods at date of seizure were the property of the claimants as against the execution creditor. The claimants' contention was that the goods were not owned by or in possession of the execution debtor at all, but in possession of his wife, and if they were not actually owned by the claimants themselves, they were owned by the wife, and that there was between her and them a bargain such as to give them an equitable right to the goods. The trial Judge ruled that, under the form of the issue, the claimants could not give evidence to shew that the property was in the debtor's wife :—

Held, that the ruling was too strict ; that the claimants should not be shut out from adducing in evidence the whole facts about the transaction ; and that the issue should be amended so as to let in the question of the *jus tertii* for the benefit of the claimants and their privity therewith, and also the claim of the wife ; and that there should be a new trial.

Per Boyd, C. Not the form of the issue, but the substance is to be looked at. It is competent for the claimant to shew any facts warranting him in interfering with the process of execution, even if the property in the goods be in another ; provided that this will not work a surprise upon the execution creditor, and that claimant appears to be in privity with or aiming under the real owner.

Per Ferguson, J. The reasoning of some of the cases that the claimant, having caused the issue by asserting his right to the goods, ought not to be allowed to set up a case shewing that the goods belonged to a third person, who has not intervened in the matter at all, can only apply to a case in which the claimant does not profess to claim title under the third person. *Bryce* v. *Kinnee*, 14 P. R. 509.

Sheriff—*Form of Issue—Barring Execution Creditor in part.*] — Where goods seized by a sheriff under execution are at the time in the possession of the execution debtor, and the sheriff interpleads in consequence of a claim made upon them by a person out of possession, claiming by transfer from the execution debtor, the claimant should be plaintiff in the interpleader issue.

Semble, that the claimant should, as a rule, be made plaintiff, where he claims by transfer from the execution debtor, whether he is in possession or not.

In order to entitle himself to an interpleader order, the sheriff is not obliged to shew that the claim of the person out of possession is open to objection.

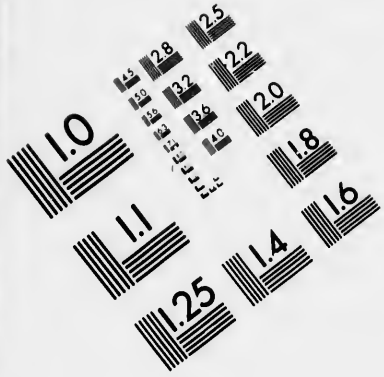
Where upon an interpleader application there is more than one claimant, and the execution creditor declines to contest the right of some or one of them, the order should absolutely bar the execution creditor as to the claim or claims which he declines to contest. *Doran* v. *Toronto Suspender Co.*, 14 P. R. 103.

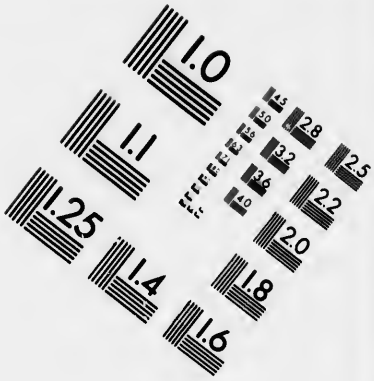
Sheriff—*Security for Goods Seized—Barring Claimant.*]—Upon a sheriff's application, an interpleader order was made in the usual terms, and the claimant having given security thereunder by an approved bond for the forthcoming of the goods, the sheriff withdrew from possession. Before the interpleader issue came to trial the goods were sold for taxes, and the surety on the claimant's bond became insolvent :—

Held, that the security had nothing to do with the determination of the claimant's rights, but only with the preservation of the property pending the litigation ; and the Court had no right to make an order barring the claim in default of giving fresh security. *Hogaboom* v. *Gillies*, 16 P. R. 96.

An appeal to the Court of Appeal was dismissed, the members of the Court being divided in opinion, 16 P. R. 260.

Sheriff—*Writ of Possession—Adverse Claim.*] —In an action upon a mortgage made by a deceased person, who died in 1889, pay[illegible]nt,





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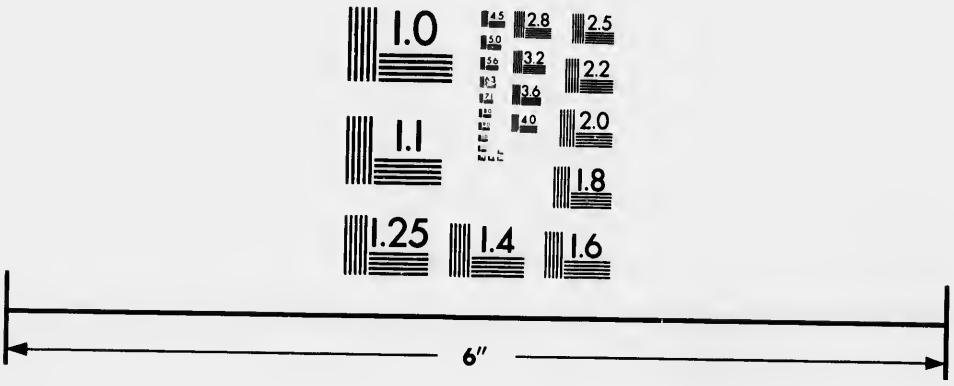

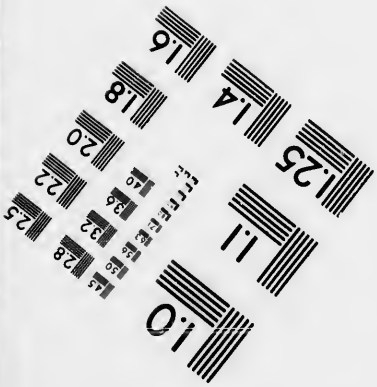

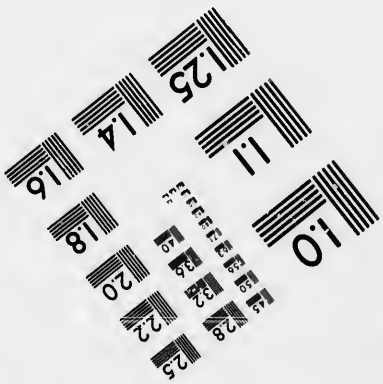

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foreclosure and possession were claimed, and the executors, to whom the real estate had been devised, were the only defendants. Judgment for possession, *inter alia*, was recovered, and a writ of possession placed in the sheriff's hands. The widow, who was one of the executors, and the infant children of the deceased mortgagor had an interest under the will in the mortgaged lands, and were in possession when the sheriff attempted to execute the writ. The infants, and the widow as their guardian, made a claim to the possession as against the writ, based on the ground of the infants not having been made parties to the action :—

Held, that the sheriff, by virtue of Rule 1141 (*b*), was entitled to interplead :—

Held, also, that the action, as regards the claim for possession, was properly constituted ; and the infants were bound by the judgment against the executors.

Keen v. *Cobb*, 14 P. R. 182, distinguished. *Emerson* v. *Humphries*, 15 P. R. 84.

Stakeholder—*Issue Sent from High Court to County Court—Appeal from Judgment on Issue.*]—The Court of Appeal has no jurisdiction to entertain an appeal from the decision of a County Court upon an interpleader issue sent for trial by an order made in an action in the High Court, upon the application of a stakeholder.

Rule 1163 applies only to the case of an application by a sheriff, and not to a case coming within the first clause of Rule 1141 ; and in the latter case the High Court has no power by virtue of any of the Consolidated Rules to direct an interpleader issue, in or arising out of an action in the High Court, to be tried in a County Court ; and, therefore, unless otherwise supportable, the proceedings under an order so directing are *coram non judice*.

But if the High Court has power to make such an order—and *semble*, it has—by force of section 110 of the Judicature Act, irrespective of the Consolidated Rules, preserving the old jurisdiction of the Court of Chancery, the appeal from the decision upon the issue is, in the first instance at all events, to the High Court, and not to the Court of Appeal. *Clancey* v. *Young*, 15 P. R. 248.

INTESTATE.

See DEVOLUTION OF ESTATES—EXECUTORS AND ADMINISTRATORS.

INTOXICATING LIQUORS.

I. CANADA TEMPERANCE ACT.

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

Held, reversing the decision of the Supreme Court of New Brunswick, King, J., dissenting, that to come within the terms of this order an incorporated town need not be separated from the county for all purposes ; it includes any town having municipal self-government even though it contributes to the expense of keeping up certain institutions in the county. *Town of St. Stephen* v. *County of Charlotte*, 24 S. C. R. 329.

Application of Fines—*Money Paid and Received.*]—The Canada Temperance Act came into force in the united counties of Leeds and Grenville on the 1st May, 1886.

Section 2 of the Act declares that the word "county" includes every town, township, etc., within the territorial limits of the county, and also a union of counties.

The town of Brockville was then an incorporated town separate from the counties for municipal purposes.

An order-in-council passed pursuant to 49 Viet. ch. 48 (D.), provided that all fines recovered under "The Canada Temperance Act, 1878," within any city or county which had adopted the Act, should be paid to the treasurer of the city or county as the case might be. Subsequently another order-in-council was passed cancelling the former, and providing for payment of such fines to the treasurer of the city or incorporated town, separated for municipal purposes from the county, or county within which they were recovered :—

Held, Maclennan, J.A., dissenting, that fines imposed and recovered for offences against the Act committed within the town of Brockville, paid over by the police magistrate of Brockville to the treasurer of the united counties of Leeds and Grenville between the dates of the two orders-in-council, could not, after the passing of the second order-in-council, be recovered back by Brockville.

Judgment of the Queen's Bench Division, 17 O. R. 261, reversed. *United Counties of Leeds and Grenville* v. *Town of Brockville*, 18 A. R. 548.

Distress—*Imprisonment—Warrant of Commitment—Excess of Jurisdiction—Summary Conviction Drawn up After the Act Ceased to be in Force.*]—The defendant was the salaried police magistrate for the county of Ontario, in which the Canada Temperance Act was in force prior to the 11th May, 1889, when the order-in-council declaring it in force was revoked.

On the 11th January, 1889, the plaintiff was convicted before the defendant of a second offence against the Act, and adjudged to pay a fine of $100 and $12.05 costs.

On the 20th March, 1889, the defendant issued a warrant of commitment reciting the plaintiff's conviction before him and the imposition of the fine and costs ; declaring that the plaintiff had no goods and chattels ; and directing her committal to gaol for sixty days "unless the said

several sums and all the costs and charges of the said distress and of the commitment and conveying of the said Nellie Meehiam to the said common gaol, amounting to the further sum of seventy-five cents and shall be sooner paid unto you."

At the trial of an action for the arrest and imprisonment of the plaintiff under this commitment a conviction of the plaintiff was put in dated 11th January, 1889, but which was not drawn up till February, 1890. The conviction adjudged that the plaintiff should pay the penalty and costs according to adjudication, and if these sums were not paid forthwith, then, inasmuch as it has been made to appear that the plaintiff had no goods or chattels whereon to levy by distress, that she should be imprisoned for sixty days unless these sums and the costs and charges of conveying to gaol shall be sooner paid.

The conviction had not been quashed.

It appeared by the examination of the defendant that the seventy-five cents in the warrant was charged for the warrant, and that the blank was left for the constable to fill in the costs of conveying to gaol. The constable, however, did not fill in the costs, but indorsed a memorandum of them on the back of the warrant, making them $13.40:—

Held, that the result of sections 62, 64, 66 and 67 of R. S. O. ch. 178, which are incorporated into the Canada Temperance Act, R. S. C. ch. 106, by virtue of section 107, is to enable the convicting magistrate to order the levy by distress of the penalty and costs, to dispense with such levy where he thinks it would be useless or ruinous, and to order the defendant to be imprisoned for a term not exceeding three months unless the penalty and costs, and also the costs and charges of the commitment and conveying to gaol, are sooner paid.

Regina v. *Doyle*, 12 O. R. 347, followed.

2. That, although the warrant of commitment went beyond the conviction by directing a detention for the costs of the commitment, as well as of conveying to gaol, yet as the only sum for which the gaoler could lawfully have detained the plaintiff was the sum of seventy-five cents mentioned in the warrant, and the costs of conveying to gaol greatly exceeded that sum, there was no excess in the warrant.

3. That, as the only evidence given at the trial with regard to the defendant's appointment as police magistrate was quite consistent with his being in office at a salary under an appointment which did not expire with the Canada Temperance Act, it could not be said that the conviction drawn up in February, 1890, was a nullity.

4. That if the plaintiff was detained on account of the charges of the constable indorsed on the warrant, it was not the act of the defendant, for he never gave any authority to the constable to require the gaoler to detain the plaintiff for any sum not inserted in the warrant.

5. That, as the conviction stated that it had been made to appear to the magistrate that there was no sufficient distress, and the conviction had not been quashed, evidence would not have been admissible to shew that there was sufficient distress.

6. That the commitment having been authorized by a lawful conviction, which had not been quashed, the plaintiff was properly non-suited.

7. That at all events the defendant was entitled to the protection of R. S. O. ch. 73. *Meehiam* v. *Horne*, 20 O. R. 267.

Sale of Liquors for Use in County where Act in Force—*Avoidance of Contract—Repeal of Act.*]—In an action for the price of liquors supplied with the knowledge that they were for use in a county in which the Canada Temperance Act was in force, part of which were sold prior to the vote for the repeal of the Act, and the remainder subsequent to a successful vote for its repeal, but before the order-in-council bringing the Act into force had been revoked:—

Held, that the price of the liquors sold before were not, but that of those sold after the successful vote were, recoverable.

Pearce v. *Brooks*, L. R. 1 Ex. 217, followed. *Smith* v. *Benton*, 20 O. R. 344.

II. Dominion License Act.

Salaries of License Inspectors—*Approval by Governor-General in Council.*]—On a claim brought by the Board of License Commissioners appointed under the Liquor License Act, 1883, for moneys paid out by them to license inspectors with the approval of the Department of Inland Revenue, but which were found to be afterwards in excess of the salaries which two years later were fixed by order-in-council under section 6 of the said Liquor License Act, 1883:—

Held, affirming the judgment of the Exchequer Court, 2 Ex. C. R. 293, that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor-General in Council. *Burroughs* v. *The Queen*, 20 S. C. R. 42.

III. Liquor License Act.

1. *Convictions.*

Admission of Guilt—*Imprisonment.*]—On an information charging that the defendant, in his premises, being a place where liquor might be sold, unlawfully did have his bar room open after 10 o'clock in the evening, contrary to the rules and regulations for license holders passed by the License Commissioners, etc., the defendant signed an admission stating that, the information having been read over to him, he desired to plead guilty to the charge, which was the only evidence before the Court, and on which the defendant was convicted. It did not appear that the municipality had passed any by-law on the subject:—

Held, that this did not prevent the defendant from objecting to the power of the License Commissioners to pass such rules and regulations, but on the authority of *McGill* v. *License Commissioners of Brantford*, 21 O. R. 665, the objection must be overruled.

Regina v. *Brown*, 24 Q. B. D. 357, followed.

By the conviction herein a fine and costs were imposed, and, in default of payment, distress, and, in default of sufficient distress, imprisonment:—

Held, under section 98 of the Liquor License Act, R. S. O. ch. 194, incorporating section 427

of the Municipal Act, costs and imprisonment could properly be imposed. *Regina* v. *Farrell*, 23 O. R. 422.

Club—*Selling Liquor without License—Locality.*]—A company was incorporated under the Joint Stock Letters Patent Act, R. S. O. ch. 157, for establishing a driving park to improve the breed of horses, etc., and for such purposes to acquire a certain named property, with power to erect a club house, and, subject to the Liquor License Act, to maintain and rent or lease same, for social purposes, etc.; and generally to do all things incidental or conducive to the objects aforesaid:—

Held, that the charter did not authorize the company to have a club house at any other place than that specified in the charter; and where, therefore, the defendant was found in possession of and selling liquor at another place, though claimed to be a club constituted under the charter, and of which the defendant claimed to be the secretary, he was properly convicted under section 50 of the Liquor License Act, R. S. O. ch. 194, for unlawfully keeping liquor for sale, barter or traffic, without a license. *Regina* v. *Charles*, 24 O. R. 432.

Club—*Manager.*]—Section 50 of the Liquor License Act, R. S. O. ch. 194, which forbids the keeping or having in any house, etc., any liquors for the purpose of selling by any person unless duly licensed thereto under the provisions of the Act, does not justify a conviction of the manager of a club incorporated under the Ontario Joint Stock Companies Letters Patent Act who has the charge or control of the liquor merely in his capacity of manager, the act of keeping, etc., being that of the club and not of the manager.

Regina v. *Charles*, 24 O. R. 432, distinguished. *Regina* v. *Slattery*, 26 O. R. 148.

Druggist—*Allowing Liquor to be Consumed on the Premises.*]—It is an offence under the Liquor License Act, R. S. O. ch. 194, and amendments thereto, for a chemist or druggist to allow liquor "sold by him or in his possession to be consumed within his shop by the purchaser thereof," and it is not essential that he should be registered. A conviction in the above form does not charge an alternative offence.

The adjudication and conviction, besides imposing the money penalty under section 70, further imposed imprisonment for three months, as provided by that section.

The Court differed as to the validity of the term of imprisonment imposed, but held that in any event the conviction could be amended under 53 Vict. ch. 37, sec. 27 (D.), so as to comply with section 67 of the Summary Convictions Act. *Regina* v. *McCay*, 23 O. R. 442.

Druggist—*Omission to Enter Sale in Book.*]—The non-entry in a book of a lawful sale of liquor by a druggist, pursuant to section 52 of R. S. O. ch. 194, does not constitute an absolute contravention of the Act; but merely throws on the defendant the onus of clearly rebutting the presumption which the statute has raised against him. *Regina* v. *Elborne*, 21 O. R. 504. Reversed in appeal, 19 A. R. 439. *See* now, 55 Vict. ch. 81, sec. 7 (O.).

Evidence — *License Inspector — Indian Reserve.*]—For an offence under "The Liquor License Act," R. S. O. ch. 194, the license inspector, who lays the information, is a competent witness.

An objection that the conviction, which was for selling liquor without a license at the village of M., in the township of O., should have negatived that the place where the offence was committed was in an Indian reserve, which it was alleged formed part of such township, was overruled, as there was nothing to shew the fact alleged, and under section 1 of R. S. O. ch. 5, there was *primâ facie* jurisdiction. *Regina* v. *Fearman*, 22 O. R. 456.

Evidence—*Witnesses Reading Over and Signing Evidence — Costs.*]—Under the power conferred on justices of the peace by section 2 of R. S. O. ch. 74, to order in and by the conviction the payment of reasonable costs, a charge of fifty cents for drawing up a conviction under the Liquor License Act, is authorized.

On motion to quash a conviction, it was objected that the evidence taken before the magistrate and returned by them, was not shewn to have been read over and signed by the witness:—

Held, that the maxim *omnia presumuntur esse rite acta* applied, and as the contrary was not shewn it would be presumed to have been done. *Regina* v. *Excell*, 20 O. R. 633.

Form—*Absence of Distress Clause—Amending Conviction—Evidence of Defendant Being Licensed—Statement by Witnesses Unchallenged.*]—In a conviction under section 73 of the Liquor License Act, R. S. O. ch. 194, for delivering liquor to a person while intoxicated, imprisonment was directed without any provision for distress. On the conviction being brought before the Court on certiorari, the Court, under section 87 of the Summary Convictions Acts, R. S. O. ch. 178, as amended by section 27 of 53 Vict. ch. 37 (D.), amended the conviction by inserting a provision for distress.

The amending Act came into force after the conviction was made and *certiorari* granted, but it being a matter of procedure, the Court had power to act under it and make the amendment.

In proof of defendant being a licensed hotel keeper under the Act, a witness in giving evidence, stated defendant to be such, and although defendant was present and represented by counsel, he allowed the statement to pass unchallenged:—

Held, sufficient, as the witness might have obtained his information from the defendant. *Regina* v. *Flynn*, 20 O. R. 638.

Form — *Enforcement of Penalty — Witnesses, —Necessity of Evidence being Read Over and Signed.*]—The defendant, holding a shop license, was convicted for allowing liquor to be drunk on the premises, contrary to section 60 of the Liquor License Act.

Quære, whether a conviction in such case need do more than impose the penalty and costs and the provisions of the Summary Convictions Act be called in aid for its enforcement, namely, by the issue of a warrant of distress under section 62 in case of non-payment of the fine due, and in default thereof, a warrant under section 67 for committal; or whether the forms provi-

ded for by section 53 must be followed providing for distress and in default imprisonment, unless, etc.; but the question was immaterial, as the Court, as a matter of precaution, amended the conviction so as to include these provisions.

An objection that it did not appear that the evidence had been read over to the witness was overruled, following *Regina* v. *Excell*, 20 O. R. 633.

The direction in sub-section 2 of section 96, as to the witnesses signing their evidence, is not imperative but directory merely. *Regina* v. *Scott*, 26 O. R. 646.

Information—*Several Offences.*]—An information laid before the police magistrate charged that the defendant did, on the 30th and 31st days of July, 1892, sell intoxicating liquor without the license therefor by law required. Upon the hearing, evidence was adduced to shew that the defendant had sold intoxicating liquor on those days; the magistrate adjudged the defendant guilty, and made a minute thereof and of the punishment imposed; a few days afterwards he returned a conviction of the defendant for having sold liquor without a license on the two days named; and a month later returned a second conviction as for an offence committed on the 31st only:—

Held, that the information charged two offences, and it and the proceedings thereon were in direct contravention of section 26 of the Summary Convictions Act, R. S. C. ch. 178; and that the misjoinder of the two offences was not a defect in substance within the meaning of section 28.

Rodgers v. *Richards*, [1892] 1 Q. B. 555, not followed.

Hamilton v. *Walker*, [1892] 2 Q. B. 25, referred to:—

Held, also, that the objection to the information and subsequent proceedings was open to the defendant upon motion to quash the convictions, although it was not taken before the magistrate:—

Held, lastly, that, under the circumstances, neither section 105 of R. S. O. ch. 194, nor sections 80, 87 and 88 of R. S. C. ch. 178, as amended by 53 Viet. ch. 37, applied to the convictions.

And the convictions were quashed with costs to be paid by the prosecutor. *Regina* v. *Hazen*, 23 O. R. 387. *See* the next case.

Information—*Several Offences — Adjournment — Waiver — Imprisonment.*]—An information stated that the defendant "within the space of thirty days last past to wit on the 30th and 31st days of July, 1892, did unlawfully sell intoxicating liquor without the license therefor by law required":—

Per Hagarty, C. J. O., and Boyd, C.:—Such an information does not charge two offences but only the single offence of selling unlawfully within the thirty days.

Per Osler, and Maclennan, JJ. A.:—Such an information does charge two offences and is in contravention of section 845 (3) of the Criminal Code, 1892.

But, per Curiam, assuming that an information so worded does contravene the provisions of section 845 (3) of the Criminal Code, 1892, the defect is one "in substance or in form" within the meaning of the curative section (847) and does not invalidate an otherwise valid conviction for a single offence.

The provision of section 857, that no adjournment shall be for more than eight days is matter of procedure and may be waived and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect.

A conviction for a first offence under section 70 of the Liquor License Act, R. S. O. ch. 194, properly awards imprisonment in default of payment of the fine and not in default of sufficient distress.

Regina v. *Smith*, 46 U. C. R. 442, and *Regina* v. *Hartley*, 20 O. R. 481, approved.

Judgment of the Queen's Bench Division, 23 O. R. 387, reversed. *Regina* v. *Hazen*, 20 A. R. 633.

Information — *Several Offences — Objection Taken at Hearing.*]—When an information laid against the defendant, under the Indian Act, charged that he sold intoxicating liquor to two persons on the 5th July, and to two persons on the 8th July, and the Justices, notwithstanding that the defendant's counsel objected to the information on this ground, proceeded and heard evidence in respect of all the offences so charged, then amended the information by substituting the 8th August for the 8th July, proceeded and heard evidence in respect of the substituted charge and dismissed it, and convicted the defendants for selling to two persons on the 5th July, the conviction was quashed.

Regina v. *Hazen*, 20 A. R. 633, distinguished.

Per Street, J. It was the duty of the justices when the objection was taken to have amended the information by striking out one or other of the charges, and to have heard the evidence applicable to the remaining charge only. *Regina* v. *Alward*, 25 O. R. 519.

License Commissioner Taking Part in Trial—*Provision for Distress in Conviction and not in Adjudication—Sale to Lodger During Prohibited Hours.*]—During the trial of an offence under the Liquor License Act, the license commissioner, who was sitting at the counsel's table, went and sat in the constable's chair a few feet distant from the desk at which the magistrate was sitting, but there was no evidence to shew that he in any way improperly interfered in the trial:—

Held, that the license commissioner could not be deemed, under the circumstances, to have been sitting on the bench and taking part in the trial, etc., contrary to section 95 of the Act.

An objection that the adjudication did not provide for distress, while the conviction contained such a provision, was overruled, following *Regina* v. *Hartley*, 20 O. R. 481:—

Held, also, that sections 54, 58, do not authorize the sale of liquor to a lodger in the licensee's house during prohibited hours; the most that can be said is that the sale to the lodger does not thereby make him an offender. *Regina* v. *Southwick*, 21 O. R. 670.

Minute of Conviction—*Conviction not in Accordance With.*]—A minute of conviction for selling liquor without a license in contravention of section 70 of the Liquor License Act, R.S.O. ch. 194, stated that in default of payment of the fine and costs imposed, the same was to be

levied by distress, and in default of distress imprisonment, and a formal conviction was drawn up following the minute :—

Held, that under section 70, distress was not authorized ; but that the fact of the minute containing such provision, did not prevent a conviction omitting such provision, being drawn up and returned, in compliance with a *certiorari* granted.

Regina v. *Brady*, 12 O. R. 358, and *Regina* v. *Higgins*, 18 O. R. 148, considered :—

Held, also, that the conviction was good under section 105 of the said Act. *Regina* v. *Hartley*, 20 O. R. 481.

Sale—*Quantity.*]—The defendant, the holder of a shop license under the Liquor License Act, R. S. O. ch. 194, was convicted by a magistrate for selling liquor in less quantity than three half-pints, contrary to section 2, sub-section 3.

The evidence shewed a sale of a bottle of ale and a flask of brandy, each containing less than three half-pints, the two together containing more than three half-pints.

Upon appeal from an order refusing a *certiorari* :—

Held, that it was within the jurisdiction of the magistrate to determine as a matter of fact whether the defendant had sold liquor in less quantity than three half-pints, and if a *certiorari* were granted, the Court would have no power, upon a motion to quash the conviction, to review the magistrate's decision.

Colonial Bank of Australasia v. *Willan*, L. R. 5 P. C. 417, followed *Regina* v. *Canerty*, 26 O. R. 51.

Sale by Wife — *Presumption — Rebuttal.*]—The defendant was a married woman, and the sale of the liquor took place in the presence of her husband ; but the evidence shewed that she was the more active party, and she was the occupant of the premises on which the sale took place :—

Held, having regard to R. S. O. ch. 194, sec. 112, sub-sec. 2, that, even if the presumption that the sale was made through the compulsion of the husband had not been removed by section 13 of the Code, it would have been rebutted by the circumstances.

Regina v. *Williams*, 42 U. C. R. 462, distinguished. *Regina* v. *McGregor*, 26 O. R. 115.

Selling Without License—*Evidence of Purchase of Day's Receipts—Costs.*]—The defendant purchased for $25, from a duly licensed hotelkeeper, the day's receipts of the bar, and at the close of the day had paid over to him such receipts :—

Held, that a conviction against defendant for selling liquor without a license could not be maintained, and the conviction was quashed, but without costs.

Remarks on the question of costs in such cases. *Regina* v. *Westlake*, 21 O. R. 619.

Taverns and Shops — *Having Liquor for Sale in Defendant's House, being a House of Public Entertainment—Conviction not Following Minute—Sale Without License—Druggist—Bias.*]—The defendant had been a licensed hotelkeeper, his hotel having a bar furnished with a counter and the usual appliances for the sale of liquor, his license having expired. On being asked by a couple of persons for whiskey, he said he could not sell it, and gave them temperance drinks, and on being paid therefor, treated to whiskey which he obtained from a bottle behind the counter.

The defendant was convicted under section 50, for permitting spirituous liquors to be drunk in his house, being a house of public entertainment, the minute of conviction providing for distress in default of payment of the fine and costs imposed ; but the conviction drawn up and returned under a writ of *certiorari* omitted the provisions for distress. Neither under sections 50 or 70 is distress authorized :—

Held, that the conviction was valid as being in accordance with section 50 ; and that, under the circumstances, it need not follow the minute.

Regina v. *Hartley*, 20 O. R. 481, followed :—

Held, also, that the conviction would have been good under section 70, as the giving and being paid for the temperance drinks was a mere subterfuge for disposing of and selling spirituous liquors ; and further, the conviction could be supported under section 105 :—

Held, also, that the facts of one of the convicting magistrates being a chemist and druggist, and in such capacity filling medical prescriptions containing small quantities of spirituous liquors, did not incapacitate him from acting as a magistrate and adjudicating upon the case. *Regina* v. *Richardson*, 20 O. R. 514.

Territorial Jurisdiction—*Warrant—Summons—Exclusion of Evidence.*]—Upon a motion for a rule *nisi* to quash a summary conviction of the defendant by a stipendiary magistrate for selling liquor without a license :—

Held, that although the conviction did not shew on its face that the offence was committed at a place within the territorial jurisdiction of the magistrate, yet, as the warrant for the defendant's apprehension, which was returned upon *certiorari*, shewed the complaint to be that the defendant sold liquor at a place within the magistrate's jurisdiction, and it was to be inferred that the evidence returned was directed to that complaint, sufficient appeared to satisfy the Court that an offence of the nature described in the conviction was committed, over which the magistrate had jurisdiction, and therefore the conviction should not, having regard to section 889 of the Criminal Code, 1892, be held invalid.

Regina v. *Young*, 5 O. R. 184*a*, distinguished :—

Held, also, that, by the combined effect of sections 559 and 843 of the Code, it was discretionary with the magistrate to issue either a summons or a warrant, as he might deem best : and therefore it was not a valid objection to the conviction that the magistrate included in the costs which the defendant was ordered to pay, the costs of arresting and bringing her before the magistrate under the warrant.

Upon the defendant tendering herself as a witness on her own behalf, the magistrate stated that, in view of the evidence adduced by the prosecutor, a denial by the defendant on oath would not alter his opinion of her guilt, upon which her counsel did not further press for her examination ; but her husband was examined, and gave evidence denying the sale of the liquor :—

Held, that there was no denial of the right of the defendant, under section 859 of the Code, to make her full answer and defence. *Regina* v. *McGregor*, 26 O. R. 115.

Waiver of Summons or Information—*Form of Conviction.*]—On the trial of a misdemeanour before magistrates, the taking of an information or issue of a summons may be waived.

On a charge for selling liquor without a license, contrary to section 70 of R. S. O. ch. 194, the defendant appeared before the magistrates, pleaded to the charge, and the evidence was gone into and the case closed without objection, the defendant convicted, and a fine of $50 and costs imposed. An objection taken on a motion to quash the conviction, that the information was taken before only one justice of the peace, was overruled, it being, under the circumstances, held to be waived; but, *Semble*, the information was apparently taken before two justices.

The adjudication did not state the amount of the costs imposed:—

Held, following *Regina* v. *Flynn*, 20 O. R. 638, this did not invalidate the conviction; but, *quære*, whether apart from the amending Acts *sub nom* would be the case.

Under R. S. O. ch. 194, secs. 60, 70, it is not a valid objection to the conviction that it did not state that the imprisonment was for the term specified, unless the costs and charges of conveying to jail were sooner paid. *Regina* v. *Clarke*, 20 O. R. 642.

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2. *Miscellaneous Cases.*

By-law — *Publication — Polling Places.*]—Notice of intention to submit a local option by-law to the votes of the township electors was given in proper form and for the requisite number of times in a paper published in an incorporated village, the bounds of which did not actually touch, though they came close to those of the township in question. This paper was the nearest paper; it had a large circulation in the township, and was that in which the township council had been in the habit of publishing their notices and by-laws. No paper was published in the township in question.

One of the polling places was described merely as being "at or near" a certain village. It was shewn that this village was a very small one, and that the description was the same as that used in the by-laws appointing the places for holding municipal elections. It was also shewn that the poll was held in a house close to the house in which the poll had been held in the next preceding municipal election, that house itself having been moved away.

Another polling place was specifically described by place, lot and concession, but there was an error in the number of the concession.

It was shewn that all the proceedings had been taken in good faith, that the poll was very large, and it did not appear that any one had been misled by any of these informalities:—

Held, therefore, reversing the judgment of Sir Thomas Galt, C. J., that the Court might, in the exercise of its discretionary power so to do, refuse to quash the by-law in question. *In re Huson and Township of South Norwich*, 19 A. R. 343. Affirmed by the Supreme Court, 21 S. C. R. 669.

By-law—*Sale by Retail—Quantity—Locality—Days Named for Appointment of Agents and Declaring the Result of Polling—Notice—Christmas Day and New Years' Day.*]—A by-law passed by a township council under 53 Viet. ch. 56, sec. 18 (O.), was entitled a by-law to prohibit the retail sale of intoxicating liquors in the township of Mariposa; and enacted that "the sale by retail of spirituous liquors is and shall be prohibited in every tavern, inn, or other house or place of public entertainment; and the sale thereof is altogether prohibited in every shop or place other than a house of public entertainment":—

Held, that the last part of the clause must be read in connection with the previous part so as to limit the prohibition to a sale by retail, which is now put beyond question by 54 Viet. ch. 46, section 1 (O.).

Slavin v. *Corporation of Orillia*, 36 U. C. R. 159, and *In re Local Option Act*, 18 A. R. 573, followed:—

Held, also, that the quantity of liquor to be deemed a sale by retail need not appear in the by-law, being defined by the statute: that the locality within which the liquor could be sold was sufficiently indicated; and that the want of a penalty in the by-law did not invalidate it.

The day named in the by-law for the appointment of agents to attend at the final summing up of the votes was nearly three weeks after the first publication of the by-law, and the day named for the clerk to declare the result of the polling was the second after said polling:—

Held, both days sufficient.

The notice at the foot of the by-law after certifying that the foregoing (*i.e.*, the copy of the by-law published) was a true copy of the proposed by-law of the township of Mariposa which had been taken into consideration by the council thereof, and which would be finally passed in the event of the electors' assent being obtained thereto after one month's publication in a named paper, stated that all persons were required to take notice that on the 4th of January, 1892, a poll will be opened, naming the statutory hours, at the several polling places named in the by-law for the purpose of receiving the votes of the electors on the same. Two of the days of publication were Christmas and New Years:—

Held, that the formal notice was sufficient; and the fact of publication on the days named did not render the publication invalid; publication not being a judicial act so as to prevent publication on those days. *Brunker* v. *Township of Mariposa*, 22 O. R. 120.

By-law—*Two-thirds' Vote—Year of Application.*]—A by-law to regulate the proceedings of a town council required that every by-law should receive three readings, and that no by-law for raising money, &c. which had a tendency to increase the burdens of the people, should be finally passed on the day on which it was introduced, except by a two-thirds' vote of the whole council.

A by-law to fix the number of tavern licenses, and which, therefore, required such two-thirds' vote, was read three times on the same day, and was declared passed. It did not, however, re-

ceive the required two-thirds' vote. A special meeting of council was then called for the following evening, when the by-law was merely read a third time, receiving the required two-thirds' vote :—

Held, that the by-law was bad, for having been defeated when first introduced by reason of not having received a two-thirds' vote, it was not validated by merely reading it a third time at the subsequent meeting.

The by-law did not shew, as required by the Liquor License Act the year to which it was to be applicable :—

Held, that it was bad for this reason, also. *Re Wilson and Town of Ingersoll*, 25 O. R. 439.

By-law—*Voters.*]—A local option by-law carried by a vote of seventy-one to fifteen was quashed where it appeared that the returning officer had refused to accept the votes of tenant voters, seventy-four of whom were on the list and had the right to vote, though it was not shewn that more than a very small number of these voters had made any attempt to vote or had expressed any intention of voting, or had heard of the returning officer's refusal.

The election doctrine that irregularities should not be held fatal unless they actually affect the result does not apply where a class is disfranchised in a by-law contest.

In re Croft and Peterborough, 17 A. R. 21, applied. *Woodward* v. *Sarsons*, L. R. 10 C. P. 733, considered.

Judgment of Galt, C. J., reversed, Maclennan, J. A., dissenting. *In re Pounder and Village of Winchester*, 19 A. R. 684.

Injury while Intoxicated—*Liquor Supplied by Two Tavern-keepers—Joint Liability.*]—Where a person comes to his death while intoxicated and the intoxicating liquor has been supplied to him at two taverns and to excess in each so that an action might have been brought successfully against either of the tavern-keepers under R. S. O. ch. 194, sec. 122, they cannot be sued jointly.

The jury having in such an action in which tavern-keepers had been jointly sued assessed the damages at the trial at different sums against the two defendants, upon application to set aside the verdict on the ground that the statute would not support such a joint action, the plaintiff was put to his election to retain his judgment against either defendant, undertaking to enter a *nolle prosequi* against the other. Meredith, C. J., *hasitante*. *Crane* v. *Hunt*, 26 O. R. 641.

License Commissioners—*Resolutions Fixing Hours for Sale of Liquor.*]—License commissioners, appointed under R. S. O. ch. 194, on 17th April, passed a resolution providing that, after 1st May following, in all places where intoxicating liquors are or may be sold by wholesale or retail, etc., no such sale or disposal of the same shall take place therein, etc., between midnight and 5 a.m., which was subsequently amended by substituting 11 p.m. for midnight :—

Held, that under section 4, enabling the license commissioners to pass resolutions for regulating taverns and shops, there was power to pass the resolutions here ; and that such power was not interfered with by sections 32 and 54, no by-laws on the subject having been passed by the municipal council.

Quære, whether there is power on notice of motion to quash resolutions of this kind.

Daniels v. *Burford*, 10 U. C. R. 478 ; *Cæsar* v. *Cartwright*, 12 U. C. R. 341, commented on, *McGill* v. *License Commissioners of Brantford*, 21 O. R. 665.

License Commissioners—*Regulations.*]—A regulation by license commissioners requiring the lower half of bar-room windows to be left uncovered during prohibited hours is valid and reasonable. *Regina* v. *Belmont*, 35 U. C. R. 298, questioned. *Regina* v. *Martin*, 21 A. R. 145.

License Commissioners—*Prohibition.*]—A board of license commissioners under the Liquor License Act, R. S. O. ch. 194, is not a body against whom a writ of prohibition will be granted, prohibiting them from issuing a license.

Regina v. *Local Government Board*, 10 Q. B. D., at p. 231, and *Re Gedson and City of Toronto*, 16 A. R. 452, followed.

Semble, an application under the latter part of sec. 21, R. S. O. ch. 194, for an additional tavern license in a locality largely resorted to in summer by visitors, may be made at any time so long as the license does not extend beyond the prescribed period of six months from the first of May. *In re Thomas's License*, 26 O. R. 448.

Police Magistrate—*Right to Try County Offences.*]—The defendant was charged with a breach of the Liquor License Act in the township of Barton, in the county of Wentworth ; and was tried and convicted at the city of Hamilton, situated in the said county, before the police magistrate thereof :—

Held, that under section 18 of the Police Magistrate's Act, R. S. O. ch. 72, the police magistrate had jurisdiction in the premises. *Regina* v. *Gully*, 21 O. R. 219.

Reeves in Unorganized Districts—*Ex officio Justices of the Peace.*]—The reeves of municipalities in unorganized districts are, under the legislation relating thereto, *ex officio* justices of the peace in their respective municipalities, with power to try alone, and convict, for offences under "The Liquor License Act," R. S. O. ch. 194. *Regina* v. *McGowan*, 22 O. R. 497.

Refusal to Admit Officer.]—The right of search given by section 130 of The Liquor License Act, R. S. O. ch. 194, may be exercised without any preliminary statement of the purpose for which the search is to be made. A formal demand of admittance is sufficient.

Judgment of the County Court of Frontenac reversed, Osler, J. A., dissenting. *Regina* v. *Sloan*, 18 A. R. 482.

Refusal to Admit Officer—*Liability of Licensee for Offence of Servant.*]—Per Hagarty, C. J. O., and Maclennan, J. A. Under section 112 of The Liquor License Act, R. S. O. ch. 194, the licensed hotel-keeper is personally responsible for the refusal of his servant to admit an officer claiming the right of search under section 130.

Per Burton, and Osler, JJ. A.—Section 112 does not apply to an offence of that kind, but is limited to offences connected with sale, barter and traffic.

In the result, the judgment of the County Court of Frontenac, quashing the conviction, was upheld. *Regina* v. *Potter*, 20 A. R. 516.

Search Warrant—*Obstructing Officer.*]—The defendants were committed for trial for obstructing a peace officer acting under a search warrant issued on an information charging that there was reasonable ground for the belief that spirituous liquors were being unlawfully kept for sale contrary to the Liquor License Act in an unlicensed house :—

Held, that the search warrant must be deemed to have been issued under section 131 of the Act, and that section containing no provision for punishment in such case, the proceedings against the defendant must be by indictment for a misdemeanour under R. S. C. ch. 162, sec. 134.

The Court refused to determine the validity of the warrant on a motion to set aside the commitment, as it could be raised on the trial of the indictment if a true bill were found. *Regina* v. *Hodge*, 23 O. R. 450.

Search Warrant—*Sufficiency of Place to be Searched, and Persons to make it.*]—A search warrant issued under section 131 of the Liquor License Act, R. S. O. ch. 194, after reciting an information laid by a police inspector, that there was reasonable ground for the belief that spirituous liquor was being unlawfully kept for sale or disposal contrary to the said Act, in a certain unlicensed house or place, namely, in the house and premises of the Toronto Industrial Exhibition Association, directed the city license inspectors, city constables, or peace officers, or any of them, to search the said house and premises, and every part thereof, or of the premises connected therewith. In attempting to search defendant's booth, which was described as being under the old grand stand on the exhibition premises, a police sergeant, who accompanied the inspector, was obstructed by defendant. The evidence did not shew there was any other booth on the premises :—

Held, that the warrant was valid; that it was sufficiently definite as to the place to be searched and the persons directed to make it. *Regina* v. *McGarry*, 24 O. R. 52.

Shop License—*Certificate of Electors—Omission to File in Proper Time—Revocation of License.*]—The contravention of the provisions of the Liquor License Act, R. S. O. ch. 194, provided for in section 91, must be a wilful or knowing contravention.

Where it appeared that the applicant for a license acted throughout in good faith, but omitted to file before 1st April, with the application, the certificate of the electors required by R. S. O. ch. 194, sec. 11, sub-sec. 14, as amended by 53 Vict. ch. 56, sec. 1; and the board of commissioners, after a fair hearing of the application, and all objections made against it, including the omission of the said certificate, which had not been filed until 25th April, in good faith and according to the best of their judgment, granted the license, and the Judge of the County Court adjudged that the license so granted should be revoked, the licensee thereby incurring the penalty of disqualification, prohibition was granted.

The provision that the certificate shall accompany the application at the time of the filing is peremptory. *In re Hunter's License*, 24 O. R. 153. *See* the next case.

Shop License—*Certificate of Electors.*]—On an application for a shop license under sub section 14 of section 11 of the Liquor License Act, R. S. O. ch. 194, as amended by 53 Vict. ch. 56, sec. 1 (O.), it is imperative that the petition which is to be filed with the inspector before 1st April, be accompanied by a properly signed certificate of the majority of the electors, and the Act does not authorize the granting of such a license contrary to the provisions of that section.

Semble, it is otherwise as to a tavern license, in which case a discretion rests with the commissioners.

Decision of Meredith, J., 24 O. R. 153, reversed. *In re Hunter's License*, 24 O. R. 522.

Transfer of License—*Certificate of Electors—County Judge—Jurisdiction to Revoke License.*]—Section 91 of the Liquor License Act, R. S. O. ch. 194, is a penal enactment and is to be construed strictly; and, as it refers only to a "license issued" contrary to any of the provisions of the Act, and not to a "license transferred," and to the licensee and not to the transferee, a County Judge has no jurisdiction under it to entertain a complaint against a transferee that a license has been improperly transferred to him; and has no jurisdiction to revoke or cancel a license not already issued.

The applicant was, in the month of March, 1891, the holder of a wholesale license to sell liquor in premises in polling sub-division 10 in a city. The holder of a shop license in polling sub-division 18 transferred his license to the applicant on the 26th March, 1891. On the same day the license commissioners, on the petition of the applicant, not accompanied by a certificate signed by a majority of the electors in polling sub-division 10, consented in writing to the transfer of the shop license and to its transfer to the premises in polling sub-division 10, and also cancelled the applicant's wholesale license :—

Held, that the commissioners erred in consenting to the transfer of the shop license to the premises of the applicant in polling sub-division 10 without his petition therefor being accompanied by the certificate required by 53 Vict. ch. 56, sec. 1 (O.). *Re Dunlop*, 22 O. R. 22.

Warehouse.]—A cellar in a brewery where beer is stored is a "warehouse" within the meaning of section 61 of the Liquor License Act R. S. O. ch. 194. *Regina* v. *Halliday*, 21 A. R. 42.

INTRUSION.

See INFORMATION.

INNUENDO.

See DEFAMATION.

JUDGMENT.

I. Amending and Vacating.

Amendment—*Mistake.*]—A Judge may always correct anything in an order which has been inserted by mistake or inadvertence; and an order will be corrected even after the lapse of a year. *McMaster* v. *Radford*, 16 P. R. 20.

Amendment—*Mortgage Action—Omission of Part of the Mortgaged Lands.*]—Under the liberal powers of amendment now given by Rules 444 and 780, the writ of summons and all subsequent proceedings may be amended after judgment.

And where the plaintiff by mistake omitted from the description of lands in the writ of summons in a mortgage action, a parcel included in the mortgage, an order was made, after judgment and final order of foreclosure, vacating the final order, directing an amendment of the writ and all proceedings, and allowing a new day for redemption by a subsequent incumbrancer who did not consent to the order; and in default the usual order to foreclose. *Clarke* v. *Cooper*, 15 P. R. 54.

Application by Plaintiffs to Vacate their Own Judgment — *Fraud—Mistake—Merger.*] — Judgment was recovered by the plaintiffs against the defendant upon a promissory note given for part of the purchase money of goods sold by the plaintiffs to the defendant.

Under execution issued upon the judgment, the goods sold were seized and were claimed by the defendant's wife under a bill of sale from her husband, which recited that in purchasing the goods he acted as her agent:—

Held, upon the evidence, that fraudulent collusion between the husband and wife to defeat the plaintiffs' claim was not established; and in the absence of fraud or mistake the Court would not grant the plaintiffs the extraordinary relief of vacating the judgment against the defendant in order to allow them to proceed against the wife:—

Held, also, that so long as the judgment stood, no action could be brought upon the original cause of action, which had become merged. *Toronto Dental Manufacturing Co.* v. *McLaren*, 14 P. R. 89.

Mistake of Vendor as to Identity of Vendee—*Fraud—Vacating Judgment Against Supposed Vendee.*] — A manufacturing company transferred to a syndicate, which had lent it money, its works, plant, and material, and in effect its whole business, which the syndicate proceeded to carry on, on the company's premises, for its own benefit, and at its own risk. The managing director of the company, who had become the manager of the syndicate, after the above transfer, but pursuant to a correspondence commenced a few days before it, ordered as in his former capacity certain goods from the plaintiff, who subsequent to the transfer supplied the goods ordered which were used by the syndicate, and he afterwards took a note of the company for their price, on which, when dishonoured, he sued and obtained judgment against the company, being, however, all the time ignorant of the circumstances above mentioned. About a week prior to the judgment, a winding-up order was obtained against the company, hearing of which the plaintiff at once commenced this action against the syndicate for the price of the goods, and afterwards before trial he obtained *ex parte* an order vacating the judgment against the company:—

Held, that the plaintiff was entitled to recover from the syndicate the price of the goods:

Held, also, per Robertson, J., that the judgment vacated was absolutely null and void, having been obtained after the winding-up order without the leave of the Court.

Per Meredith, J., the judgment was at any rate irregularly entered, and when set aside, was as if it had never existed. *Keating* v. *Graham*, 26 O. R. 361.

Order—*Power of Judge or Master in Chambers to Rescind.*]—A Judge or the Master in Chambers has power to reconsider a matter which has been brought before him *ex parte*, on the application of an opposing party; and he can also open up a matter in respect of which an order has been made after notice and upon default to shew cause, if he is satisfied that opposition was intended and that any injustice has arisen.

Semble, that if necessary the words "*ex parte* order" in Rule 536 may be read so as to cover cases going by default, where through some slip cause has not been shewn. *Flett* v. *Way*, 14 P. R. 123.

Order—*Extending Time for Service—Motion to Set Aside—Statute of Limitations.*]—An action upon a promissory note payable on the 4th November, 1885, was begun on the 31st October, 1891. The writ of summons not having been served, an order was made on the 28th October, 1892, on the *ex parte* application of the plaintiff, under Rule 238 (*a*), that service should be good if made within twelve months. The writ together with this order and an order of revivor—the original plaintiff having died in the meantime—was served on one of the defendants on the 2nd August, 1893. On the 12th September, 1893, the defendant who had been served moved before the local Judge who made the order of 28th October, 1892, to set it aside, which he refused to do:—

Held, reversing the decision of Galt, C.J., in Chambers, that the local Judge was right; for the time for moving under Rule 536 had expired

and had not been extended; and certain correspondence relied on as shewing an agreement to extend the time, had not that effect.

The validity of the *ex parte* order did not depend solely upon whether the affidavit upon which it was made was sufficient to support it; the motion to set it aside was a substantive motion supported by affidavits; and the plaintiff was at liberty to answer the motion by shewing new matter in support of the original order.

And upon the material before the local Judge his refusal to set aside his order was right upon the merits. *Cairns* v. *Airth*, 16 P. R. 100.

II. Consent Judgment.

Giving Consent.]—After an order has been pronounced, the initialling of it, as drawn up by the solicitor for the party opposed to the party having the carriage of it, does not make it a consent order, but merely assents to it as being the understanding of the party of what was ordered by the Judge. *McMaster* v. *Radford*, 16 P. R. 20.

Withdrawing Consent.]—Much time having elapsed since the consent judgment, and much having been done under it, it could not be vacated without consent, even if a petition to vacate it had not already been presented and dismissed.

Upon a petition by the defendant for leave to withdraw his consent and to vacate the judgment entered thereon, the petitioner alleged that there was a mistake in the consent; that it was intended that the mortgage should be ordered to be discharged as to any interest which the plaintiff might have over and above a life estate; and he contended that the plaintiff had no such interest:—

Held, that the petition could be dealt with on no other grounds than any other matter of practice, although the petitioner was in contempt; and that the matters alleged were not sufficient to induce the Court to vacate the judgment and allow the case to be tried out, after the withdrawal of charges of fraud against the petitioner, the death of the original plaintiff, the lapse of more than four years since the judgment, and the prior refusal of two similar applications:—

Elsas v. *Williams*, 54 L. J. Ch. 336, and *Peed* v. *Cussen*, 4 Dr. & War. 199, followed. *Roberts* v. *Donovan*, 16 P. R. 456.

III. Declaratory Judgment.

Inchoate Right to Dower—*Incidental to Present Relief.*]—Where the sole object of an action was to obtain a declaration that the plaintiff was entitled to an inchoate right of dower in certain lands, all other questions raised in the pleadings having been settled by agreement before trial:—

Held, that, notwithstanding R. S. O. ch. 44, sec. 52, sub-sec. 5, no such declaration should be made, for it would be solely as to a claim which might or might not be made, under circumstances which might or might not happen, and was not required in any way as incidental to any present relief whatever. R. S. O. ch 44, sec. 52, sub-sec. 5, was not intended to make any radical change in the rules and practice of the Court. *Bunnell* v. *Gordon*, 20 O. R. 281.

Public Highway—*Obstruction by Private Person.*]—A municipal corporation has the right to have it declared, as against a private person, whether or not certain land is a public highway, and whether such person has the right to possess, occupy, and obstruct the same.

And in an action brought by the municipal corporation for the purpose, a declaration may be made according to the facts, and the defendant enjoined from possessing or occupying the land so as to obstruct the use of it as a public highway.

Pinedon Falls v. *Victoria R. W. Co.*, 29 Gr. 4, followed. *Gooderham* v. *City of Toronto*, 21 O. R. 120; 19 A. R. 641, applied and followed. *City of Toronto* v. *Lorsch*, 24 O. R. 227.

IV. Default Judgment.

Default of Appearance—*Money Demand—Leave to Proceed upon Another Claim.*]—Where the writ of summons was specially indorsed to recover a money demand, and was also indorsed with a claim to set aside a conveyance, the plaintiff was allowed, upon default of appearance, to sign judgment for the money demand, and to proceed in the ordinary way upon the other claim.

Huffman v. *Dower*, 12 P. R. 492; *Hay* v. *Johnston*, *ib.* 596, followed. *Mackenzie* v. *Ross*, 14 P. R. 299.

Default of Appearance — *Promissory Note—Interest—Liquidated Damages—Application to Set Aside Judgment—Laches.*]—By sections 57 and 88 of the Bills of Exchange Act, the interest accruing due after the date of maturity of a promissory note is recoverable by statute as liquidated damages, and is to be calculated at the rate of six per cent. per annum, in the absence of a special contract for a different rate.

And where, in an action upon two promissory notes, the plaintiff, by the indorsement on the writ of summons, claimed the principal and a definite sum for interest, without specifying the rate or the dates from which it was calculated, such sum being less than interest at six per cent. from the dates of maturity:—

Held, a good special indorsement.

London, etc., Bank v. *Clancarty*, [1892] 1 Q. B. 689, and *Lawrence* v. *Willcocks*, *ib.* 696, followed.

Eyley v. *Master*, *ib.* 674, and *Wilks* v. *Wood*, *ib.* 684, distinguished:—

Held, also, that the indorsement being regular, the defendant's non-appearance was equivalent to an admission that the claim was correct, and that he was bound to pay the whole demand; and a judgment signed for default of appearance was, therefore, regular.

Rodway v. *Lucas*, 10 Ex. 667, followed.

Semble, that had the indorsement lacked the essentials of a special indorsement, such a judgment would have been a nullity.

Rogers v. *Hunt*, 10 Ex. 474, and *Smurthwaite* v. *Hannay*, [1894] A. C., at p. 501, specially referred to:—

Held, also, that an application to set aside the judgment (unless upon terms) was too late when made twelve days after a seizure by the sheriff under execution issued pursuant thereto, and after the defendant's wife had claimed the goods seized and an interpleader order had been made on the application of the sheriff, to the knowledge of the defendant.

Bank of Upper Canada v. *Vanrochis*, 2 P. R. 382; *Dunn* v. *Dunn*, 1 C. L. J. 239; and *McKenzie* v. *McNaughton*, 3 P. R. 35, specially referred to.

If the defendant desired to contest the whole action, it was not unreasonable that as a condition of his being allowed to do so he should bring into Court the amount of principal claimed; but if his only objection was to the interest, the judgment might, at the option of the plaintiff, have been amended by reducing it by the amount claimed for interest, or limiting the defence accordingly.

Costs withheld from the successful respondent where the objection as to laches was substantiated by affidavits filed for the first time in the Court of Appeal. *McVicar* v. *McLaughlin*, 16 P. R. 450.

Default of Appearance—*Time for Appearance Shortened.*]—*See Bank of British North America* v. *Hughes*, 16 P. R. 61, *ante* 16.

V. Delay in Entering.

Order of Court—*Effect of not Issuing—Abandonment.*]—Where an order was in June, 1889, pronounced by a Divisional Court, upon the application of the defendants, setting aside a judgment recovered by the plaintiff and directing a new trial, but was never issued:—

Held, that the original judgment must be considered to be still in force; and a motion to set aside execution issued thereon was refused. *Kelly* v. *Wade*, 14 P. R. 13. *See* the next case.

Order of Court — *Delay in Issuing—Abandonment—Effect of Pronouncing Judgment on Merits.*]—The plaintiff, in an action of tort, recovered a verdict which was set aside and a new trial was granted by the order of a Divisional Court in June, 1889. The plaintiff died in the spring of 1890, and at the time of her death the order had not been issued:—

Held, upon an application in December, 1896, that the defendants were entitled to issue the order; the delay affording no evidence of an intention to abandon it.

A judgment pronounced by the Court, affecting the merits, is an effective judgment from the day it is pronounced; the formal signature of the judgment is merely the record that it has been pronounced. *Kelly* v. *Wade* (*No. 2*), 14 P. R. 66. *See* the next case.

Order of Court—*Delay in Issuing—Application for Leave to Issue—Discretion.*]—In 1880 a bill was filed by the plaintiff for an account in respect of a mortgage, which had been assigned to the defendant as a security for advances. A decree was pronounced in June, 1880, directing that the plaintiff might have an account if he desired it, and that the defendant should have his costs to the hearing. The decree was not then drawn up and issued, and in December, 1892, the plaintiff applied for leave to issue it.

The delay was not explained, except by saying that the plaintiff had been out of the jurisdiction, and no details were given of when he went away or when he returned. It appeared that the plaintiff had no beneficial interest upon the footing of the accounts, as shewn by the assignment and the answer. The defendant swore to the loss of one material witness through death:—

Held, that the decree meant that the plaintiff should, within some reasonable time, exercise the option given him of having a reference to take the accounts, at the peril of losing it if changed circumstances worked any prejudice to the defendant; and that, under all the circumstances, the application should, in the exercise of a sound discretion, be refused.

Finkle v. *Lutz*, 14 P. R. 446, and *Kelly* v. *Wade*, *ib.* 66, distinguished. *Eaton* v. *Dorland*, 15 P. R. 138.

VI. Enforcing.

Attachment of Debts by Assignee of Judgment.]—*See McLean* v. *Bruce*, 14 P. R. 190, *ante* 61.

Damages — *Judgment not Entered — Attachment.*]—*See Davidson* v. *Taylor*, 14 P. R. 78, *ante* 58.

Division Court — *Action on Judgment of High Court—Final Judgment Abandoning Excess.*] — Division Courts have jurisdiction to entertain an action brought upon a judgment of the High Court, where the judgment of that Court is a final judgment.

Re Eberts v. *Brooke*, 10 P. R. 257, 11 P. R. 296, referred to and followed:—

In an action for alimony, the plaintiff recovered judgment against the defendant for $211.39 taxed costs, and in the usual form for alimony, at the rate of $226 per year, payable in equal quarterly instalments at specified times:—

Held, that the judgment, so far as it related to the costs, was a final judgment, whatever might be the case with regard to the payments of alimony, and that a Division Court had jurisdiction under R. S. O. ch. 51, sec. 70 (*b*), to entertain a suit by the plaintiff for $100 in respect to the costs, as being a claim for a debt owing to the plaintiff by the defendant, she expressly abandoning the balance of the taxed costs awarded. *Aldrich* v. *Aldrich*, 23 O. R. 374. *See* the next case.

Division Court — *Action on Judgment of High Court—Final Judgment — Abandoning Excess.*]—In an action for alimony the plaintiff recovered judgment against the defendant for $211.39 taxed costs, and for alimony at the rate of $226 per year, payable quarterly. After two instalments of alimony had fallen due and were unpaid, she entered suit for $100 in the Division Court in respect to the costs, which were also unpaid, abandoning the balance of the costs and the overdue alimony:—

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Held, affirming the decision of Ferguson, J., 23 O. R. 374, that the Division Court had jurisdiction under R. S. O. ch. 51, sec. 70 (*b*). *Aldrich* v. *Aldrich*, 24 O. R. 124.

Execution—*Accord and Satisfaction—Part Performance of Obligation.*]—A judgment remains in force for twenty years at least, the only limitation that can be applicable to it being R. S. O. ch. 60, sec. 1. In view of the amendment made in R. S. O. (1877) ch. 108, sec. 23, by the Revision of 1887, R. S. O. ch. 111, sec. 28, the English authorities, such as *Jay* v. *Johnstone*, [1893,] Q. B. 189, and cases there cited, do not apply.

Boice v. *O'Loane*, 3 A. R. 167, followed.

Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction. Where, therefore, the judgment debtor forwarded to the solicitor of the judgment creditor a bank draft, payable to the solicitor's order, as payment "in full," and the solicitor endorsed the draft and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full," the judgment creditor was allowed to proceed for the balance.

Day v. *McLea*, 22 Q. B. D. 610, applied.

Section 53, sub-section 7, Judicature Act, as to part performance of an obligation in satisfaction, considered. *Mason* v. *Johnston*, 20 A. R. 492.

Execution — *Statute of Limitations.*] — The limit of twenty years being fixed by R. S. O. ch. 60, sec. 1, after which, in the absence of payment or acknowledgment, an action cannot be brought upon a judgment, the analogy of the statute applies to applications for leave to issue execution after the lapse of twenty years from the date of the judgment or the return of the last execution.

An issue directed under Rule 886, to try the question of liability upon a judgment more than twenty years old, is an action within the meaning of R. S. O. ch. 60, sec. 1, and the Statute of Limitations would be a good defence. *Price* v. *Wade*, 14 P. R. 351.

Staying Proceedings—*Motion to Set Aside Judgment.*]—When a motion to a Divisional Court to set aside the judgment pronounced at the trial, but not yet entered, has been set down for hearing, there is a stay of proceedings upon such judgment *ipso facto*, unless it should be otherwise ordered. *Western Bank of Canada* v. *Courtemanche*, 16 P. R. 513.

Subsequent Order to Take Accounts.]—After judgment had been pronounced in an action therefor, declaring the estate the plaintiff took under a will in certain lands which he had mortgaged to the defendants, and refusing to restrain the sale thereof under the mortgage, the sale was proceeded with and the lands sold. Subsequently, on the plaintiff's application, a Judge's order was obtained directing a reference to the clerk in Chambers to take the mortgage accounts, and to the taxing officer to tax the defendant's costs; and, while this application was pending, the defendants obtained an *ex parte* order to pay the surplus proceeds of the sale into Court :—

Held, that under Rule 551 the order to take the accounts, etc., was properly made. *Meyers* v. *Hamilton Provident and Loan Society*, 15 P. R. 39.

See EXECUTION.

VII. FOREIGN JUDGMENT.

Action on—*Defence—False Affidavit—Fraud.*]—To an action on a foreign judgment the defendants pleaded that the order for such judgment was obtained upon a false affidavit, and that the plaintiffs obtained the judgment by fraudulently concealing from the Court the true nature of the transactions between them and the defendant :—

Held, a good defence.

Abouloff v. *Oppenheimer*, 10 Q. B. D. 295, and *Vadala* v. *Lawes*, 25 Q. B. D. 310, followed in preference to the decision of the Court of Appeal for Ontario in *Woodruff* v. *McLennan*, 14 A. R. 242, in accordance with the expression of opinion of the Judicial Committee of the Privy Council in *Trimble* v. *Hill*, 5 App. Cas. 342, that a colonial court should follow the decisions of the Court of Appeal in England.

To the above defence, the plaintiffs, after the coming into force of Rule 1322, replied that the defendant was precluded by law from raising any question as to the validity of the foreign judgment which might have been raised by way of appeal in the foreign forum :—

Held, that this replication was equivalent to a demurrer under the former practice, and was an admission of the truth of the facts stated in the defence; and to such a replication Rule 403 had no application. *Hollender* v. *Efoulkes*, 26 O. R. 61. *See S. C.*, on motion for judgment under Rule 739, 16 P. R. 175, *post* 572.

Action on—*Merger—Right to Sue on Original Cause of Action.*]—A foreign judgment is not a merger of the original cause of action, which may, notwithstanding such judgment, be sued on in this Province. *Trevelyan* v. *Myers*, 26 O. R. 439.

Action on—*Validity—Interest.*]—The defendant in an action in a foreign country, though not resident therein, appeared and delivered a defence He was not represented at the trial, and judgment was given against him, which was afterwards varied on his motion :—

Held, in an action on the foreign judgment, that he could not dispute its validity.

McLean v. *Shields*, 9 O. R. 699, distinguished.

The amount of a foreign judgment is a liquidated demand, which may be the subject of a special endorsement on a writ of summons.

Hodsoll v. *Baxter*, E. B. & E. 884, and *Grant* v. *Easton*, 13 Q. B. D. 302, followed.

Interest included in the amount of such a judgment is an integral part thereof.

Johnson v. *Bland*, 2 Burr., at p. 1083, followed.

Interest upon the amount of such a judgment cannot under sections 85 and 86 of the Judicature Act, R. S. O. ch. 44, be recovered except as unliquidated damages.

If a writ of summons is endorsed to recover a liquidated demand and also unliquidated

damages, it is not specially indorsed within Rule 245, and will not support a summary judgment under Rule 739.

Wilks v. *Wood*, [1892] 1 Q. B. 684, and *Sheba Gold Mining Co.* v. *Trubshawe*, *ib.* 674, followed.

Nor can the writ be amended after (though it may be before) motion for judgment by striking out the claim for unliquidated damages.

Gurney v. *Small*, [1891] 2 Q. B. 584, and *Paxton* v. *Baird*, [1893] 1 Q. B. 139, followed.

A foreign judgment was varied and the amount reduced by the foreign Court after action begun thereon by specially indorsed writ:—

Held, that an order for summary judgment for the amount of the foreign judgment as varied could not be supported, because it was for a debt not claimed by the indorsement.

But the Court (C. P. D.), under Rule 757 permitted the appeal to be turned into a motion for judgment, and gave judgment for the plaintiff, no defence being shewn. *Solmes* v. *Stafford*, 16 P. R. 78. *See* this case in appeal, 16 P. R. 264, *post* 572.

VIII. Motion for Judgment.

Rule 739 —*Covenant in Mortgage—Interest.*]—In an action to recover the amount due under a mortgage, the plaintiff indorsed upon his writ of summons particulars of his claim, shewing the date of the mortgage, the parties, the amount of principal and interest claimed, and the date when the interest fell due; also a statement that, by the terms of the mortgage, on default in payment of interest the principal became due, and that default in payment of interest had been made. Interest on overdue interest was also claimed, but no contract therefor was alleged:—

Held, that the indorsement was not a sufficient special indorsement to support a summary judgment under Rule 739, in that it omitted the dates from which interest was claimed, and did not state a contract to pay interest upon interest; and that the affidavit in support of the motion could not be read with the indorsement so as to make it good.

Gold Ores Reduction Co. v. *Parr*, [1892] 2 Q. B. 14, followed. *Munro* v. *Pike*, 15 P. R. 164.

Rule 739 — *Foreign Judgment — Interest.*]—Where the plaintiff indorsed his writ of summons with a claim for the amount of a foreign judgment and interest, and after the issue of such writ and while a motion for summary judgment under Rule 739 was pending, the foreign judgment was varied on appeal by reducing the amount:—

Held, that, even if the claim for interest did not stand in the way, the indorsement could not be amended upon the motion for summary judgment so as to accord with the foreign judgment as varied, and the plaintiff's proper course was to abandon his motion and move for leave to amend the indorsement, or to discontinue the action altogether.

Gurney v. *Small*, [1891] 2 Q. B. 584, and *Paxton* v. *Baird*, [1893] 1 Q. B. 139, followed.

Interest upon the amount of a foreign judgment from the date of its entry is not payable by contract nor by statute, but is recoverable only as unliquidated damages, and cannot be the subject of a special indorsement.

And while, for the purpose of obtaining judgment by default, the plaintiff may indorse his writ specially for a liquidated demand and also for a further claim under Rule 711, yet if he wishes to be in a position to move for summary judgment under Rule 739, he must bring himself strictly within Rule 245, as having indorsed his writ only with a claim which is the subject of a special indorsement under that Rule.

Judgment of the Common Pleas Division, 16 P. R. 78, affirmed on these three points.

Hollender v. *Ffoulkes*, 16 P. R. 175, and *Munro* v. *Pike*, 15 P. R. 164, approved. *Hay* v. *Johnston*, 12 P. R. 596, overruled. *Huffman* v. *Doner*, *ib.* 492, and *Mackenzie* v. *Ross*, 14 P. R. 299, commented on. *Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q. B. 674, and *Wilks* v. *Wood*, *ib.* 684, followed.

Where an order for summary judgment under Rule 739 is set aside on appeal, Rule 757 cannot be made available for the purpose of turning the appeal into a motion for judgment and granting a yet more summary judgment.

Judgment of the Common Pleas division, 16 P. R. 78, reversed on this point. *Solmes* v. *Stafford*, 16 P. R. 264.

Rule 739 — *Foreign Judgment — Interest.*]—Where a writ of summons was indorsed to recover the amount of a foreign judgment, together with interest from the date thereof until judgment:—

Held, that the claim for interest was for an unliquidated amount, and the two claims together did not constitute a good special indorsement within Rule 245:—

Held, also, that the plaintiff was not entitled upon such indorsement to a summary judgment under Rule 739 for the amount of the foreign judgment only, with liberty to proceed for the interest; for that Rule is not applicable where there is a claim for a liquidated demand joined to one for unliquidated damages.

Rules 245, 705, 711, and 739, considered.

Solmes v. *Stafford*, 16 P. R. 78, followed.

Hay v. *Johnston*, 12 P. R. 596, not followed. *Hollender* v. *Ffoulkes*, 16 P. R. 175.

Rule 739 — *Goods Sold—Leave to Defend—Payment into Court.*]—Where no defence has been made to appear upon a motion for judgment under Rule 739, the defendant will not be allowed to defend unconditionally.

In an action for the price of goods sold and delivered to a partnership, brought after the dissolution thereof, against the two members of the partnership, one of them set up as a defence upon a motion for judgment that upon the dissolution he retired and his copartner agreed to continue the business and pay the debts, including that of the plaintiffs, and that the plaintiffs had taken securities from the copartner after the dissolution and given him time, and so had relieved the other; but all those who knew of the dealings negatived any such course of dealing, and shewed that all that was done was with a reservation of rights against the retiring partner:—

Held, that the latter could not succeed in the action unless the jury disbelieved all this evidence; and he should be allowed to defend only upon payment into Court of the amount claimed. *Dunnet* v. *Harris*, 14 P. R. 437.

Rule 739 — *Goods Sold—Leave to Defend—Payment into Court.*]—In an action to recover $1,547.47 the plaintiffs moved for summary judgment under Rule 739, and the defendant set up as a defence that the plaintiffs had agreed to discharge him upon his making an assignment for the benefit of creditors to their nominee. The weight of testimony upon the motion was against the existence of such an agreement :—

Held, that it was a proper exercise of discretion to require the defendant to pay $300 into Court as a condition of being allowed to defend.

Dunnet v. *Harris*, 14 P. R. 437, followed. *Adams* v. *Anderson*, 16 P. R. 157.

Rule 739 — *Implied Covenant—Land Titles Act, R. S. O ch. 116, sec. 29.*]—In an action by the assignee of a charge registered against land under the Land Titles Act, R. S. O. ch. 116, to recover money due under the covenant for payment implied by virtue of section 29, there being no entry on the register negativing the implication, the defendant, in answer to an application for summary judgment under Rule 739, swore that it was clearly understood between him and the original chargees that the land only was to be liable, and this was corroborated by one of the original chargees ; the plaintiff, however, swearing that she was a *bonâ fide* purchaser for value without notice of this understanding :—

Held, that there was a *bonâ fide* contest of a question to some extent novel, which ought to be fairly litigated in the usual way, without hampering conditions being imposed on the defence.

Jones v. *Stone*, [1894] A. C. 124, followed. *Wilkes* v. *Kennedy*, 16 P. R. 204.

Rule 739—*Indemnity.*]—The plaintiffs sued the defendant for moneys alleged to have been paid by them for interest upon certain mortgages, and for the principal due under certain other mortgages. The writ of summons was specially indorsed, and contained a statement that the defendant was liable to pay the mortgages by virtue of a certain covenant made by him with one T. on a certain date and assigned by T. to the plaintiffs. Upon a motion by the plaintiffs for summary judgment under Rule 739, it appeared that the deed alleged to contain the covenant made by the defendant with T. did not, in fact, contain any express covenant to pay the mortgages, but by it T. conveyed the lands in question to the defendant "subject to all mortgages registered against the lands," and the deed was not executed by the defendant. The plaintiffs, however, sought to support the indorsement by reference to the preliminary contract between the defendant and T., which contained an offer to assume and to covenant to pay off the mortgages :—

Held, that, although the deed expressed an equitable obligation by the defendant to indemnify T., there was no covenant in any sense ; and the plaintiffs could not invoke the benefit of the preliminary contract, for the indorsement must be complete in itself, containing everything which entitles the plaintiffs to recover ; and the Court will not encourage an amendment for the purpose of upholding a summary judgment.

Frauhauf v. *Grosvenor*, 8 Times L. R. 744, followed :—

Held, also, that Rule 245, specifying the different kinds of actions in which writs may be specially indorsed, does not extend to the case of an action upon an implied covenant. *Davidson* v. *Gard*, 15 P. R. 31.

Rule 739—*Interest.*]—The writ of summons was endorsed with a money claim for the value of a certain quantity of logs at certain prices, and an additional claim for interest on the price :—

Held, that as interest was not claimed as arising under a statute or by contract, the writ was not specially indorsed under Rule 245, and an order for summary judgment could not be made under Rule 739. *Wilks* v. *Wood*, [1892] 1 Q. B. 684, followed.

Mackenzie v. *Ross*, 14 P. R. 299, and *Hay* v. *Johnston*, 12 P. R. 596, distinguished.

Semble, if the plaintiff abandoned all claim to interest he might be entitled to judgment in a proper case. *Casselman* v. *Barrie*, 14 P. R. 507.

Rule 739 — *Promissory Note — Incorporated Company—Accommodation Note.*]—In an action upon a promissory note the only fact shewn by the defendants, an incorporated company, as the basis of a defence, was that they made the note for the accommodation of one of their directors. They did not shew that the plaintiffs were not holders for value in due course without notice ; while the plaintiffs swore that the note was discounted before maturity in the usual course of their banking business ; and it was admitted that one of the trustees for the defendants, who were insolvent, had offered to the plaintiffs the compromise of fifty cents on the dollar, which the undoubted creditors were accepting :—

Held, upon a motion for summary judgment under Rule 739, that the defence alleged was not founded upon any known facts, but was mere guess work, and unless the defendants paid into Court a substantial portion of the plaintiffs' claim as a condition of being allowed to defend, the motion should be granted.

The presumption that value has been given may be done away with in the case of notes which have had their origin in actual fraud, but not in the case of notes made for the accommodation of others ; and even where accommodation notes are made by an incorporated company, the onus of shewing value is not shifted over to the plaintiffs.

Re Peruvian Railways Co., L. R. 2 Ch. 617, followed.

Millard v. *Baddeley*, W. N. 1884, p. 98, and *Fuller* v. *Alexander*, 47 L. T. N. S. 443, distinguished. *Merchants' National Bank* v. *Ontario Coal Co.*, 16 P. R. 87.

Rule 744—*Special Grounds for Relief—Claim for Costs.*]—In order to obtain the very extraordinary relief provided for by Rule 744, the plaintiff must not only make out as strong a case as he would under Rule 739, but, in addition, establish some special ground for relief.

And where the special indorsement upon the writ of summons shewed the plaintiff's claim to be for an amount paid as surety for the defendant, and also a sum for costs paid and interest on costs ; and the plaintiff on his application shewed that the defendant was a married woman, and that, owing to her financial affairs,

the only way in which he could recover his claim was by recourse to a certain fund coming to the defendant under a mortgage held by her; and the defendant set up a partnership between the plaintiff and herself and claimed that, on the accounts being taken, the balance would be in her favour:—

Held, without saying that any clear legal defence to the action had been shewn, enough appeared of the dealings and transactions between the parties to make it not unreasonable that the plaintiff should be left to his ordinary remedies for the recovery of his claim.

Quære, as to the effect of the items in the special indorsement for costs and interest on costs; and also as to the application of Rule 744 to actions between creditor and debtor.

Remarks on the origin and application of the Rule. *Leslie* v. *Poulton*, 15 P. R. 332.

Rule 744—*Special Grounds for Relief.*]—In two actions to recover the amounts of overdue promissory notes, motions were made by the plaintiffs, at an early stage, under Rule 744, for summary judgments, upon the ground that the sheriff had seized and sold certain property of the defendants under execution, and that in order to share in the distribution of the proceeds of sale under the Creditors' Relief Act, it was necessary for the plaintiffs to have immediate judgments:—

Held, not a sufficient special ground for the application of the Rule.

In answer to the motions, the defendants set up in affidavits the defence that there was an agreement between them and the plaintiffs that moneys collected on collaterals should be applied in discharge of the notes sued on, among others, and moneys were so collected and applied; but the agreement was denied by the plaintiffs:—

Held, that this was a substantial defence and ought not to be tried summarily upon affidavits.

Leslie v. *Poulton*, 15 P. R. 332, followed.

Remarks by Maclennan, J. A., on the origin and application of Rule 744. *Molsons Bank* v. *Cooper*, 16 P. R. 195.

Married Woman — *Summary Judgment.*]—Summary proceedings upon specially indorsed writs do not apply where, the defendant being a married woman, the judgment can be only of a proprietary nature. *Cameron* v. *Heighs*, 14 P. R. 56. *See* the next case.

Married Woman—*Summary Judgment.*]—In an action upon a covenant in an agreement, made subsequently to the coming into force of the Married Woman's Property Act, 1884, R. S. O. ch. 132, whereby the defendants, husband and wife, covenanted to pay the plaintiff the moneys then owing to him, and other moneys thereafter to be advanced, the writ of summons was specially indorsed with particulars shewing the amounts and dates of the various advances:—

Held, a sufficient special indorsement.

Where it is shewn that a married woman defendant has separate estate, judgment may be entered against her as to such separate estate, upon default or by order under Rule 739.

And where the writ of summons did not shew that one of the defendants was a married woman having separate estate, but the plaintiff's affidavit, filed on a motion for summary judgment under Rule 739, did shew it, the plaintiff was allowed to amend his writ, and to enter a proprietary judgment against her. *Nesbitt* v. *Armstrong*, 14 P. R. 366.

Verdict.]—Where a verdict only is taken at the trial, and the Judge does not pronounce judgment or direct findings of fact to be entered, a motion for judgment is necessary. *Blair* v. *Asselstine*, 15 P. R. 211.

IX. Miscellaneous Cases.

Creditors' Action — *Settlement.*] — Before judgment in an action by a creditor, on behalf of himself and all other creditors, to set aside a fraudulent conveyance, the actual plaintiff may settle the action on any terms he thinks proper, and no other creditor can complain; but where judgment has been obtained by the plaintiff, it enures to the benefit of all creditors, and the defendants cannot get rid of it by settling with the actual plaintiff alone. If they do so, any other creditor will be entitled to obtain the carriage of the judgment and to enforce it; and if, upon appeal from the judgment, the actual plaintiff refuses to support it, the Court will give the other creditors an opportunity of doing so before reversing it. *Canadian Bank of Commerce* v. *Tinning*, 15 P. R. 401.

Executors and Administrators.] — In an action of seduction, continued against the administratrix of the original defendant, who died before the trial, the administratrix denied the plaintiff's right to recover, but did not set up *plene administravit*, and a verdict for $500 was recovered by the plaintiff:—

Held, that the judgment should be that the debt and costs should be levied *de bonis testatoris et si non, de bonis propriis* as to the costs only.

The Judicature Act has not altered the form of the judgment in such cases. *Lince* v. *Faircloth*, 14 P. R. 253.

Executors and Administrators.] — The practice in force before the Judicature Act, under which a plaintiff taking issue on and failing on an executor's plea of *plene administravit*, could not have judgment of assets *quando*, no longer exists, and it is now proper to give a plaintiff judgment of assets *quando*, if his debt be established and such a judgment be desired. *McKibbon* v. *Feeyan*, 21 A. R. 87.

Mortgage Action—*Default of Appearance.*]—By analogy to Rule 393, where, in a mortgage action for foreclosure or sale, some of the defendants do not appear to the writ of summons, and others do appear, against whom judgment cannot then be obtained, the officer may note the pleadings closed as against the former, and the action may be brought on for judgment against them without further notice to them. *Morse* v. *Lamb*, 15 P. R. 9.

Mortgage Action—*Præcipe Judgment.*]—In a mortgage action for payment, foreclosure, etc., the defendant entered an appearance in which she stated that she did not require the delivery of a statement of claim, and added: "Take notice that the defendant disputes the amount claimed by the plaintiff":—

Held, that the record was then complete, and that a statement of claim was unnecessary and irregular. *Peel* v. *White*, 11 P. R., 177, approved and followed :—

Held, also, that the case was not within Rule 748, and the plaintiff could not obtain a judgment on præcipe.

Upon motion to the Court upon the record as contained in the writ of summons and the appearance, an order was made under Rules 551 and 753, directing a reference to take the mortgage account, and directing that if the referee should find any amount due to the plaintiff, the plaintiff should have judgment according to the writ with costs. *Mahoney* v. *Hopkins*, 14 P. R. 117.

Partnership—*Judgment Against Firm.*]—The latter part of Rule 876, providing for an application for leave to issue, upon a judgment against a firm, execution against some person as a member of the firm other than those mentioned in sub-sections (*b*) and (*c*) of the Rule, applies only where there is in truth a partnership which is bound by the judgment obtained against the firm in consequence of the service of the writ of summons upon one of its members or its manager.

Where there is in fact no partnership, no one can be bound by a judgment against an abstraction called "a firm," except the person who has been served under the provisions of Rule 266, and who has appeared or pleaded in the action.

And where the wife of the manager of the business of a so-called firm, who has shewn by the subsequent proceedings to have been merely a trustee for him of the profits, was personally served as a defendant with process in an action against the firm upon a bill of exchange and defended :—

Held, that as there was in fact no partnership, an issue directed to determine whether the husband was liable to have execution issued against him as a member of the firm, upon a judgment recovered in the action against the firm, must be found in favour of the husband; and no amendment could be made which would enable the Court to determine otherwise; Hagarty, C. J. O., dissenting.

Per Hagarty, C. J. O.—The husband was in fact the firm itself; his liability for the debts of the firm was established; and it was not clearly wrong to find that he was a member of the firm. But, at any rate, it was a case in which the power to make all necessary amendments could and should be exercised. *Standard Bank of Canada* v. *Frind*, 15 P. R. 438.

Partnership — *Judgment Against Firm — Action Against Alleged Partner.*]—*See Ray* v. *Ibister*, 24 O. R. 497; 22 A. R. 12, *ante* 394.

Registered Judgment—*Priority.*]—By R. S. N. S. 5th ser. c. 84 sec. 21, a registered judgment binds the lands of the judgment debtor, whether acquired before or after such registry, as effectually as a mortgage; and deeds or mortgages of such lands, duly executed but not registered, are void against the judgment creditor who first registers his judgment —A mortgage of land was made, by mistake and inadvertence, for one-sixth of the mortgagor's interest instead of the whole. The mortgage was foreclosed and the land sold. Before the foreclosure judgment was registered against the mortgagor and two years after an execution was issued and an attempt made to levy on the five-sixths of the land not included in said mortgage. In an action for rectification of the mortgage and an injunction to restrain the judgment creditor from levying:—

Held, affirming the judgment of the Court below, Strong, and Patterson, JJ., dissenting, that as to the said five-sixths of the land the plaintiff had only an unregistered agreement for a mortgage which, by the statute, was void as against the registered judgment of the creditor. *Grindley* v. *Blakie*, 19 N. S. Rep. 27, approved and followed. *Miller* v. *Duggan*, 21 S. C. R. 33.

JUDGMENT DEBTOR.

Committal.]—It appeared that the judgment debtor's wife had mortgaged her farm for the purpose of paying some of his debts; and that after the mortgage, instead of his continuing to work the farm for his own benefit or on shares with his wife, as he had formerly done, he had agreed that until the mortgage was paid off he would work it for his wife alone :—

Held, that this arrangement was not illegal nor unreasonable, and on no principle could it be said that it was a making away with property in order to defeat or defraud creditors.

The order directed that the defendant should be committed to the county jail of L., or of any other county in which he might be found :—

Held, that this was wrong and not warranted by Rule 932; but it was not a ground for setting the order aside altogether. *Baby* v. *Ross*, 14 P. R. 440.

Committal—*Discharge—Consent.*]—Where a judgment debtor was imprisoned under an order directing his committal for three months for a contumacious refusal to answer questions put to him upon his examination as such judgment debtor :—

Held, that an application to the indulgence and discretion of the Court for his discharge from custody before the expiry of the term of imprisonment could not be granted, even upon the consent of the judgment creditor upon whose motion the order for committal had been made. *Jones* v. *Macdonald*, 15 P. R. 345.

Committal—*Right to Writ of Habeas Corpus.*]—*See Re Anderson* v. *Vanstone*, 16 P. R. 243, *ante* 480.

Company — *Examination of Officer.*]— The object of the examination under Rule 927 of an officer of a body corporate, after judgment against it, is to discover assets of the company or to follow assets wrongfully disposed of, and within this limit a judgment creditor is entitled to full disclosure of the company's concerns, and as a consequence to have access to its books pertinent to that inquiry. The person examined is to facilitate the examination by procuring all information in the possession of the company which he himself has not as an officer of the company.

There is no right to examine as to dealings with stock which were had after it was fully paid up. *Charlebois* v. *Great North-West. T. W. Co.*, 15 P. R. 10.

Costs.]—Under Rule 1180, the costs of proceedings to examine a judgment debtor may be allowed, in the discretion of the Court or a Judge, where the examination has not actually taken place.

And where the judgment debtor attended upon an appointment for his examination, procured an enlargement, and meanwhile, under force of the proceedings, paid the judgment debt, he was ordered to pay the costs of the proceedings. *Popham* v. *Flynn*,, 15 P. R. 286.

Disposition of Goods—*Advice of Counsel—Examiner's Ruling.*]—Where the defendant had, before judgment against him, executed a bill of sale of his stock-in-trade, which had been registered:—

Held, that upon his examination as a judgment debtor he was compellable to answer questions in respect to his dealings with such property after the date of the bill of sale; and that he could not shelter himself behind the advice of counsel:—

Held, also, that notwithstanding that the examiner had ruled that the judgment debtor was not obliged to answer certain questions, and that the ruling had not been appealed against, the usual order might be made directing the defendant to attend again for examination. *Bank of Hamilton* v. *Essery*, 15 P. R. 202.

Married Woman — *Refusal to Attend for Examination—Commitment.*]—An order may be made for the commitment of a married woman to goal for refusal to attend for examination as a judgment debtor.

Rules 926 and 932, and R. S. O. ch. 67, sec. 7, considered.

Metropolitan L. & S. Co. v. *Mara*, 8 P. R. 355, followed. *Watson* v. *Ontario Supply Co.*, 14 P. R. 96.

Motion to Commit—*Appeal — Costs.*]—An appeal lies to a Divisional Court from an order in Chambers refusing an application under Rule 932 to commit a judgment debtor for unsatisfactory answers; but, as the liberty of the subject is at stake, the appellate court will not reverse the order unless the Judge below has erred in principle, or is almost "overwhelmingly" wrong.

And under the circumstances of this case, the Court refused to interfere.

Graham v. *Devlin*, 13 P. R. 415, approved and followed.

The judgment debtor appeared in person and argued his own case on appeal:—

Held, that he should be allowed to set off against the judgment debt his disbursements and a moderate allowance for his time and trouble on the argument. *Millar* v. *Macdonald*, 14 P. R. 499.

Motion to Commit—*Service of Appointment—Certificate of Examiner.*]—Where, upon a motion to commit a party for unsatisfactory answers upon his examination as a judgment debtor, it is shewn that he attended and submitted to be sworn and examined, it is not necessary to prove service of an appointment or payment of conduct money.

And where the depositions returned by the examiner shew on their face that the party was being examined as a judgment debtor, there need be no other proof of the fact.

The certificate of an examiner is good evidence of the proceedings before him, notwithstanding that it was settled *ex parte*.

Re Ryan v. *Simonton*, 13 P. R. 299, commented on. *Jones* v. *Macdonald*, 14 P. R. 109.

Re-examination.]—The examination of a judgment debtor in aid of execution under Rule 926 may be made of the most searching character—a cross-examination of the severest kind; and very strong special grounds must be shewn to justify further examination of a debtor who has fully and fairly answered on two former examinations.

And where it did not appear that any change in the circumstances of the judgment debtor had taken place since her last examination, and the affidavit on which an application for a third examination was based did not shew the grounds for the deponent's belief that she had property concealed, and did not negative the ability to obtain information as to details, the application was refused.

Order and decision of Boyd, C., 15 P. R. 427, affirmed. *Re Central Bank of Canada—Watson's Case*, 16 P. R. 55.

Refusal to be Sworn.]—Where a judgment debtor attends for examination, but refuses to be sworn, he will be ordered to attend and take the oath and submit to be examined at his own expense; if he makes default, process of contempt may issue on further proof. *Uhrig* v. *Uhrig*, 15 P. R. 53.

Transferee of Judgment Debtor — *Examination.*]—Upon an application under Rule 928 for an order for the examination of the wife of the judgment debtor as a person to whom he had made the transfer of his property, the affidavit of the applicant, the judgment creditor, stated that the action arose out of the sale of a stock of goods by the plaintiff to the defendant, and, referring to a verified copy of the judgment debtor's examination, taken under Rule 926, that on such examination the latter admitted that he had transferred to his wife a sum of money, part of the proceeds of the sale of the same stock of goods. In the examination the judgment debtor stated that in buying the stock from the plaintiff he was acting as agent for his wife, and that when he sold it he gave the purchase money to her, as it was her own property:—

Held, that, upon this material, an order for the examination of the wife was properly made.

Per Osler, J.A.—On such an application the real title of the debtor should not be inquired into or tried; nor can the transferee resist it merely by asserting that the debtor held the property as agent or trustee; standing in his name and being dealt with as his own, it was *primâ facie* his.

Per Maclennan, J.A.—The case intended by the Rule is a transfer of the debtor's own property, and not of property which he has dealt with as agent or trustee for another. But where it is a disputed question whether the property was not the property of the debtor or property in which he had an interest, the rule ought to be applied. *Goodeve* v. *White*, 15 P. R. 433.

Will—*Proceedings to Ascertain Interest of Judgment Debtor.*]—*See McLean* v. *Bruce*, 14 P. R. 190, *ante* 59.

See, also, ATTACHMENT.

JUDGMENT SUMMONS.

See DIVISION COURTS, III.

JURISDICTION

OF COURTS.]—*See* THE SEVERAL TITLES.

JURY.

See APPEAL IV.—COUNTY COURT, I.—CRIMINAL LAW, III.—MALICIOUS PROSECUTION, III.—TRIAL.

JUSTICE OF THE PEACE.

I. ACTIONS AGAINST.

Notice of Action.]—The object of the "Act to protect justices of the peace and others from vexatious actions," R. S. O. ch. 73, is for the protection of those fulfilling a public duty, even though, in the performance thereof, they may act irregularly or erroneously, and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause; but where a person entitled to the protection of the Act voluntarily does something not imposed on him in the discharge of any public duty, such notice is not required. *Kelly* v. *Archibald*, *Kelly* v. *Barton*, 26 O. R. 608. Affirmed in appeal, 22 A. R. 522.

Notice of Action.]—*See Scott* v. *Reburn*, 25 O. R. 450, *ante* 8.

Return of Convictions—*Penalty.*]—A police magistrate, acting *ex officio* as justice of the peace, is not subject to the provisions of section 1 of R. S. O. ch. 76, and need not make a return as therein required to the clerk of the peace.

Section 6 of R. S. O. ch. 77, exempts him from this duty whether he is acting as police magistrate or *ex officio* as justice of the peace. *Hunt* v. *Shearer*, 22 A. R. 202.

Security for Costs—*Character of Property of Plaintiff.*]—Upon applications under 53 Vict. ch. 23 (O.), for security for costs in actions against justices of the peace, the rule should not be more, but rather less, onerous than in ordinary applications for security where the plaintiff is out of the country.

Section 2 of the Act provides that it is to be shewn that the plaintiff is not possessed of property sufficient to answer the costs of the action:—

Held, that the Court should be less exacting as to the character of the property where the person is a *bond fide* resident than in the ordinary case of a stranger who seeks to justify upon property within the jurisdiction; the test is: is it such property as would be forthcoming and available in execution?

And where the plaintiff had property, partly real and partly personal, to the value of $800 over and above debts, incumbrances, and exemptions, security for costs was not ordered. *Bready* v. *Robertson*, 14 P. R. 7.

Security for Costs—*Form of Order*—*Time*—*Dismissal of Action.*]—An order under 53 Vict. ch. 23 (O.) for security for costs in an action against a justice of the peace should not limit a time within which security is to be given nor provide for dismissal of the action in default; the order should be simply "that the plaintiff do give security for the costs of the defendant to be incurred in the action." *Thompson* v. *Williamson*, 16 P. R. 368.

Security for Costs—*Merits.*]—In an action against a justice of the peace for false arrest and imprisonment, it appeared that there was a valid warrant of commitment against the plaintiff in the county of O., which was, in the absence of a police magistrate, indorsed by the defendant for execution in the city of T., and under which the plaintiff was there arrested.

The plaintiff alleged that the arrest was illegal because the defendant's mandate was not actually indorsed upon the warrant, and because the defendant's authority was not shewn on the face of his mandate. It appeared, however, that the defendant's mandate was pasted or annexed to the warrant, and that the defendant in fact had authority though it was not set out. It was admitted that the plaintiff was not possessed of property sufficient to answer costs:—

Held, that the defendant was entitled to security for costs under 53 Vict. ch. 23 (O.).

Per Robertson and Meredith, JJ., that it was not intended by the statute that the merits of the action should be determined upon an application for security for costs. *Southwick* v. *Hare*, 15 P. R. 222.

Setting Aside Proceedings—*Premature Application.*]—In an action against a justice of the peace for false imprisonment and for acting in his office maliciously and without reasonable and probable cause, an application was made before statement of claim to set aside the proceedings under section 12 of R. S. O. ch. 73, on the ground that the conviction of the plaintiff made by the defendant, had not been quashed. It appeared, however, that the plaintiff was arrested and imprisoned under a warrant issued by the defendant, which in fact had no conviction to support it:—

Held, not a case within section 12.

Per Robertson, J., that the plaintiff had a complete cause of action without setting aside the conviction.

Per Meredith J., that the application was premature. *Webb* v. *Spears*, 15 P. R. 232.

Trespass—*Arrest Before Endorsement of Warrant—Detention Afterwards—Damages.*]—*See Southwick* v. *Hare*, 24 O. R. 528, *ante* 42.

Trespass—*Malicious Prosecution.*]—The defendant laid an information charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars, purporting to be made against J. M. in favour of T. A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was under it apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted :—

Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and an action of trespass was not maintainable against the defendant, even upon evidence of his interference with the arrest.

Semble, that if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, an action for malicious prosecution would nevertheless lie. *Anderson* v. *Wilson*, 25 O. R. 91.

Witness.]—Where a police magistrate acting within his jurisdiction under R. S. C. ch. 174, sec. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice, liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest.

Judgment of the Common Pleas Division, 24 O. R. 576, affirmed. *Gordon* v. *Denison*, 22 A. R. 315.

II. Convictions.

Amendment.]—Where a summary conviction, valid on its face, has been returned with the evidence upon which it was made, in obedience to a *certiorari*, the Court is not to look at the evidence for the purpose of determining whether it establishes an offence, or even whether there is any evidence to sustain a conviction.

Regina v. *Wallace*, 4 O. R. 127, followed.

But where a conviction for an offence over which the magistrate had jurisdiction, is bad on its face, the Court is to look at the evidence to determine whether an offence has been committed, and if so, it should amend the conviction.

A conviction under the Ontario Medical Act, R. S. O. ch. 148, sec. 45, for practising medicine for hire :—

Held, bad for uncertainty in not specifying the particular act or acts which constituted the practising.

Re Donnelly, 20 C. P. 165; *Regina* v. *Spain*, 18 O. R. 385; and *Regina* v. *Somers*, 24 O. R. 244, followed.

And the Court refused to amend, and quashed the conviction, where the practising consisted in telling a man which of several patent medicines sold by the defendant was suitable to the complaint which the man indicated, and selling him some of it.

Costs against the informant refused.

Regina v. *Somers*, 24 O. R. 244, followed. *Regina* v. *Coulson*, 24 O. R. 246.

Interest—*Bias—Relationship to Complainant.*]—Where the convicting justice was the son of the complainant, and the latter was entitled to one-half the penalty imposed, a summary conviction was quashed, on the ground that the justice had such an interest as made the existence of real bias likely, or gave ground for a reasonable apprehension of bias, although there was no conflict of testimony.

Regina v. *Huggins*, [1895] 1 Q. B. 563, followed.

Dictum of Rose, J., in *Regina* v. *Langford*, 15 O. R. 52, approved.

Costs of quashing conviction withheld from successful defendant, where he filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts. *Regina* v. *Steele*, 26 O. R. 540.

Interested Magistrate—*Hearing before Another Magistrate — Defendant Appearing and Answering Charge.*]—The justice of the peace before whom the information was laid, and who issued the summons, was claimed to be interested. The hearing, however, took place before, and the adjudication and conviction were made by another justice whose qualification was not attacked, while the defendant pleaded to the charge and raised no objection to the validity of the proceedings until the application for a *certiorari* :—

Held, that the conviction could not be impugned. *Regina* v. *Stone*, 23 O. R. 46.

Offences under By-law — *Admissibility of Evidence of Defendant.*]—On the trial of an offence against a city by-law in the erection of a wooden building within the fire limits, the defendant is not either a competent or compellable witness; and, therefore, where in such a case, the defendant's evidence was received, and a conviction made against him, it was quashed with costs. *Regina* v. *Hart*, 20 O. R. 611.

Substituting New Charge—*Imprisonment—Habeas Corpus—Discharge.*]—The defendant was brought before justices of the peace on an information charging him with the indictable offence of shooting with intent to murder, and they, not finding sufficient evidence to warrant them in committing for trial, of their own motion, at the close of the case, summarily convicted the defendant for that he did "procure a revolver with intent therewith unlawfully to do injury to one J. S." It appeared by the evidence that the weapon was bought and carried and used by the defendant personally.

By the Criminal Code, section 108, it is matter of summary conviction if one has on his person a pistol with intent therewith unlawfully to do any injury to any other person.

The return to a writ of *habeas corpus* shewed the detention of the defendant under a warrant

of commitment based upon the above conviction; and upon a motion for his discharge:—

Held, that the detention was for an offence unknown to the law; and although the evidence and the finding shewed an offence against section 108, the motion should not be enlarged to allow the magistrates to substitute a proper conviction, for it was unwarrantable to convict on a charge not formulated, as to which the evidence was not addressed, upon which the defendant was not called to make his defence, and as to which no complaint was laid; and the prisoner should, therefore, be discharged. *Regina* v. *Mines*, 25 O. R. 577.

Two Offences—"*Defect in Substance or in Form*"—*Adjournment.*]—An information stated that the defendant, "within the space of thirty days last past, to wit, on the 30th and 31st days of July, 1892, . . did unlawfully sell intoxicating liquor without the license therefor by law required":—

Per Hagarty, C. J. O., and Boyd, C.—Such an information does not charge two offences, but only the single offence of selling unlawfully within the thirty days.

Per Osler and Maclennan, JJ. A.—Such an information does charge two offences, and is in contravention of section 845 (3) of the Criminal Code, 1892.

But, *per Curiam*, assuming that an information so worded does contravene the provisions of section 845 (3) of the Criminal Code, 1892, the defect is one "in substance or in form" within the meaning of the curative section (847) and does not invalidate an otherwise valid conviction for a single offence.

The provision of section 857, that no adjournment shall be for more than eight days, is matter of procedure and may be waived, and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect.

A conviction for a first offence under section 70 of the Liquor License Act, R. S. O. ch. 194, properly awards imprisonment in default of payment of the fine, and not in default of sufficient distress.

Regina v. *Smith*, 46 U. C. R. 442, and *Regina* v. *Hartley*, 20 O. R. 481, approved.

Judgment of the Queen's Bench Division, 23 O. R. 387, reversed. *Regina* v. *Hazen*, 20 A. R. 633.

See CRIMINAL LAW — INTOXICATING LIQUORS, AND THE TITLES OF SPECIFIC OFFENCES.

III. JURISDICTION.

Power to Commit for Contempt—*Power to Exclude from Court Room—Privileges of Counsel—Review by Court of Justice's Proceedings.*]—A barrister and solicitor while acting as counsel for certain persons charged with a misdemeanour before a justice of the peace holding court under the Summary Convictions Act, was arrested by a constable by the order of the justice, without any formal adjudication or warrant, excluded from the court room, and imprisoned for an alleged contempt and for disorderly conduct in court.

In an action by the counsel against the justice and the constable for assault and false arrest and imprisonment:—

Held, that the justice had no power summarily to punish for contempt *in facie curiæ*, at any rate without a formal adjudication and a warrant setting out the contempt.

Armour v. *Boswell*, 6 O. S. 153, 352, 450, followed.

2. That he had the power to remove persons who, by disorderly conduct, obstructed or interfered with the business of the Court; but, upon the evidence, that the plaintiff was not guilty of such conduct, and had not exceeded his privilege as counsel for the accused; and the proper exercise of such privilege could not constitute an interruption of the proceedings so as to warrant his extrusion.

If the justice had issued his warrant for the commitment of the plaintiff and had stated in it sufficient grounds for his commitment, the Court could not have reviewed the facts alleged therein; but, there being no warrant, the justice was bound to establish such facts upon the trial, as would justify his course. *Young* v. *Saylor*, 23 O. R. 513. Affirmed in appeal, 20 A. R. 645.

Provincial Fisheries—*Prosecution for Penalty Exceeding $30.*]—The defendant was convicted before one justice of the peace on an information under 55 Vict. ch. 10, sec. 19 (O.), charging him with fishing in a certain stream without the permission of the proprietors, and of taking therefrom forty-five fish:—

Held, that the conviction must be quashed, for the penalty fixed for the offence charged exceeded $30, and, therefore, under sections 25 and 26 of the Act, the prosecution should have been before a stipendiary or police magistrate or two or more justices of the peace, or one justice and a fishery overseer.

Only one offence is created by section 19, that of fishing in prohibited waters, and that offence is complete though no fish be taken. *Regina* v. *Plows*, 26 O. R. 339.

Summary Trials Act—*Trial of Defendant for Felony Without Consent—Conviction—Quashing.*]—The defendant, on being charged before a stipendiary magistrate with felonious assault, pleaded guilty to a common assault, but denied the more serious offence. The magistrate, without having complied with the requirements of section 8 of the Summary Trials Act, R. S. C. ch. 176, by asking defendant whether he consented to be tried before him or desired a jury, proceeded to try and convict the defendant on the charge of the felonious assault:—

Held, that the defendant was entitled to be informed of his right to trial by a jury, and that the conviction must be quashed.

Where a statute requires something to be done in order to give a magistrate jurisdiction, it is advisable to shew, on the face of the proceedings, a strict compliance with such direction. *Regina* v. *Hogarth*, 24 O. R. 60.

Territorial Jurisdiction — *Summons — Warrant—Costs—Rejection of Evidence.*]—Upon a motion for a rule *nisi* to quash a summary conviction of the defendant by a stipendiary magistrate for selling liquor without a license:

Held, that although the conviction did not shew on its face that the offence was committed

at a place within the territorial jurisdiction of the magistrate, yet, as the warrant for the defendant's apprehension, which was returned upon *certiorari*, shewed the complaint to be that the defendant sold liquor at a place within the magistrate's jurisdiction, and it was to be inferred that the evidence returned was directed to that complaint, sufficient appeared to satisfy the Court that an offence of the nature described in the conviction was committed, over which the magistrate had jurisdiction, and therefore, the conviction should not, having regard to section 889 of the Criminal Code, 1892, be held invalid.

Regina v. *Young*, 5 O. R. 184*a*, distinguished:—

Held, also, that, by the combined effects of sections 559 and 843 of the Code, it was discretionary with the magistrate to issue either a summons or a warrant, as he might deem best; and therefore it was not a valid objection to the conviction that the magistrate included in the costs which the defendant was ordered to pay, the costs of arresting and bringing her before the magistrate under the warrant.

Upon the defendant tendering herself as a witness on her own behalf, the magistrate stated that, in view of the evidence adduced by the prosecutor, a denial by the defendant on oath would not alter his opinion of her guilt, upon which her counsel did not further press for her examination; but her husband was examined, and gave evidence denying the sale of the liquor:—

Held, that there was no denial of the right of the defendant, under section 850 of the Code, to make her full answer and defence. *Regina* v. *McGregor*, 26 O. R. 115.

Trespass—*Railway.*]—Section 283 of the Railway Act of Canada, 51 Viet. ch. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where the constable arrests an offender and takes him before the justice.

A summary conviction of the defendant by a justice for the county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested, but merely summoned. *Regina* v. *Hughes*, 26 O. R. 486.

Witness Fees.]—Section 58 of R. S. C. ch. 178, authorizes justices of the peace to allow witness fees. *Regina* v. *Becker*, 20 O. R. 676.

IV. Qualification.

Property—*Value.*]—The interest of a justice of the peace in property in respect of which he qualifies as such, as required by R. S. O. ch. 71, sec. 9, need not be in itself of the value of $1,200. It is sufficient if he has in lands which are of the value of $1,200, over and above what will satisfy and discharge all incumbrances affecting the same, and over and above all rents and charges payable out of or affecting the same, such an estate or interest as is mentioned in the section, whatever the value of the estate or interest may be. *Weir* v. *Smyth*, 19 A.R. 433.

LACHES.

Action—*Delay in Prosecuting.*]—An action by solicitors to recover the amount of a bill of costs was begun and the defendant appeared in February, 1883. No further step was taken till February, 1892, when the plaintiffs delivered a statement of claim. The plaintiffs' reason for the delay was that the defendant had no means to pay during the period of delay.

Upon motion by the defendant to dismiss and cross-motion by the plaintiffs to validate the delivery of the statement of claim:—

Held, that the action should be allowed to proceed.

Terms imposed upon the plaintiffs. *Finkle* v. *Lutz*, 14 P. R. 446.

Crown—*Acts of Ministers of Crown.*]—While the law is that the Crown is not bound by estoppels and that no laches can be imputed to it, and that there is no reason why it should suffer by the negligence of its officers, yet it appears to be well settled that forfeitures such as accrued in this case may be waived by the acts of ministers and officers of the Crown. *Attorney-General of Victoria* v. *Ettershank*, L. R. 6 P. C. 354, and *Davenport* v. *The Queen*, 3 App. Cas. 115, referred to. *Peterson* v. *The Queen*, 2 Ex. C. R. 67.

Crown—*Negligence of Officer.*]—Laches cannot be imputed to the Crown, and, except where a liability has been created by statute, it is not answerable for the negligence of its officers employed in the public service. *Burroughs* v. *The Queen*, 2 Ex. C. R. 293.

Infant—*Motion to Set Aside Proceedings After Coming of Age.*]—An infant was a part owner of a patent right and engaged in business transactions with respect to it. Along with other part owners he signed a retainer to solicitors to take proceedings to stop the infringement of the patent, and the solicitors, not knowing that he was an infant, brought an action for that purpose, using his name as a plaintiff, without a next friend. The action was prosecuted for a time, with the result that the infringement ceased, but it was subsequently dismissed with costs against the plaintiffs for want of prosecution. More than a year after he came of age he moved to set aside all proceedings in the action:—

Held, that, under the circumstances mentioned, he was not entitled to relief on the ground of infancy. *Millson* v. *Smale*, 25 O. R. 144.

Judgment—*Application for Leave to Issue—Discretion.*]—In 1880 a bill was filed by the plaintiff for an account in respect of a mortgage, which had been assigned to the defendant as security for advances. A decree was pronounced in June, 1880, directing that the plaintiff might have an account if he desired it, and that the defendant should have his costs to the hearing. The decree was not then drawn up and issued, and in December, 1892, the plaintiff applied for leave to issue it.

The delay was not explained, except by saying that the plaintiff had been out of the jurisdiction, and no details were given of when he went away or when he returned. It appeared

that the plaintiff had no beneficial interest upon the footing of the accounts, as shewn by the assignment and the answer. The defendant swore to the loss of one material witness through death :—

Held, that the decree meant that the plaintiff should, within some reasonable time, exercise the option given him of having a reference to take the accounts, at the peril of losing it if changed circumstances worked any prejudice to the defendant; and that, under all the circumstances, the application should, in the exercise of a sound discretion, be refused. *Finkle* v. *Lutz*, 14 P. R. 446, and *Kelly* v. *Wade*, *ib.* 66, distinguished. *Eaton* v. *Dorland*, 15 P. R. 138.

Mistake—*Will—Heir-at-Law.*]—Upon the death of the testator's widow, the three surviving children of the deceased nephew (one daughter had died a short time before intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew, and one-sixth to each of the others. In 1885 a partition deed was executed of part of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards commenced by him, asking that the title might be declared, the partition deed set aside, and the rents and proceeds of sales received by the brother and sister repaid to him :—

Held, affirming the judgment of Robertson, J., 16 O. R. 341, that, as all parties had acted under a mistake as to, and in ignorance of, the true legal construction of the will, the plaintiff was not barred by laches or acquiescence from recovering any portion of the land unsold at the time his claim was made, and any mortgages to secure purchase moneys of land previously sold and held by the defendants at the time his claim was made, and any moneys received by them after that time, but that there could be no recovery back of the moneys actually received by them before notice of the claim. *Cooper* v. *Phibbs*, L. R. 2 H. L. 148; *Beauchamp* v. *Winn*, L. R. 6 H. L. 223; and *Rogers* v. *Ingham*, 3 Ch. D. 351, considered and followed. *Baldwin* v. *Kingstone*, 18 A. R. 63, and Appendix.

Mortgage—*Decree for Redemption—Quieting Title.*]—That lapse of time which would be a statutory bar to the assertion of a claim before litigation should, as a general rule, apply by analogy to induce the Court to exercise its discretion by holding its hand when the laches occur in the prosecution of an action, whether before or after judgment.

After the usual decree for redemption had been pronounced in favour of a mortgagor, who was at the time and continued afterwards to be a lunatic residing in Scotland, no proceedings were taken under it for over twenty years. Although several communications with reference to the suit passed between the mortgagor's solicitor and his curator, the latter never intervened. For some years before, and during all the time after, the making of the decree, the mortgagee, or those claiming under him, had been in possession of the mortgaged premises; and the petitioner in this matter, claiming under the mortgagee, sought, after notifying the curator of the facts and proceedings, to quiet his title under the Quieting Titles Act, R. S. O. ch. 113 :—

Held, that after the great and unexplained delay in the redemption suit, the decree made therein was no obstacle to the petitioner's obtaining a certificate of title. *Re Leslie*, 23 O. R. 143.

Partnership Dealings—*Interest in Partnership Lands.*]—A judgment creditor of J. applied for an order for sale of the latter's interests in certain lands the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands and to take an account of the dealings between J. and K. In the Master's office K. claimed that in the course of the partnership business he signed notes which J. indorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he claimed a large sum to be due him from J. for such overcharge. The Master held that, as these transactions had taken place nearly twenty years before, K. was precluded by the Statute of Limitations and by laches and acquiescence from setting up such claim. His report was reversed by a Judge, whose decision was affirmed by the Court of Appeal on the ground that the matter being one between partners, and the partnership affairs never having been formally wound up, the statute did not apply :—

Held, reversing the decision of the Court of Appeal and restoring the Master's report, that K.'s claim could not be entertained; that there was, if not absolute evidence, at least a presumption, of acquiescence from the long delay; and that such presumption should not be rebutted by the evidence of the two partners, considering their relationship and the apparent concert between them. *Toothe* v. *Kittredge*, 24 S. C. R. 287.

Specific Performance—*Agreement to Convey Land—Possession.*]—In a suit for specific performance of an agreement by the devisee of land to convey to P., it appeared that the agreement of sale to P. was executed in 1884, and the suit was not instituted until four years later. P. was in possession of the land during the interval :—

Held, that, as the evidence clearly shewed that P. was only in possession as agent of the trustees under the will and caretaker of the land, and as by the terms of the agreement time was to be of the essence of the contract, the delay was a sufficient answer to the suit. *Porter* v. *Hale*, 23 S. C. R. 265.

LAND TITLES ACT.

Caution—*Cessation of—Security.*]—Under section 61 of the Land Titles Act, R. S. O. ch. 116, a caution was registered against dealings by the registered owner, the cautioner claiming that the

registered owner held as trustee for another against whose lands the cautioner had an execution. An action had been brought for a declaration to that effect. The Master of Titles made an order that entry of the cessation of the caution should be made, upon the registered owner giving security for the amount claimed by the cautioner; that payment should be made according to the result of the pending action; and that until such entry should be made the caution was to continue to have effect:—

Held, that the scheme of the Act contemplates such a course of proceeding, although it is not specifically provided for by sections 62 and 63; and that, under the circumstances, the order was the simplest and most effective that could be made in the interests of all parties. *Re Macdonald and Sullivan*, 14 P. R. 60.

Costs—*Powers of Local Master of Titles—Discretion—Appeal.*]—A local Master of Titles has power by virtue of sections 137 and 74 of the Land Titles Act, R. S. O. ch. 116, in ordering that a caution be vacated, to direct payment by the cautioner of costs as between solicitor and client; and by Rule 16 (2) of the Rules in the schedule to the Act has power to give a special direction that costs as of a Court motion may be taxed.

And where a Master in his discretion so ordered, a Judge in Chambers refused to interfere, more especially as the appeal was late and could only be entertained as an indulgence. *Re Ross and Stobie*, 14 P. R. 241.

Evidence — *Woman Past Child-bearing — Registration.*]—Land was devised to the petitioner for life, with remainder in fee to her children surviving her. At the age of fifty-six the petitioner and one of her children, all the other surviving children having conveyed their shares to her, applied under the Land Titles Act, R. S. O. ch. 116, to be registered as owners with absolute title.

The petitioner's monthly periods began at the age of eleven; she was married in her twenty-second year, and bore children rapidly till her thirty-sixth year, when her tenth child was born; five months after this her periods, having regularly continued, suddenly ceased, and up to the time of the application had never returned.

The evidence of a physician who had made a medical examination of the petitioner shewed that senile atrophy of the uterus and ovaries had proceeded so far that it would be a moral impossibility for pregnancy to take place:—

Held, having regard to the provisions of sec. 23, sub-sec. 5, of the Act, that the Master should have accepted the evidence as sufficient proof that the petitioner was physically incapable of child-bearing, and should have acted upon it by granting the registration. *Re G——*, 21 O. R. 109.

Implied Covenant—*Leave to Defend.*]—In an action by the assignee of a charge registered against land under the Land Titles Act, R. S. O. ch. 116, to recover money due under the covenant for payment implied by virtue of sec. 29, there being no entry on the register negativing the implication, the defendant, in answer to an application for summary judgment under Rule 739, swore that it was clearly understood between him and the original chargees that the land only was to be liable, and this was corroborated by one of the original chargees; the plaintiff, however, swearing that she was a *bond fide* purchaser for value without notice of this understanding:—

Held, that there was a *bond fide* contest of a question to some extent novel, which ought to be fairly litigated in the usual way, without hampering conditions being imposed on the defence. *Jones v. Stone*, [1894] A. C. 121, followed. *Wilkes v. Kennedy*, 16 P. R. 204.

See Inre McIlmurray and Jenkins, 22 A. R. 398 *post*, PLANS AND SURVEYS.

LANDLORD AND TENANT.

I. AGREEMENT FOR LEASE.

Indorsement on Former Lease—*Terms—Possession.*]—A lessee of house No. 107 signed

an indorsement on the lease that he would lease house 109 at the same rent, he getting possession as soon as the premises should be vacated by the then tenants, which indorsement, however, was not signed by the lessor:—

Held, that from the time of his getting possession of No. 109, the lessee held it on the same terms as No. 107, and all the terms and covenants in the lease of the latter, barring the time of getting possession and the consequent difference in the length of the terms, applied to the letting of No. 109. *Mehr* v. *McNay*, 24 O. R. 653.

Possession after Expiration of Lease—*Implied Obligation.*]—Where a lessee continues in possession as a yearly tenant after the expiration of a lease, containing a covenant by him to repair, a similar obligation will be implied. *Hett* v. *Janzen*, 22 O. R. 414.

II. Assignment of Lease and Sub-lease.

Covenant—*Consent—Rent—Indemnity.*]—Where a lease, containing a covenant against assignment without the consent of the lessors, is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the demised premises, he is liable, although the consent of the lessors may not have been procured, to repay to the assignor rent accruing due after the assignment which the latter has been obliged to pay. *Brown* v. *Lennox*, 22 A. R. 442.

Covenant—*Re-entry—License—Severance of Reversion—Registration—Notice.*]—Upon a lease made pursuant to the Short Forms of Leases Act, containing a condition for re-entry on assigning or sub-letting without leave, when the lessor gives license to assign part of the demised premises, he may re-enter upon the remainder for breach of covenant not to assign or sub-let, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole.

Sections 12 and 13 of the Landlord and Tenant Act, R. S. O. ch 143, are to be read together, the former referring generally to all cases, and making licenses to alien applicable *pro hac vice* only, the latter referring to specific cases of licensing the alienation of a part, and reserving the right of re-entry as to the remainder. Hence, where a lessor gave a license to alien part of the demised premises, it was held, that the license applied to the licensed arrangements only, and that upon subsequent alienation without leave, he might re-enter.

A lessee under such a lease, which contained also a covenant for renewal, sub-let, and the sub-lease contained a covenant to renew for the term to be granted on the renewal of the superior lease, less one month; and to this the lessors assented. On an assignment by the lessee, without leave, of his reversion expectant on the sub-lease:—

Held, that the lessors might re-enter as against the sub-tenant, notwithstanding their assent, for it must be deemed to have been an assent to the renewal of the sub-lease, provided that the superior lease was renewed.

A lessee under such a lease created a number of sub-tenancies on part of the land with leave. He then assigned all the rents, etc., to an assignee. The head lessors assented to the assignment, and covenanted with the assignee that so long as the rents reserved were paid, and the covenants observed, they would not claim any forfeiture, as to the lands affected by the assignment, and that the rights of the assignee should not be prejudiced by any act of the original lessee, or any person claiming under him, or by any breach or non-observance by the lessee, or any person claiming under him, of the covenants or provisions contained in the original lease, such consent not, however, to operate as a waiver of the covenant against assigning and sub-letting. The original lessee afterwards assigned his reversion in the whole of the demised premises without leave, and for this the lessors brought an action to recover the demised premises, after the interest of the assignee of the rents had expired by lapse of time:—

Held, that in the absence of notice of the assignment without leave, pending the existence of the interest created by the assignment of the rents, they were not precluded from maintaining the action.

After an assignment by the lessee without leave, of part of a lot, was registered, the lessors took a surrender of part of the same lot demised by another lease and registered it:—

Held, that the registration of the assignment without leave was not notice of it to them, as they were not bound by the nature of the surrender to examine the register as to that part of the lot affected by the assignment without leave.

A tenant in fee simple conveyed land to the use of himself for life, and after his death to such uses as he might by will appoint. He, with his grantees to uses, then made a lease of the land containing a covenant not to assign or sub-let without leave, and a proviso for re-entry for breach of the covenant, and by will appointed the reversion to his seven children. After his death an assignment was made by the lessee without leave, and subsequently one of the devisees conveyed his undivided one-seventh interest to trustees, to sell, lease, or mortgage. An action was brought to recover the lands for breach of the covenant against assigning:—

Held, that by the conveyance of the undivided one-seventh share, the reversion was severed and the condition destroyed, and therefore no recovery could be had for breach of the covenant occurring either before or after the severance. *Baldwin* v. *Wanzer, Baldwin* v. *Canadian Pacific R. W. Co.*, 22 O. R. 612.

Verbal Lease—*Expiration of—Notice to Quit—Possession by Sub-tenant after Expiry of Original Lease.*]—M., by verbal agreement, leased certain premises to McC., who sub-let a portion thereof. After the original tenancy expired, on 15th November, 1887, the sub-tenant remained in possession, and in March, 1888, received a notice to quit from M. In June, 1888, M. issued a distress warrant to recover rent due for said premises from McC., and the sub-tenant paid the amount claimed as rent due from McC., but not from herself to McC. More than six months after the notice to quit was given, proceedings were taken by M. to recover possession of the premises from the sub-tenant:—

Held, that the notice to quit given to the sub-tenant, and the distress during the latter's possession on sufferance, did not work estoppel against the landlord, as the tenancy had always been repudiated; Fournier, J., dissenting. *Gilmour* v. *Mayer*, 18 S. C. R. 579.

See Seldon v. *Buchannan*, 24 O. R. 349, *post* 605.

III. Attornment.

Mortgage—*Demise to Mortgagor—Possession.*]—*See Hobbs* v. *Ontario Loan and Debenture Co.*, 18 S. C. R. 483, *post* 605.

IV. Buildings.

Renewal of Lease.]—*See Sears* v. *City of St. John*, 18 S. C. R. 702, *post* 602.

Right of Building over Lane.]—*See Jakes* v. *O'Keefe*, 26 O. R. 489, *post* 596.

V. Covenants.

Husbandry—*Manure—Expiry of Term—Mesne Profits—Action—Estoppel.*]—A lessee covenanted to use upon the demised premises all the straw and dung which should be made thereupon:—

Held, that the lessor was entitled to recover for manure removed from the premises which was there at the expiry of the term, but not for manure made thereafter, while the lessee was overholding.

Hindle v. *Pollitt*, 6 M. & W. 529, followed.

In a former action of ejectment brought by the plaintiff against the defendants, mesne profits were claimed, but no evidence was given in regard to them:—

Held, that the plaintiff was not estopped from recovering in this action occupation rent for the premises since the expiry of the term. *Elliott* v. *Elliott*, 20 O. R. 134.

Husbandry—*Title to Land—Custom—Pleading—Division Courts.*]—In an action brought in the High Court by a landlord against a tenant, for damages for breach of the latter's covenants in a farm lease, the statement of claim alleged that the plaintiff by deed let to the defendant the land described, for a term of years, and that the defendant thereby covenanted as set forth, and assigned as breaches of the covenants that he [illegible] did not cultivate the farm in a good, husbandlike, and proper manner. By the statement of defence the defendant denied all the allegations of the statement of claim, and further that he had used the premises in a tenant-like and proper manner, "according to the custom of the country where the same was situate." The plaintiff recovered a verdict of $160, the action being tried with a jury. The title to the land was not brought into question at the trial, but it was contended that it came in question on the pleadings:—

Held, not so; for the defendant was, on the face of the record, estopped from pleading *non demisit*, and his denial could only be read as a traverse of the actual execution of the lease.

Purser v. *Bradburne*, 7 P. R. 18, commented on.

Held, also, that the "custom" pleaded was not the "custom" meant by sec. 69, subsec. 4, of the Division Courts Act, R. S. O. ch. 51 which refers to some legal custom by which the right or title to property is acquired, or on which it depends.

Legh v. *Hewitt*, 4 East 154, followed:

Held, therefore, that the action was within the competence of the Division Court, and that the costs should follow the event in accordance with Rules 1170, 1172. *Talbot* v. *Poole*, 15 P. R. 99.

Not to Assign or Sub-let.]—*See Brown* v. *Lennox*, 22 A. R. 442, *ante* 593; *Bubbear* v. *Wanzer*, 22 O. R. 612, *ante* 593.

Not to Remove Gravel.]—*See Bordon* v. *Shea*, 22 S. C. R. 742, *post* 599.

Quiet Enjoyment—*Easement—Indemnity.*] The plaintiff and defendant occupied adjoining shops under leases from the same landlord, the plaintiff having the prior lease. The plaintiff brought this action to restrain the defendant from obstructing his light and view, and the defendant served a third party notice upon the landlord, claiming, under a covenant for quiet enjoyment, to be protected against the plaintiff's claim:—

Held, that the defendant could not call upon his landlord to defend him against an unfounded claim; but if the plaintiff's claim was well founded, it was by reason of an easement expressly or impliedly granted by his lease, and the defendant took subject to such easement, and could not claim that the landlord covenanted with him for quiet enjoyment of that which did not pass under his lease; and, therefore, whether the plaintiff's claim was well or ill founded, the landlord was not a proper party to be called on for indemnity under Rule 329. *Thomas* v. *Owen*, 20 Q. B. D. 225, followed. *Scripture* v. *Reilly*, 14 P. R. 249.

Restricting Use of Premises—*Auction Sales—Injunction.*]—By a lease under seal the defendant rented from the plaintiff certain premises for three months. The lease contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling and "gents' furnishing store:"—

Held, that the carrying on by the lessee of auction sales of his stock, on the premises, was a breach of the covenant restrainable by injunction. *Cockburn* v. *Quinn*, 20 O. R. 519.

To Pay Rent.]—*See Mitchell* v. *McCauley*, 20 A. R. 272, *post* 603.

To Pay Taxes—*Right of Building over Lane—Interest in Land.*]—A lessee covenanted, pursuant to the Short Forms of Leases Act, to pay all taxes "to be charged upon the said demised premises or upon the said lessee on account thereof." The premises consisted of a building with a lane to the rear, described as being "north of the premises hereby demised," over which the lease provided that the lessee might at any time erect a building or extension, pro-

vided the same was always nine feet above the ground, and in accordance with which the lane was built over. The lease also provided that if the lessors elected not to renew, they were to pay a fair valuation for the building which should at that time be erected "on the lands and premises hereby demised and over the said lane;"—

Held, that the words "demised premises" in the covenant referred only to the building lot itself, and not to the interest in the lane which passed by the lease.

Semble, where a tenant agrees to pay taxes on the land demised to him, the omission of the assessor to enter his name on the assessment roll, or that of the landlord to resort to the Court of Revision to have the omission rectified, does not relieve him from his obligation;—

Held, also, that the interest of the defendants in the lane was clearly an interest in land.

And *semble*, even if it were not separately assessable, this would not excuse the defendants from repaying the lessor what he had to pay for taxes in respect to it. *James* v. *O'Keefe*, 26 O. R. 489.

To Renew.]—*See Sears* v. *City of St. John*, 18 S. C. R. 702, *post* 602; *Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205, *post* 603.

To Repair.]—*See Hett* v. *Janeau*, 22 O. R. 444, *post* 600; *Brown* v. *Trustees of Toronto General Hospital*, 23 O. R. 599, *post* 600; *Mehr* v. *McNab*, 24 O. R. 653, *post* 601.

VI. Disputing Landlord's Title.

Pleading—*Estoppel.*]—*See Talbot* v. *Poole*, 15 P. R. 99, *ante* 596.

VII. Eviction.

Mortgage—*Apportionment of Rent.*]—*See Kinnear* v. *Aspden*, 19 A. R. 468, *post* 604.

VIII. Forfeiture of Lease.

Election to Forfeit—*Retraction*—*Payment of Rent and Costs*—*Implied Request for Relief.*]—Rent under a lease made pursuant to the Short Forms Act becoming in arrear, the landlord served the statutory notice of forfeiture, and brought an action against the tenants both for the recovery of the demised premises and of the arrears of rent. Before the action came to trial the defendants paid the arrears and costs:—

Held, that the bringing of the action was an election on the part of the landlord to forfeit the lease which could not be retracted by him; to enable him to get rid of the forfeiture there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture; and the mere payment, after the forfeiture, of rent which accrued due before, would not amount to such a request.

The effect of such a payment depends upon the intention of the party paying; and the payment of the rent and costs in this case could not operate, by force of R. S. O. ch. 143, secs. 17-22, to permit the landlord to retract his forfeiture, without regard to the intention of the tenants, and without any request on their part to be relieved from the forfeiture.

These sections are applicable simply to an action for the recovery of the demised premises; had the action been brought for that alone, an implication might have arisen from the payment of rent and costs that the tenant intended to seek to be relieved from the forfeiture; but not so where the action was also brought for the rent in arrear, more especially as the demised premises were vacant land, the tenants not being in actual possession:—

Held, also, on the evidence, that there was no intention on the part of the tenants to seek to be relieved from the forfeiture:

Held, further, that the landlord could not get rid of the forfeiture unless both tenants concurred in seeking relief from it. *Davison* v. *Maitland*, 22 O. R. 166.

Non-payment of Rent—*Laches*—*Misrepresentations.*]—To an action for relief against a re-entry made by a landlord for non-payment of rent, the defendant pleaded that she had been induced to grant the lease by reasons of representations made by the plaintiff to the effect that he would improve and beautify the demised premises, which would enhance the value of other lands of the defendant, but that the plaintiff had not done as he represented he would, and that the defendant had been thereby damnified:—

Held, that the evidence tendered by the defendant to establish the truth of this defence was admissible in answer to the claim of the plaintiff for relief.

The origin both of the action for specific performance and of the action for relief against re entry for non-payment of rent is in the equitable jurisdiction of the Court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the Court: and in each the Court has regard to the conduct of the party seeking to compel such performance or to obtain such relief. *Coventry* v. *McLean*, 22 O. R. 1.

Non-payment of Rent.—*Option to Purchase.*]—The Court will not make a declaration relieving against forfeiture of a lease for non-payment of rent when the trial of the action for that relief takes place after the term has expired by effluxion of time, even though the lease gives an option of purchase to be exercised during the term, which the lessee had attempted to exercise after the forfeiture.

A lessee is not entitled as of right to relief against forfeiture for non-payment of rent. That relief may be refused on collateral equitable grounds. *Coventry* v. *McLean*, 22 O. R. 1, approved. *Coventry* v. *McLean*, 21 A. R. 176.

Notice—*Distress After Ejectment.*]—A notice of forfeiture of a lease under R. S. O. ch. 143, sec. 11, sub-sec. 1, given in the words "You have broken the covenants as to cutting timber," etc., without more particularly specifying the breach and claiming compensation, is sufficient.

After an action of ejectment was commenced for the forfeiture of the lease the landlord distrained for and received rent subsequently accruing due :—

Held, that such course did not *per se* set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year. *McMullen* v. *Vannatto*, 24 O. R. 625.

See Baldwin v. *Warner*, 22 O. R. 612, *ante* 593; *Scarth* v. *Ontario Power and Flat Co.*, 24 O. R. 446, *ante* 454; *Argles* v. *McMath*, 26 O. R. 224, 23 A. R. 44, *ante* 455.

IX. Improvements.

Crown Lands—*Arbitration and Award.*]—The plaintiffs leased certain Crown Lands to the defendant, the lease containing a covenant by the defendant not to remove gravel or sand from the premises. The defendant afterwards ascertained that no patent had been issued to the plaintiffs, and applied to the Crown Lands Department for a patent to himself, and also sold gravel off the premises. The plaintiffs then pressed the claim they had previously made to the department, and the Commissioner of Crown Lands ruled that the patent should issue to them on payment to the defendant for his improvements. The defendant refused to agree to any terms of compensation. The plaintiffs served him with a notice of arbitration, and an award was made, which was not taken up, as the defendant refused to pay his share of the arbitrators' fees. This action was then brought claiming arrears of rent, payment for use and occupation, damages for breach of covenant not to remove gravel, and delivery of possession :—

Held, affirming the decision of the Court of Appeal for Ontario, Gwynne, J., dissenting, that the plaintiffs were not in a position to bring the action until the defendant had been paid for his improvements. *Boulton* v. *Shea*, 22 S. C. R. 742.

See Sears v. *City of St. John*, 18 S. C. R. 702, *post* 602; *Adamson* v. *Rogers*, 22 A. R. 415, *ante* 498; *Lashy* v. *Crewson*, 21 O. R. 255, *ante* 499.

X. Lease for Lives.

Renewal—*Evidence—Counterpart of Lease—Custody of—Duration of Life—Presumption.*]—By indenture made in 1805 F. demised certain premises to C. to hold for the lives of the lessee, his brother, and his wife, "and renewable forever." The lessee covenanted that on the fall of any of said lives he would, within twelve months, insert a new life and pay a renewal fine; otherwise the right of renewal of the life fallen should be forfeited; and if any question should arise, it would be incumbent on the one interested in the premises to prove the person on whose death the term was made terminable to be alive, or in default such person would be presumed to be dead. In 1884 a purchaser from the assignees of the reversion entered into possession, and in 1890 an action was brought by persons claiming through the lessee to recover possession and for an account of mesne profits. On the trial a counterpart of the lease, found among the papers of the devisee of the lessor, was received in evidence, upon which was an indorsement dated in 1852, and signed by such devisee, by which a new life was inserted in place of one of the original lives and receipt of the renewal fine was acknowledged :—

Held, affirming the decision of the Supreme Court of Nova Scotia, that the words "renewable forever" in the habendum, taken in conjunction with the lessee's covenant to pay a fine for inserting a new life in place of any that should fall, conferred a right to renewal in perpetuity, notwithstanding there was no covenant by the lessor so to renew; that the indorsement was an operative instrument, though found in possession of the owner of the reversion, or at all events it was an admission by their predecessor in title binding on the defendants, and entitled the plaintiffs to a renewal for a new life so inserted, but the right to further renewal was gone, exact compliance with the requirements of the lease in the payment of the fines being essential, and the evidence having shewn that the original lessee was dead, and the proper assumption being that his brother, the third life, who was a married man in 1805, was also dead in 1884, even if the lease itself had not provided that death would be presumed in default of proof to the contrary :—

Held, per Gwynne, J., dissenting, that the term granted was for the joint lives of the three persons named, and ceased upon the falling of any one life without renewal as provided; and the fines not having been paid on the death of the lessee and his brother, there was a forfeiture which entitled the defendants to enter.

The person in possession pleaded that he was a purchaser for value without notice, and entitled to the benefit of the Registry Act, R. S. N. S., 5th ser., ch. 84 :—

Held, that the memorandum indorsed on the lease was not a deed within sec. 18 of the Act, nor a lease within sec. 25; that if a speculative purchaser having just such an estate as his conveyance gave him, the person in possession would not be within the protection of the Act; and that there was sufficient evidence of notice.

Semble, that sec. 25 of the Nova Scotia Act, R. S. N. S., 5th ser., ch. 84, applies only to leases for years. *Clinch* v. *Pernette*, 24 S. C. R. 385.

XI. Liability for Negligence.

Agreement to Repair—*Notice—Damages.*]—An express contract between a landlord and his tenant that the former is to repair the demised premises does not render him liable for an injury to the tenant arising from want of repair, although the tenant has notified him of the dis-repair.

In such a case the tenant should himself repair, at the expense of the landlord. *Brown* v. *Trustees of Toronto General Hospital*, 23 O. R. 599.

Covenant to Repair—*Non-repair During Lease and Subsequent Yearly Tenancy.*]—Where a lessee continues in possession as a

yearly tenant after the expiry of a lease containing a covenant by him to repair, a similar obligation will be implied; and the landlord, if ignorant of a defect arising from non-repair during the currency of the lease, and continuing during the subsequent tenancy, is not liable to a stranger for an injury caused by such neglect, happening during such subsequent tenancy. *Hett* v. *Janzen*, 22 O. R. 414.

Fall of Verandah—*Liability to Daughter of Tenant.*]—The lessee had covenanted with the lessor to keep the premises in repair, and his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building:—

Held, that the daughter had no right of action for damages on account of the accident against the lessor, nor could she be considered as standing in the position of a stranger. *Mehr* v. *McNab*, 24 O. R. 653.

Ice on Sidewalk—*Owner of Adjacent Building—Tenant.*]—In an action against a city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building, which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof were, at the instance of the municipality, made party defendants under sec. 531 of the Consolidated Municipal Act. The pipe in its condition at the time of the accident, discharging the water upon the sidewalk, had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of the building, or, if unoccupied, the owner, to remove ice from the front of a building abutting on a street within a limited time:—

Held, that the owner was, but the tenant was not, liable over to the municipality for damages recovered. *Organ* v. *City of Toronto*, 24 O. R. 318.

XII. Mesne Profits.

Res Judicata—*Previous Action.*]—*See Elliott* v. *Elliott*, 20 O. R. 134, *ante* 595.

XIII. Notice to Quit.

Effect of—*Estoppel—Repudiation of Tenancy.*]—*See Gilmour* v. *Magee*, 18 S.C.R. 579, *ante* 594.

XIV. Occupation Rent.

Recovery of—*Claim for Mesne Profits in Previous Action.*]—*See Elliott* v. *Elliott*, 20 O. R. 134, *ante* 595.

XV. Overholding Tenants.

Motion to Reverse Finding of County Judge—*Forum.*]—An application under sec. 6 of the Overholding Tenants' Act may be properly made to a Divisional Court; and

Semble, it is the only Court in which the motion can be made. *Re Scottish Ontario and Manitoba Land Company*, 21 O. R. 676.

See Gilmour v. *Magee*, 18 S.C.R. 579, *ante* 594; *Elliott* v. *Elliott*, 20 O. R. 134, *ante* 595; *Hett* v. *Janzen*, 22 O. R. 414, *ante* 600.

XVI. Pleading.

Action by Landlord against Tenant—*Breach of Covenants.*]—*See Talbot* v. *Poole*, 15 P. R. 99, *ante* 595.

Action by Tenant against Landlord—*Wrongful Entry.*]—*See Flett* v. *Way*, 14 P. R. 312, *ante* 215.

XVII. Re-entry.

See Coventry v. *McLean*, 22 O. R. 1, *ante* 598; *Coventry* v. *McLean*, 21 A. R. 176, *ante* 598; *Baldwin* v. *Wanzer*, 22 O. R. 612, *ante* 593; *Argles* v. *McMath*, 26 O. R. 224, *ante* 454.

XVIII. Renewal of Lease.

Covenant—*Option of Lessor—Second Term—Possession after Term—Specific Performance.*]—A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued, and it should be optional with the lessors either to pay for the same or to continue the lease for a further term of like duration. After the term expired the lessees remained in possession some years, when a new indenture was executed which recited the provisions of the original lease, and after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby, at the same rent and under the like covenants, conditions, and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired, the lessees continued in possession and paid rent for one year, when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender, and, after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option:—

Held, affirming the judgment of the Court below, 28 N. B. Reps. 1, Ritchie, C.J., and Taschereau, J., dissenting, that the lessors were not entitled to a decree for specific performance:—

Held, per Gwynne, J., that the provision in the second indenture granting a renewal under

the like covenants, conditions, and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease, which should have been expressed in an independent covenant.

Per Gwynne, J.—Assuming that the renewal clause was incorporated in the second indenture, the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could, the clause would operate to make the lease perpetual at the will of the lessors.

Per Gwynne and Patterson, JJ.—The option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument containing such clause; and if the second indenture was subject to renewal, the clause had no effect, as there were no buildings erected during the second term.

Per Gwynne, J.—The renewal clause was inoperative under the Statute of Frauds, which makes leases for three years and upwards, not in writing, to have the effect of estates at will only, and consequently there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors.

Per Ritchie, C.J., and Taschereau, J.—The occupation by the lessees, after the terms expired, must be held to have been under the lease, and to signify an intention on the part of the lessees to accept a renewal for a further term as the lease provided. *Sears* v. *City of St. John*, 18 S. C. R. 702.

Covenant—*Power of Executor of Lessor—Devolution of Estates Act.*]—Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew. *Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205.

See Jones v. *O'Keefe*, 26 O. R. 489, *ante* 596; *Clinch* v. *Pernette*, 24 S. C. R. 385, *ante* 599; *Re Watson's Trusts*, 21 O. R. 528, *post*, SETTLED ESTATES.

XIX. RENT.

Acceleration—*Execution—Distress—Severance of Reversion.*]—A condition in a lease that in case any writ of execution shall be issued against the goods of the lessee, the then current year's rent shall immediately become due and payable, and the term forfeited, is personal to the original lessor and lessee, and does not run with the land, and cannot be taken advantage of by the grantee of part of the reversion.

Osler, J. A., dissenting, was of opinion that the acceleration clause was a covenant and not a condition, and formed part of the covenant to pay rent, merely accelerating it in a certain event, and so passed on the severance of the reversion, enabling the grantee of part to distrain. *Mitchell* v. *McCauley*, 20 A. R. 272.

Acceleration—*Insolvency—Winding-up Act—Quebec Law.*]—There is nothing in sec. 56 of the Dominion Winding-up Act which alters or interferes with the *lex loci contractus* in the case of a claim.

Where a lease of property situate in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the lessor, on the insolvency of the lessee, and by the law of that Province (Civil Code, Art. 1092) on such insolvency the rent not yet exigible, by the terms of the lease, becomes so, a claim for the whole rent, taxes, etc., to the end of the term was, on the insolvency of the lessee company, allowed to the lessors in liquidation proceedings under the Dominion Act. *In re Harte and Ontario Express and Transportation Co.*, 22 O. R. 510.

Apportionment—*Prior and Subsequent Mortgagee—Eviction.*]—Where demised property is sold by a prior mortgagee under power of sale, and the lease is thereby determined, between two gale days, the rent is apportionable, and the tenant is liable to pay rent up to the day of such determination.

The defendant was tenant of certain land, subject to two prior mortgages created by his landlord. The plaintiff was a subsequent mortgagee who had given notice of his mortgage, and had required the defendant to pay the rent to him. Afterwards the land was sold by the prior mortgagees to a person who on the same day re-sold it to the defendant. The purchaser from the mortgagees claimed to be entitled to the rent:—

Held, that as to the rent which had accrued up to the date of the sale, the right of the plaintiff as mortgagee of the reversion was not affected by the sale: that the rent was apportionable; and that the plaintiff was entitled to recover. *Kinnear* v. *Aspden*, 19 A. R. 468.

Attachment of, as Debt—*Notice to Tenants to Pay Mortgagee.*]—*See Parker* v. *McIlwain*, 16 P. R. 555, 17 P. R. 84, *ante* 60.

Claim for Reduction—*Quebec Law—Lease of Telegraph Lines—Disturbance of Use—Trespass—Trouble de droit.*]—*Great North-Western Telegraph Co.* v. *Montreal Telegraph Co.*, 20 S. C. R. 170.

See Elliott v. *Elliott*, 20 O. R. 134, *ante* 595; *Coventry* v. *McLean*, 22 O. R. 1, *ante* 598; *Coventry* v. *McLean*, 21 A. R. 176, *ante* 598; *Denison* v. *Maitland*, 22 O. R. 166, *ante* 597; *McMullen* v. *Vannatto*, 24 O. R. 625, *ante* 598; *Brown* v. *Lennox*, 22 A. R. 442, *ante* 593; *Boulton* v. *Shea*, 22 S. C. R. 742, *ante* 599.

XX. SHORT FORMS ACT.

See Denison v. *Maitland*, 22 O. R. 166, *ante* 597; *Baldwin* v. *Wanzer*, 22 O. R. 612, *ante* 593; *Argles* v. *McMath*, 26 O. R. 224, 23 A. R. 44, *ante* 455; *Jones* v. *O'Keefe*, 26 O. R. 489, *ante* 596.

XXI. SUB-LEASE.

See Gilmour v. *Magee*, 18 S. C. R. 579, *ante* 594; *Baldwin* v. *Wanzer*, 22 O. R. 612, *ante* 593; *Seldon* v. *Buchannan*, 24 O. R. 349, *post* 605.

XXII. Surrender of Lease.

Acceptance—*Acts Relied On.*]—Acts relied on as shewing the acceptance by the landlord of the surrender of a lease and as affecting a surrender by operation of law must be such as are not consistent with the continuance of the term; and using the key left by the tenants at the landlords' office, putting up a notice that the premises are "to let," making some trifling repairs, and cleaning the premises, are ambiguous acts which are not sufficient for this purpose. *Ontario Industrial Loan and Investment Co.* v. *O'Dea*, 22 A. R. 349.

Sub-lease—*Whole or Part of Lands.*]—A lease to the defendant, dated 1st April, 1885, for ten years, at an annual rent of $120, payable quarterly in each year, contained a provision enabling the lessee to determine the lease by giving three months' notice in writing before 1st January in any year. The defendant for his own business only occupied part of the premises, and sub-leased the remainder. In November, 1891, the part sub-leased by the defendant being unoccupied, the defendant verbally notified the lessor that unless the premises were repaired he would leave to surrender. The lessor treated this as a valid notice under the lease, and after negotiations with the defendant it was agreed that the defendant should have the portion of the premises occupied by him at $24 a year, to take effect on 1st April following, but with a right to the lessor, should he sell, to cancel the same:—

Held, that what had taken place constituted a surrender in law of the whole of the premises, and not merely of the part not occupied by the defendant. *Seldon* v. *Buchanan*, 24 O. R. 349.

XXIII. Tenancy Created by Mortgage.

Demise to Mortgagor—*Construction—Rent Reserved—Intention.*]—A mortgage of real estate provided that the money secured thereby, $20,000, should be payable with interest at seven per cent. per annum as follows: $500 on 1st December, 1883; $500 on the first days of June and December in each of the four following years; and $15,500 on 1st June, 1888; and it contained the following provision: "And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso." The mortgage did not contain the statutory distress clause, or clause providing for possession by the mortgagor until default, and it was not executed by the mortgagees.

The mortgagor was in possession of part of the premises and his tenants of the remainder, and such possession continued after the mortgage was executed. The goods of the mortgagor having been seized under execution, the mortgagees claimed payment of a year's rent under the statute of Anne:—

Held, per Strong, Gwynne, and Patterson, JJ., (Ritchie, C.J., and Taschereau, J., dissenting), that the mortgage deed failed to create between the mortgagor and mortgagees the relation of landlord and tenant, so as to give the mortgagees the right to distrain for arrears of rent, under the provisions of 8 Anne ch. 14, as against an execution creditor of the mortgagor; because, even if the deed could operate as a lease, although not signed by the mortgagees, the rent reserved was so unreasonable and excessive as to shew conclusively that the parties could not have intended to create a tenancy, and that the arrangement was unreal and fictitious.

The right to impugn the validity of a lease between a mortgagor and mortgagees, on the ground that it is merely fictitious and colourable, is not to be confined to any particular class such as assignees in bankruptcy, but may be exercised wherever the interests of third parties may be involved.

Per Strong, J.—The execution of the deed by the mortgagor estopped him from disputing the tenancy, and the mortgagees were also estopped by their acceptance of their mortgagor as their tenant, evidenced by their accepting the deed, advancing their money upon the faith of it, and permitting the mortgagor to remain in possession. The mortgage deed, although executed by the mortgagor only, operated in any event to create a tenancy at will, at the same rental as that expressly reserved by the demise clause. Section 3 of 8 & 9 Vict. ch. 106. (R. S. O. ch. 100, sec. 8,) has not the effect of repealing the words of the Statute of Frauds which make the lease required by that statute to be in writing signed by the lessor so far effectual as to create a tenancy at will.

Per Gwynne and Patterson, JJ.—The mortgage deed, not having been signed by the mortgagees, failed to create even a tenancy at will.

Per Gwynne, J.—The form adopted for the demise clause is such that by the mortgagees executing the deed it would operate as a lease, and by their not executing it the clause would be simply inoperative.

Per Ritchie, C.J., and Taschereau, J.—The execution of the mortgage by the mortgagor and continuing in possession under it amounted to an attornment and the relation of landlord and tenant was created. The deed was intended to operate as an immediate lease with intent to give the mortgagees an additional remedy by distress, and was a *bonâ fide* contract for securing the payment of principal and interest, and, in the absence of any bankruptcy or insolvency laws, there was nothing to prevent the parties from making such a contract. *Hobbs* v. *Ontario Loan and Debenture Co.*, 18 S. C. R. 483.

LARCENY.

See Criminal Law, IV.

LEASE.

See LANDLORD AND TENANT.

LEASE FOR LIVES.

See LANDLORD AND TENANT, X.

LEAVE TO APPEAL.

See APPEAL, VI. — SUPREME COURT OF CANADA, XIV.

LEGACY.

See WILL, II.

LIBEL.

See COSTS, IV.—DEFAMATION.

LICENSE.

FOR SALE OF LIQUORS.—*See* INTOXICATING LIQUORS.

MUNICIPAL LICENSES.—*See* MUNICIPAL CORPORATIONS, XIV.

TIMBER LICENSES.—*See* CROWN LANDS.

TO MANUFACTURE.—*See* PATENT FOR INVENTION.

LICENSE COMMISSIONERS.

See INTOXICATING LIQUORS, III.

LICENSE INSPECTOR.

See INTOXICATING LIQUORS, II., III

LIEN.

See BANKS, III.—SOLICITOR, IV.

I. ARTISAN'S LIEN.

Brick-maker.]—A brick-maker who makes bricks for another person in a brickyard belonging to that person, and has possession of the brickyard while engaged in making the bricks, is entitled to a lien upon them as against an execution creditor or chattel mortgagee of the owner.

Judgment of Boyd, C., 25 O. R. 194, affirmed *Roberts* v. *Bank of Toronto*, 21 A. R. 629.

II. BUILDER'S PRIVILEGE.

Expert—*Duties of*—*Procès-verbal*—*Valuation.*]—It is not necessary for an expert, when appointed under Art. 2013, C. C., to secure a builder's privilege on an immovable, to give notice of his proceedings to the proprietor's creditors, such proceedings not being regulated by Arts. 322 *et seq.*, C. C. P.

2. There was evidence in this case to support the finding of fact of the Courts below, that the second *procès-verbal* or official statement, required to be made by the expert under Art. 2013, had been made within six months of the completion of the builder's works.

3. It was sufficient for the expert to state in his second *procès-verbal*, made within the six months, that the works described had been executed, and that such works had given to the immovable the additional value fixed by him. The words "exécutés suivant les règles de l'art" are not *strictissimi juris.*.

4. If an expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity, but will only entitle the interested parties to ask for a reduction of the expert's valuation. *Dufresne* v. *Préfontaine*, *Vallée* v. *Préfontaine*, 21 S. C. R. 607.

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Vallée v. *Préfontaine*.

III. MECHANICS' LIENS.

[See 59 Vict. ch. 35 (O.), repealing R. S. O. ch. 126; 53 Vict. ch. 36; and 56 Vict. ch. 24; and all amendments thereto.]

1. *Action.*

Mortgage Account — *Inferior Courts.*] — County Courts and Division Courts cannot entertain *an action* in the nature of an action of account by a lien-holder against a mortgagee who has sold the land in question under a mortgage prior to the lien, though there may be wider powers by way of summary application. *Hutson* v. *Valliers*, 19 A. R. 154.

2. *Amendment.*

See Bickerton v. *Dakin*, 20 O. R. 192, 695, *post* 617; *Orr* v. *Durie*, 22 O. R. 430, *post* 616; *Jacobs* v. *Robinson*, 16 P. R. 1, *post* 617.

3. *Claim of Lien.*

Form—*Address of Lien-holder.*]—The name of the town and county in which a lien-holder resides is a sufficient address under sec. 11 of 56 Vict. ch. 24 (O.). *Dufton* v. *Horning*, 26 O. R. 252.

Form—*Name and Residence — Demurrer — Costs.*]—The omission from the registered claim of lien of the name and residence of the person for whom or upon whose credit the work is done or materials furnished, provided for by sec. 16 of the Mechanics' Lien Act, R. S. O. ch. 126, is fatal to the lien.

The objection can be taken by a contractor as against a sub-contractor; and, as in this action it might have been raised by a demurrer, the costs of defence were given as of a successful demurrer, to be set off against the costs of a judgment on the pleadings for an admitted debt. *Wallis* v. *Skain*, 21 O. R. 532.

Partnership — *Dissolution* — "*Claimant*" — "*Person.*"]—A claim of lien under the Mechanics' Lien Act was registered and proceedings to enforce it were taken in the name of a firm which had been dissolved, and one of the members of which had died prior to the registration. The materials for which the lien was claimed were, however, all furnished by the firm before the dissolution or death, and it was provided that the dissolution was not to affect this and other engagements.

Section 16 of R. S. O. ch. 126, under which the lien was registered, speaks of the "claimant" of the lien, and sec. 19 of the "person entitled to the lien." The Interpretation Act, R. S. O. ch. 1, sec. 8 (13), shews what the word "person" shall include, and does not mention a "firm" or "partnership:"—

Held, that the lien attached on the land, and was validly continued; the difficulty as to the word "person" was overcome by the use of the alternative word "claimant," which extended to a partnership using the firm name in the registration of the lien. *Bickerton* v. *Dakin*, 20 O. R. 192, 695.

4. *Construction of Contract.*

Impossible Date.]—Where, under a building contract work was to be completed by "November 31st" under penalty of damages:—

Held, that this must be construed to mean November 30th. *McBean* v. *Kinnear*, 23 O. R. 313.

5. *Contract Price.*

Deductions — *Bad Work—Acceptance.*]—In an action to enforce a Mechanics' Lien, the contest was as to whether anything was due to the contractor.

The work in question was the building of a church. The last of the work done was the pews, and as they were being put in objection was made by the architect to their material and workmanship:—

Held, that the occupying of the church with the pews objected to in it was not an acceptance of the work:—

Held, also, that a reduction of the contract price by any amount equal to the difference in value between the bad material and that which should have been used, was not an adequate measure of the set-off to which the proprietors were entitled. *Wood* v. *Stringer*, 20 O. R. 148.

Deductions — *Delay — Damages.*]—Where a contract provided that upon non-completion by a fixed date a contractor was to pay or "allow" ten dollars a day until completion:—

Held, that this authorized a deduction as liquidated damages of the amount so "allowed" from the contract price, even as against lien-holders claiming adversely to the contractor, other than those having liens for wages, where such wages liens were less in the aggregate than ten per cent. of the contract price.

The amount required to satisfy the wages lien should be deducted from the contract price remaining unpaid after allowing for the reduction by reason of the non-completion, and cannot be marshalled in favour of a material man by being thrown upon the part of the contract price representing such reduction. *McBean* v. *Kinnear*, 23 O. R. 313.

See Reggin v. *Manes*, 22 O. R. 443, *post* 614; *In re Scar and Woods*, 23 O. R. 474, *post* 614.

6. *Costs.*

Parties—*Scale of Costs.*]—In an action by lien-holders to enforce their lien under the Mechanics' Lien Act, it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lien-holders; but this can be done where they are added as defendants in the Master's office.

The amount due from the owner to the contractor should be paid into Court by the former, less his costs, which should be taxed as to a stake-holder watching the case.

The costs of lien-holders establishing their liens should be paid as a first charge on the fund.

The costs of lien-holders subsequent to judgment of reference should be taxed upon the scale appropriate to the amount found due to each. *Hall* v. *Hogg*, 14 P. R. 45.

Payment into Court—*Subsequent Order for Costs—Set-off.*]—In a mechanics' lien action a certain sum was found due from the owner to the contractor, and the latter was found indebted to other lien-holders. Payment of the former sum into Court was ordered and made, the amount, however, being insufficient to pay the claims of lien-holders against the contractor. The latter then appealed unsuccessfully and was ordered to pay the costs of appeal to the owner, who claimed that these costs should be paid out of the moneys paid by her into Court :—

Held, that by the payment into Court for distribution she was discharged from her liability and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in. *Patten* v. *Laidlaw*, 26 O. R. 189.

See Wallis v. *Skain*, 21 O. R. 532, *ante* 609.

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7. *Extras.*

Written Agreement.]—Where the contract provided that no extras were to be allowed unless expressly ordered, and payments for the same expressly agreed for in writing by the proprietors or architects :—

Held, that extras could not be allowed unless a writing was proved. *Wood* v. *Stringer*, 20 O. R. 148.

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8. *Increased Value.*

See Cook v. *Belshaw*, 23 O. R. 545, *post* 612; *Dufton* v. *Horning*, 26 O. R. 252, *post* 612.

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9. *Material Men.*

See Hall v. *Hogg*, 20 O. R. 13, *post* 615; *Wood* v. *Stringer*, 20 O. R. 148, *post* 613; *McBean* v. *Kinnear*, 23 O. R. 313, *post* 613; *Morris* v. *Tharle*, 24 O. R. 159, *post* 615.

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10. *Mortgaged Property.*

Inferior Courts—*Account.*]—Section 23 of R. S. O. ch. 126, which allows proceedings to recover the amount of a mechanic's lien to be taken under certain circumstances in County Courts and Division Courts, applies only to actions in which the party seeking to enforce his lien is suing in the ordinary way to obtain judgment and execution. Those Courts cannot entertain *an action* in the nature of an action of account by a lien-holder against a mortgagee who has sold the land in question under mortgage prior to the lien, though there may be wider powers by way of summary application. *Hutson* v. *Valliers*, 19 A. R. 154.

Priorities—*Advances on Progress Certificates—Registry Act.*]—"Prior mortgage," in sec 3, sub-sec. 3, of the Mechanics' Lien Act, means one existing in fact before the lien arises, though not necessarily prior in point of registration.

Under a mortgage, advances were to be made from time to time as buildings progressed. Part of the work was done, and the mortgage was registered, the buildings completed, and the further advances made, before a lien was registered, and without actual notice of it :

Held, that the mortgage had priority over the lien both as to prior and subsequent work, and as to the latter each further advance under the mortgage attracted to itself the advantage of the Registry Act so as to gain priority over the concurrent unregistered lien.

The increased value in such a case is not a benefit added to the pre-existing mortgage, but the periodical increase of value calls forth the periodical payments. *Cook* v. *Belshaw*, 23 O. R. 545.

Priorities—*Increased Value.*]—Under the Act to Simplify the Procedure for Enforcing Mechanics' Liens, 53 Vict. ch. 37 (O.), the remedy of a lien-holder as against a mortgagee is confined to the increased value provided by sec. 5, sub-sec. 3, of R. S. O. ch. 126, and he cannot question the priority of the mortgage. *Dufton* v. *Horning*, 26 O. R. 252.

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11. *Owners.*

Contract of Purchase—*Statute of Frauds—Registry Laws.*]—An agreement to purchase property, under which buildings are to be erected thereon by the seller, and which has been acted on by the parties, although not binding under the Statute of Frauds if pleaded, constitutes the person agreeing to buy an "owner" within sub-sec. 3 of sec. 2 of the Mechanics' Lien Act :—

Semble, if not an owner under such agreement, then, by virtue of the Registry Act, no unregistered lien of which he had not notice prior to the registry of the deed to him could prevail against him. *Reggin* v. *Manes*, 22 O. R. 443.

Contract of Purchase—*Unpaid Vendor—Consent.*]—A verbal agreement, without any condition as to forfeiture on non-payment of the purchase money, was entered into for the purchase of certain lands, it being understood that the purchaser would proceed to erect buildings thereon, which he accordingly did, procuring materials and work from the plaintiff and others, and then became insolvent without having paid anything to the vendor :—

Held, that, there having been sufficient acts of part performance, the purchaser had become the owner in equity of the lands, and, the plaintiff's lien attaching to his interest, the vendor could only after that hold the lands subject to the burden of the lien.

Before the persons claiming liens furnished work and material, they were aware that the purchaser was in difficulties, but the vendor assured them that they would be paid, and

urged them to go on with the work, although it was not contended that he actually guaranteed payment himself:—

Held, that the work was done and the material furnished with the "privity and consent" of the vendor within the meaning of sub-sec. 3 of sec. 2 of the Mechanics' Lien Act, R. S. O. ch. 126. *Blight* v. *Ray*, 23 O. R. 415.

See Jennings v. *Willis*, 22 O. R. 439, *post* 611; *McBean* v. *Kinnear*, 23 O. R. 313, *post* 613.

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12. *Parties.*

Lien-holders—*Master's Office.*]—In an action by lien-holders to enforce their lien under the Mechanics' Lien Act, it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lien-holders; but this can be done when they are added as defendants in the Master's office. *Hall* v. *Hogg*, 14 P. R. 45.

Registered Owner—*Persons Liable.*]—In an action to enforce a mechanics' lien, brought by material men against the contractor and the registered owner, the contest was as to whether anything was due to the contractor, the registered owner not being liable on the contract:—

Held, that the amount due to the contractor could not be ascertained without the persons liable on the contract being brought before the Court. *Wood* v. *Stringer*, 20 O. R. 118.

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13. *Payment.*

Appropriation by Lien-holder—*Notice to Owner.*]—After proceedings commenced to enforce a mechanics' lien, a sub-contractor and material man, who finds that he is not able to support his claim to a lien as to certain items in his account, cannot, to the prejudice of the owner, agree with the contractor to appropriate moneys received from the latter and for which he had given credit, to those items.

A material man giving notice to the owner, under R. S. O. ch. 126, sec. 11, of an unpaid account against the contractor, is not thereby entitled to dispute the validity of payments afterwards made by the owner to persons having claims for wages, or to persons furnishing materials to be used on the building, who would have refused to furnish the same if he had not, as he did, assumed a personal liability to them for the value thereof.

And this also was held to apply to a payment made by the owner by cheque payable to the order of the contractor, but for the specific purpose of the latter indorsing the same over, as he did, to certain persons who refused to supply material unless paid for, and also to a payment made for insurance which the contractor ought to have paid.

These sums were not payable to the contractor by virtue of any lien held by him as required by sec. 11, but were virtually payments to sub-contractors with him, who thereupon furnished the particular material for which the payments were made.

But *aliter* as to a payment made to an assignee of the contractor who had no lien or claim on the money coming from the owner except as such assignee, and this although the assignment from the contractor was prior in date to the giving of the notice under sec. 11.

Payments made by an owner to a contractor after notice under R. S. O. ch. 126, sec. 9, are only invalid when, if not made, they would have been liable for the satisfaction of the sub-contractor's lien or claim. *McBean* v. *Kinnear*, 23 O. R. 313.

Contract Price—*Abandonment of Contract — Percentage — Wages-earners.*]—The words used in secs. 7 and 9 of the Mechanics' Lien Act, R. S. O. ch. 126, as amended by 53 Vict. ch. 38, "the price to be paid to the contractor," and other like expressions in the same sections, all mean the original contract price, and not that part of the contract price to the extent of which the contractor has done work or supplied materials.

And where the owner has, in good faith and without notice of any lien, paid the contractor the full value of the work done and materials furnished, and such value does not exceed the statutory percentage of the contract price, and the contractor has abandoned his contract, and no money is payable to him in respect thereof, no lien can exist or be enforced against the owner in favour of any one.

Wages-earners are not, by virtue of sec. 9, sub-sec. 3, and sec. 10, as amended, entitled to the percentage of the contract price necessary to be retained, if it never becomes payable by the owner to the contractor. *Gothard* v. *Coulson*, 10 A. R. 1, followed. *Re Cornish*, 6 O. R. 259, not followed. *In re Sear and Woods*, 23 O. R. 474.

Contract Price—*Deduction—Percentage.*]—A payment, in excess of the contract price, made to complete a building, owing to the failure of the contractor, should be deducted from the contract price, and the ten per cent., under sec. 9 of the Mechanics' Lien Act, is to be calculated on the balance of the contract price after such deduction. *Re Cornish*, 6 O. R. 259, followed. *Reggin* v. *Manes*, 22 O. R. 443.

Payment into Court.]—Amount due from owner to contractor to be paid into Court, less costs. *Hall* v. *Hogg*, 14 P. R. 45.

Payment into Court.]—Where amount so paid in, owner discharged from liability, and money not available for subsequent costs ordered to be paid by contractor to owner. *Patten* v. *Laidlaw*, 26 O. R. 189.

Promissory Note—*Owner.*]—The word "payment" in sec. 9 of the Mechanics' Lien Act, R. S. O. ch. 126, covers the giving of a bill or promissory note; or payments made by the owner at the instance or by the direction of the contractor to those who supply materials to him; or tri-partite arrangements by which an order is given by the contractor on the owner for the payment of the material man out of the fund, which, when accepted, fixes the owner with direct liability to pay for the materials. *Jennings* v. *Willis*, 22 O. R. 439.

Promissory Note—*Suspension of Lien.*]—E. supplied a contractor with materials for building a house for W. and took the contractor's note for $1,100 at thirty days for his account. The note was discounted but dishonoured at maturity, and E. took it up and registered a mechanics' lien against the property of W. While the note was running, W. paid the contractor $500, and afterwards, but when was uncertain, $600 more. In an action by E. to enforce his lien:—

Held, affirming the judgment of the Court below, that, as the lien was suspended during the currency of the note, it was absolutely gone, there being nothing in the British Columbia Lien Act to shew that it could be abandoned for a time only, and this result would follow even if part of the amount only had been paid to the contractor. *Edmonds* v. *Tiernan*, 21 S. C. R. 406.

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14. *Priorities.*

Mortgage—*Increased Value.*]—*See Cook* v. *Belshaw*, 23 O. R. 545, *ante* 612; *Dufton* v. *Horning*, 26 O. R. 252, *ante* 612.

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15. *Proceedings to Realize.*

Defence—*Counterclaim.*]—A defence filed by a lien-holder within the period mentioned in sec. 23 of R. S. O. ch. 126, in an action by the owner of the property to set aside the lien, is not a "proceeding to realize the claim" within the meaning of that section, though a counterclaim, if properly framed and a certificate thereof duly registered, may be. *McNamara* v. *Kirkland*, 18 A. R. 271.

Proceedings by other Persons.]—Persons who have registered liens, but have taken no proceedings to realize them, cannot have the benefit of proceedings taken by other persons to enforce liens against the same lands, where the liens of such other persons are not enforceable. *In re Sear and Woods*, 23 O. R. 474.

See Hudson v. *Valliers*, 19 A. R. 154, *ante* 611.

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16. *Registration.*

Material—*Time.*]—Merchants supplied materials to the contractor for certain buildings and claimed a lien under the Mechanics' Lien Act in respect thereof. There was no contract for the placing of these materials upon the property; the last of them were bought by the contractor from the merchants on the 22nd November, and were by him placed in the building on the 23rd November:—

Held, that the time for registering the claim of lien, under sec. 21 of R. S. O. ch. 126, began to run from the 22nd November. *Hall* v. *Hogg*, 20 O. R. 13.

Material—*Time.*]—Where there is a prevenient general arrangement, although not binding, between a contractor and a supplier of building material, whereby the former undertakes to procure from the latter all the material required for a particular building contract, so that, although the prices and quantities are not defined until orders are given and deliveries made, the entire transaction, although it may extend over some months, is linked together by the preliminary understanding on both sides, a lien for all material so supplied is in time if registered within thirty days of the furnishing of the last item. *Morris* v. *Thurle*, 24 O. R. 159.

Proceeding to Realize—*Counterclaim.*]—A defence filed by a lien-holder within the period mentioned in sec. 23 of R. S. O. ch. 126, in an action by the owner of the property to set aside the lien, is not a "proceeding to realize the claim" within the meaning of that section, though a counterclaim, if properly framed and a certificate thereof duly registered, may be.

Per Osler, J. A.—Observations as to the effect of registration of the lien. *McVean* v. *Tiffin*, 13 A. R. 1, considered.

Per Maclennan, J. A.—The defendant in this action having commenced an independent action and registered his lien within the prescribed period, his lien was preserved, and the registration of the certificate in the other action enured to his benefit in the present one, though after judgment establishing his lien he abandoned the other proceedings. *McNamara* v. *Kirkland*, 18 A. R. 271.

Work—*Alterations to, after Completion—Time.*]—A lien was claimed for certain steel work done on a building which had been completed by 30th September, 1893, with the exception of the cutting down of certain bolts which it was afterwards found projected out of the walls too far, and which was done between 19th October and 25th October, 1893. The lien was registered on 17th November, 1893:—

Held, upon the authority of *Neill* v. *Carroll*, which is incorrectly reported in 28 Gr. 339, that the lien was registered too late, since the time should have been computed from 30th September, and was not extended by the alterations to the bolts. *Summers* v. *Beard*, 240, R. 641.

See Bickerton v. *Dakin*, 20 O. R. 192, 695, *ante* 609; *Wallis* v. *Skain*, 21 O. R. 532, *ante* 609; *Reggin* v. *Manes*, 22 O. R. 443, *ante* 614; *Cook* v. *Belshaw*, 23 O. R. 545, *ante* 612; *Dufton* v. *Horning*, 26 O. R. 252, *ante* 612.

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17. *Summary Procedure.*

Amendment of Claim—*Jurisdiction of Master—Extension of Time.*]—The Master or official referee in a proceeding under 53 Vict. ch. 37 (O.), an Act to simplify the procedure for enforcing mechanics' liens, should be judicially satisfied that the facts stated before him are sufficient to manifest a valid claim; but if any one element is omitted, he has general power of permitting an amendment if the facts and circumstances warrant it, *e.g.*, as in this case, to permit an amendment of the claim shewing when the work was done or materials furnished.

The distinction between the requisites of a claim under the amending Act and one under

sec. 16 of the original Act, R. S. O. ch. 126, pointed out.

A Master or referee has power to extend the time for prosecuting the proceedings where the certificate and appointment have not been served within the time named in sec. 6 of the Act. *Orr* v. *Davie*, 22 O. R. 430.

Appeal from Report—*Court or Chambers.*]—In summary proceedings under the Act to simplify the procedure for enforcing mechanics' liens, 53 Viet. ch. 37 (O.), the appeal to a Judge in Chambers under sec. 35 is confined to orders and certificates; the final report under sec. 13 is not included in the words "orders and certificates;" and the appeal from such a report should be to a Judge in Court under Rule 850. *Wagner* v. *O'Donnell*, 14 P. R. 254.

County Court—*Jurisdiction of Local Master—Amendment—Costs.*]—A Master of the High Court of Justice has no jurisdiction as such to entertain a summary proceeding under 53 Viet. c. 37 to enforce a mechanic's lien, launched in a County Court.

Secord v. *Trumm*, 20 O. R. 174, followed.

Nor can he confer jurisdiction upon himself by subsequently directing an amendment of the affidavits and papers filed, by substituting the High Court for the County Court.

An appeal from an order so amending was allowed, but without costs, as the objection was not taken *in limine*. *Jacobs* v. *Robinson*, 16 P. R. 1.

High Court—*Joining Liens — Statement of Claim—Amendment.*]—Under the Act to simplify the procedure for enforcing mechanics' liens, 53 Viet. ch. 37, it is competent to join liens so as to give jurisdiction to the High Court, though each apart may be within the competence of an inferior Court.

The plaintiffs, in proceeding under 53 Viet. ch. 37 to enforce their lien, filed with a Master, as the "statement of claim" mentioned in sec. 2, a copy of the claim of lien and affidavit registered, verified by an affidavit, and the Master thereupon issued his certificate:—

Held, that if the "statement of claim" filed was not in proper form, inasmuch as it contained all the facts required for compliance with the Act, an amendment *nunc pro tunc* should be allowed. *Bickerton* v. *Dakin*, 20 O. R. 192, 695.

High Court and Inferior Courts—*Application of Statute.*]—Notwithstanding the apparently unlimited provisions of sec. 1 of 53 Viet. ch. 37 (O.), entitled an Act to simplify the procedure for enforcing mechanics' liens, the intention of the Act is to simplify such procedure in the High Court only, leaving the procedure provided for in County Courts and Division Courts unaffected by the passing of the Act. *Secord* v. *Trumm*, 20 O. R. 174.

Mortgage—*Priorities.*]—Under the Act to simplify the procedure for enforcing mechanics' liens, 53 Viet. ch. 37 (O.), the remedy of a lien-holder as against a mortgagee is confined to the increased value provided for by sec. 5, sub-sec. 3, of R. S. O. ch. 126, and he cannot question the priority of the mortgage. *Dufton* v. *Horning*, 26 O. R. 252.

See Hutson v. *Valliers*, 19 A. R. 154, *ante* 611.

IS. *Time.*

See Hall v. *Hogg*, 20 O. R. 13, *ante* 615; *Orr* v. *Davie*, 22 O. R. 430, *ante* 616; *McBean* v. *Kinnear*, 23 O. R. 313, *ante* 610; *Morris* v. *Tharle*, 24 O. R. 159, *ante* 615; *Summers* v. *Beard*, 24 O. R. 641, *ante* 616.

19. *Vendor and Purchaser.*

Agreement to Purchase—"*Owner.*"]—*See Reggin* v. *Manes*, 22 O. R. 443, *ante* 614.

Agreement to Purchase—*Work Done with Privity of Vendor.*]—*See Blight* v. *Ray*, 23 O. R. 415, *ante* 612.

20. *Wages-earners.*

Payments to — *Dispute.*] — *See McBean* v. *Kinnear*, 23 O. R. 313, *ante* 614.

Payments to—*Percentage.*]—*See In re Sear and Woods*, 23 O. R. 474, *ante* 614.

IV. VENDOR'S LIEN.

Contract Price—*Extra Work.*]—The owner of certain land agreed with a company to build a factory thereon, which, when completed, was to be conveyed to the company in return for a certain number of shares.

During the progress of the building certain extra work for the company, agreed to be paid for in cash, became necessary, and was begun before but not completed until after the execution of the conveyance to the company:—

Held, that the owner had no vendor's lien for the value of the extra work. *Re Toronto Drop Forge Co.* (*Limited*), 24 O. R. 191.

See SALE OF GOODS.

LIEN FOR WAGES.

See SHIP, II.

LIEN NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, II.

LIEUTENANT-GOVERNOR.

See CONSTITUTIONAL LAW, II.

LIFE ASSURANCE.

See INSURANCE, V.

LIFE LEASE.

See LANDLORD AND TENANT, X.

LIMITATION OF ACTIONS.

I. CLAIMS BY AND AGAINST THE CROWN

Negligence of Servant—*Liability.*] Held, that even assuming that under the common law of the Province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable for an injury caused by negligence of its servants, such injury having been received more than a year before the filing of the petition, the right of action was prescribed under Arts. 2262 and 2267, C.C.

Per Patterson, J. The Crown is made liable for damages caused by the negligence of its servants operating Government railways by 44 Vict. ch. 25 (R.S.C. ch. 38), but, as the petition of right in this case was filed after the passing of 50 & 51 Vict. ch. 16, the claimant became subject to the laws relating to prescription in the Province of Quebec, and his action was prescribed. *The Queen* v. *Martin*, 20 S. C. R. 240.

Revenue—*Customs Duty.*] The additional duty of fifty per cent. on the true duty, payable for undervaluation under sec. 102 of the Customs Act, 1883, is a debt due to Her Majesty which is not barred by the three years' prescription contained in sec. 207, but may be recovered at any time in a Court of competent jurisdiction. *Vacuum Oil Co.* v. *The Queen*, 2 Ex. C. R. 234.

Tierce-Opposition to a Judgment—*Interest of Opposant—Intervention—Sales of Litigious Rights—Judgment.*] P. having filed a *tierce-opposition* to a judgment obtained by the Attorney-General for the Province of Quebec in 1884, in a suit commenced by information in 1790, against the succession of one M. P., in order to have the judgment set aside on the ground that it declared escheated to the Crown a part of the Seigniory of Grendines, of which he (P.) had been in possession for a great number of years, and which judgment it was alleged had been obtained illegally and by fraud and collusion, one M., an advocate, who had purchased all the rights of the Crown in the said succession, intervened, and asked for the dismissal of the *tierce-opposition*. The Attorney-General and the curator to the succession of M. P., the only parties to the judgment sought to be set aside, in answer to P.'s *tierce-opposition* merely appeared and declared that "*ils s'en rapportent à justice.*" Upon the issues being joined on the *tierce-opposition* and on the intervention and evidence taken, the Superior Court dismissed M.'s intervention and maintained P.'s *tierce-opposition*. On appeal to the Court of Queen's Bench by the Crown and M. jointly, this judgment was reversed, and P.'s *tierce-opposition* was dismissed. On appeal to the Supreme Court of Canada:—

Held, reversing the judgment of the Court below:—

1. That M. had no *locus standi* to intervene, the sale to him of the Crown's rights being void, (*a*) because it was a sale of litigious rights to an advocate prohibited by Arts. 1485 and 1583, C. C., and therefore null under Arts. 14 and 990, C. C.; (*b*) because it was tainted with champerty: Arts. 14, 989, 990, C. C.; (*c*) because M. admitted he had no interest in the case: Art. 154, C. P. C.

2. That P., being in possession of the property declared escheated to the Crown in a proceed-

ing to which he was not a party, had a sufficient interest, under the circumstances, in the case to file a *tierce-opposition*, and that the judgment of 1884 should be set aside because, *inter alia*, (*a*) it was obtained by fraud and collusion; (*b*) the action being prescribed in 1884: Arts. 2216, 2242, 2265, C. C.: P. under Art. 2187 had the right to avail himself of this prescription.

Fournier, J., dissented on the ground that P. not having alleged or shewn a right superior to that of the Crown, his *tierce-opposition* should be dismissed. *Price* v. *Mercier*, 18 S. C. R. 363.

See Labrador Co. v. *The Queen*, [1893] A. C. 104, *post* 622; *Martial* v. *The Queen*, 3 Ex. C. R. 118, *ante* 300.

II. Claims to Realty.

1. *Acts of Ownership.*

Tenancy—*Taxes — Entry — Vacant Possession.*]—In 1857 or 1858 J. entered upon the land in question in this action as tenant to the true owners, upon the terms that he should pay the taxes, and he cultivated the land during his occupation. In the autumn of 1864 he gave up the place to the plaintiff, who paid him something for improvements; and in the spring of 1865 the plaintiff began to work upon it, living upon and occupying an adjoining lot of land, separated by a fence. The plaintiff disclaimed any knowledge of J.'s tenancy, and alleged that he entered as a purchaser of J.'s rights as a squatter, with the intention of acquiring a title by possession. In 1868 the true owners pulled down an old fence and put up a new one upon part of the land in question. In 1877 the plaintiff executed a writing under seal, whereby he agreed to lease the land from the true owners, and to pay as rent the taxes thereon and to give up possession when requested. From the time the plaintiff bought out J. till 1884, when he ceased to use or occupy the land, he grew crops and vegetables upon it in the summer and did nothing at all in the winter except draw manure upon it, which he spread in the spring:—

Held, following *Finch* v. *Gilray*, 16 A. R. 484, that the mere fact that the plaintiff paid the taxes was not sufficient to keep the right of the owners alive against him: but what was done by the owners in 1868 was an entry upon the land in the capacity of owners, an assertion of their rights as such, and a resumption of possession for the time being, before the statute then in force had given a title to the plaintiff, and it furnished a new starting point; and, farther, that what the plaintiff did upon the land did not shew such a possession as entitled him to assert that he had acquired a title as against the true owners.

The acts done in the winter did not constitute an occupation of the property to the exclusion of the rights of the true owners, but were mere acts of trespass, covering necessarily but a very short portion of the winter; and, as the possession must be taken to have been vacant for the remainder of it, the right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken again in the spring by the plaintiff. *Coffin* v. *North American Land Co.*, 21 O. R. 80.

See Howard v. *O'Donohoe*, 18 A. R. 529, 19 S. C. R. 341, *post* 628; *Horton* v. *Casey*, 22 S. C. R. 739, *post* 622; *Parks* v. *Cahoon*, 23 S. C. R. 92, *post* 626.

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2. *As Against the Crown.*

Title—*Seigneurie.*]—Held, in an action of ejectment by the Crown, with regard to the claim of the company, defendants, to hold the whole of the land in suit by prescription and immemorial possession, that inasmuch as the company had disclosed the true root of its title, the law of prescription did not apply. *Labrador Co.* v. *The Queen*, [1893] A. C. 104.

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3. *Boundaries.*

Evidence—*Acts of Ownership.*]—Actions for trespass to land, defended on the ground of want of title in the plaintiffs and title by possession in the defendant. At the trial evidence was given on behalf of the plaintiffs of a survey of their land and the defendant's land adjoining, made in 1869 by one B., in which, as he reported to the Crown Lands Department, he had made a mistake, and which he corrected by moving the posts he had planted as the line was traced. The defendant contended that the line as first run by B. was the true line. As to possession, the evidence was that the defendant had cut timber on the land in dispute for many years, and also tapped maple trees for sugar, but had not fenced the land until some six or seven years before action. The trial Judge found that the plaintiffs had respectively proved title to their lands, and that the acts of ownership shewn by the defendant were mere acts of trespass, committed either wilfully or in ignorance as to boundaries, and not such as would enable his possession to ripen into a title. His decision was affirmed by the Court of Appeal for Ontario and by the Supreme Court of Canada. *Horton* v. *Casey*, *Horton* v. *Humphries*, 22 S. C. R. 739.

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4. *Commencement of Statute.*

See McLure v. *Black*, 20 O. R. 70, *post* 623; *Kent* v. *Kent*, 20 O. R. 158, 445, 19 A. R. 352, *post* 628; *Hill* v. *Ashbridge*, 20 A. R. 44, *post* 629; *Coffin* v. *North American Land Co.*, 21 O. R. 80, *ante* 621.

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5. *Dower.*

Judgment—*Will.*]—In an action by a devisee to establish a destroyed will devising real estate, to which the plaintiff in this action, the widow of the testator, was a defendant, she, although she pleaded to the action, did not claim to be entitled to or to recover her dower in the land, of which the action also sought to deprive her, and a decree was made declaring that the de-

visee, one of the defendants in this action, was entitled to the land in fee simple, subject to the dower of the plaintiff:—

Held, that the decree did not prevent the running of sec. 25 of the Real Property Limitation Act, R. S. O. ch. 111, so as to bar the remedy of the plaintiff. *Cope* v. *Cope*, 26 O. R. 441.

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6. *Easements.*

Interruption —*Occupation.*]—The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner. *Innes* v. *Ferguson*, 21 A. R. 323.

Affirmed by the Supreme Court of Canada. *Ferguson* v. *Innes*, 24 S. C. R. 703.

Water Pipes—*Railway.*]—Nearly forty years before the commencement of the action, the predecessors in title of the defendants laid pipes for conveying water along the railway line of the plaintiffs' predecessors, using them for such purpose almost continuously up to the time the action was brought:—

Held, that the defendants, not having used and enjoyed their easement for forty years, had not acquired a title thereto by prescription under R. S. O. ch. 111, sec. 35. *Canada Southern R. W. Co.* v. *Town of Niagara Falls*, 22 O. R. 41.

Water Rights.]—*See Ellis* v. *Clemens*, 21 O. R. 227, 22 O. R. 216.

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7. *Entry or Claim.*

Mortgage—*Vacant Lands.*]—*See Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11, *post* 626.

Tenancy—*Vacant Possession.*]—*See Coffin* v. *North American Land Co.*, 21 O. R. 80, *ante* 621.

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8. *Fencing.*

Boundaries — *Evidence.*] — *See Horton* v. *Casey*, 22 S. C. R. 739, *ante* 622.

Possession — *Trespass—State of Nature.*]—*See Stovel* v. *Gregory*, 21 A. R. 137, *post* 631.

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9. *Fraud.*

Crown Patent — *Locatee Receipt.*] — One through whom the plaintiff claimed obtained in 1855 from the commissioner of crown lands a receipt on sale of a certain lot of land. In 1868 B., in whose possession this receipt was, handed it back to the crown lands office, and by means of fraud procured his own name to be substituted as purchaser in the books of the department; and he and those claiming under him, including the defendant, had remained in possession of the lot ever since. In 1872 the plaintiff, having learned of the imposition, applied to the department for redress. This application was pending and undisposed of by the commissioner till 14th March, 1889, when it was ordered that the patent should issue to the defendant, but three months were allowed to the plaintiff to take proceedings in Court to establish his title; and within that time the plaintiff commenced this action for a declaration as to his right to the land:—

Held, affirming the decision of Ferguson, J., that the plaintiff's right of action was not barred by any statute of limitation.

Per Boyd, C.—The case might be likened to a matter litigated in the proper forum wherein no decision is given till after the lapse of years:—

Held, per Ferguson, J., (Robertson, J., dissenting), that even if the Statute of Limitations did commence to run against those under whom the plaintiff claimed, it ceased to do so on rescission of the sale and the substitution of B.'s name in 1868, because then all right to bring an action or make an entry on their part ceased. *McLure* v. *Black*, 20 O. R. 70.

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10. *Interruption of Statute.*

See McLure v. *Black*, 20 O. R. 70, *ante* 623; *Innes* v. *Ferguson*, 21 A. R. 323, 24 S. C. R. 703, *ante* 623.

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11. *Land in Trust.*

Will—*Possession by Trustee.*]—A son of the testator and one of the executors and trustees named in a will was a minor when his father died, and after coming of age he never applied for probate, though he knew of the will and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate, and remained in possession over twenty years, and until the period of distribution arrived, and then claimed to have a title under the Statute of Limitations:—

Held, affirming the decision of the Court of Appeal, 18 A. R. 25, that as he held under an express trust by the terms of the will, the rights of the other devisees could not be barred by the statute. *Houghton* v. *Bell*, 23 S. C. R. 498.

Will—*Purchase by Executor.*] — Judgment was recovered against the executors of an estate on a note made by D. M., one of the executors, and indorsed by the testator for his accommodation. In 1849 land devised by the testator to A. M., another son, was sold under execution issued on the judgment, and purchased by D. M., who, in 1853, conveyed it to another brother, W. M. In 1865 it was sold under execution issued on a judgment against W. M., and again purchased by D. M. In 1888 A. M., the devisee of the land under the will, took forcible possession thereof, and D. M. brought an action against him for possession:—

Held, affirming the decision of the Court of Appeal, Strong, J., dissenting, that the sale in 1849 being for his own debt, D. M. did not acquire title to the land for his own benefit

thereby, but became a trustee for A. M., the devisee, and this trust continued when he purchased it the second time in 1865;—

Held, also, that if D. M. was in a position to claim the benefit of the Statute of Limitations, the evidence did not establish the possession necessary to give him a title thereunder. *McDonald* v. *McDonald*, 21 S. C. R. 201.

See Clarke v. *Macdonell*, 20 O. R. 504, *post* 627; *Kent* v. *Kent*, 20 O. R. 158, 445, 19 A. R. 352, *post* 628.

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12. *Mortgagor and Mortgagee.*

Notice—*Good Faith—Possession.*]—The respondents, having lent a sum of money to one Liboiron, subsequently, on the 9th May, 1876, took a transfer of his property by a deed *en dation de paiement*, in which the registered title deed of Liboiron to the same was referred to, and by which it also appeared that the appellants had a *bailleurs de fonds* claim on the property in question. Liboiron remained in possession and sub-let part of the premises, collected the rents, and continued to pay interest to the appellants for some years on the *bailleurs de fonds* claim. In 1887 the appellants began an action *en déclaration d'hypothèque* for the balance due on their *bailleurs de fonds* claim. The respondents pleaded that they had acquired the property in good faith by a translatory title, and had become freed of the hypothec by ten years' possession: Art. 2251, C. C.:—

Held, reversing the judgments of the Courts below, that the oral and documentary evidence in the case as to the actual knowledge on the respondents' part of the existence of this registered hypothec or *bailleurs de fonds* claim was sufficient to rebut the presumption of good faith when they purchased the property in 1876, and therefore they could not invoke the prescription of ten years: Art. 2251, C. C.: Fournier, J., dissenting.

In their declaration the appellants alleged that the respondents had been in possession of the property since 9th May, 1876, and after the *enquête* they moved the Court to amend the declaration by substituting for the 9th May, 1876, the words "1st December, 1886." The motion was refused by the Superior Court, which held that the admission amounted to a judicial avowal from which they could not recede. On appeal to the Supreme Court it was:—

Held, reversing the judgment of the Court below, that the motion should have been allowed so as to make the allegation of possession conform with the facts as disclosed by the evidence; Art. 1245, C. C.: Fournier, J., dissenting. *Baker* v. *Société de Construction Métropolitaine*, 22 S. C. R. 364.

Payments—*Subsequent Mortgagee.*]—The assignee in insolvency, under the Insolvent Act of 1865, of the plaintiffs' mortgagor, in 1869 conveyed in part satisfaction of his claim, without covenants on either side, the mortgaged property to a subsequent mortgagee, who had valued his security, the plaintiffs' mortgages being referred to in a recital. The subsequent mortgagee shortly afterwards conveyed the property to a third person, but, notwithstanding this conveyance, continued to pay interest to the plaintiffs till within ten years of this foreclosure action:—

Held, on a case stated in the action for the opinion of the Court, with liberty to draw inferences of law and fact, that it was proper to infer that the provisions of sec. 19 of the Insolvent Act of 1865 had been complied with; that under that section the subsequent mortgagee taking over his security would be primarily bound to pay off the prior incumbrances; and that therefore his payments kept alive the plaintiffs' rights.

Judgment of the Chancery Division, 21 O. R. 571, reversed, Osler, J. A., dissenting. *Trust and Loan Co. of Canada* v. *Stevenson*, 20 A. R. 66.

Title.]—The statutory title gained by the mortgagor enures to the benefit of the mortgagee's title. *Re Bain and Leslie*, 25 O. R. 136.

Vacant Lands—*Constructive Possession—Presumption of Payment—Arrears of Interest.*]—Where a right of entry has accrued to a mortgagee without actual entry by him, and the mortgaged lands are subsequently left vacant before a title by possession has been acquired by anyone, the constructive possession thereof is in the mortgagee, and the Statute of Limitations does not run against him so as to extinguish his title to the lands: the mortgage being in default and no presumption of payment arising.

An action of trespass to vacant lands will lie by the mortgagee thereof.

In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by a railway company for the purposes of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land.

R. S. O. ch. 111, sec. 17, which provides that no more than six years' arrears of interest upon money charged upon land shall be recoverable, only applies where a mortgagee is seeking to enforce payment, out of the lands, of his mortgage money and interest, and does not apply to an action for redemption or to actions similar in principle.

In this action the mortgagee was held entitled to interest at the rate fixed by the mortgages up to the maturity thereof, and afterwards at the rate of six per cent.; in all for about sixteen years. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

See Brossard v. *Dupras*, 19 S. C. R. 531, *post* 633.

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13. *Nature and Proof of Possession.*

Disseisin—*Paper Title—Joint Possession—Acts of Ownership.*]—A deed executed in 1856 purported to convey land partly in Lunenburg and partly in Queen's County, N.S., of which the grantor had been in possession up to 1850, when C. entered upon the portion in Lunenburg County, which he occupied until his death in

1888. The grantee under the deed never entered upon any part of the land, and in 1866 he conveyed the whole to a son of C., then about 24 years old, who resided with C. from the time he took possession. Both deeds were registered in Queen's. The son shortly afterwards married, and went to live on the Queen's County portion. He died in 1872, and his widow, after living with C. for a time, married P. and went back to Queen's County. P. worked on the Lunenburg land with C. for a few years, when a dispute arose and he left. C. afterwards, by an intermediate deed, conveyed the land in Lunenburg County to his wife. On one occasion P. sent a cow upon the land in Lunenburg County, which was driven off, and no other act of ownership on that portion of the land was attempted until 1890, after C. had died, when P. entered upon the land and cut and carried away hay. In an action of trespass by C.'s widow for such entry, the title to the land was not traced back beyond the deed executed in 1856 :—

Held, affirming the decision of the Supreme Court of Nova Scotia, that C.'s son not having a clear documentary title, his possession of the land was limited to such part as was proved to be in his actual possession and in that of those claiming through him : that neither he nor his successors in title ever had actual possession of the land in Lunenburg County ; that the possession of C. was never interfered with by the deeds executed : and, having continued in possession for more than twenty years, C. had a title to the land in Lunenburg County by prescription. *Parks* v. *Cahoon*, 23 S. C. R. 92.

Will—*Uncleared Land.*]—A son of the testator went upon a farm of 86 acres, believing that it had been devised to him by the will, and remained in possession for more than ten years :—

Held, upon the evidence, that he had acquired a good title by virtue of the statute, to the whole 86 acres, though only part was cleared and cultivated. *Re Bain and Leslie*, 25 O. R. 136.

See Heward v. *O'Donohoe*, 18 A. R. 529, 19 S. C. R. 341, *post* 628; *Coffin* v. *North American Land Co.*, 21 O. R. 80, *ante* 621 ; *McDonald* v. *McDonald*, 21 S. C. R. 201, *ante* 624.

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14. *Partition.*

See Heward v. *O'Donohoe*, 18 A. R. 529, 19 S. C. R. 341, *post* 628 ; *Haig* v. *Haig*, 20 O. R. 61, *post* 629 ; *Baxter* v. *Phillips*, 23 S. C. R. 317, *post* 629 ; *Baldwin* v. *Kingstone*, 18 A. R. 63, *post* 630.

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15. *Payment of Taxes.*

Tenancy—*Entry—Vacant Possession.*]—*See Coffin* v. *North American Land Co.*, 21 O. R. 80, *ante* 621.

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16. *Possession By or Against Infants.*

Guardian—*Majority of Infant.*]—A guardian of an infant appointed by the Surrogate Court under R. S. O. ch. 137 has power to lease the lands of the infant during the latter's minority, but not beyond that period. *Switzer* v. *McMillan*, 23 Gr. 538, not followed.

During such minority the guardian is a trustee of the lands for the infant and cannot acquire a title to them by possession, but after the majority of the infant the possession of the guardian changes its character and becomes that of a stranger, and the Statute of Limitations runs in favour of the guardian or those claiming under him. *Hickey* v. *Storer*, 11 O. R. 106, followed. *Clarke* v. *Macdonell*, 20 O. R. 564

Guardian—*Tenant by the Curtesy.*]—A man, married in 1854, conveyed in 1870 certain lands to his wife by deed under the Short Forms Act, with the usual covenants, for the expressed consideration of "respect and of one dollar." The husband and wife remained in possession of the lands until the wife died in 1872, leaving a will by which she devised her real estate to two daughters of herself and this husband, aged respectively seventeen and twelve. The husband remained in possession till his death in 1890. This action was then brought by the younger daughter and the son of the elder daughter to recover possession from the devisee of the husband :—

Held, reversing the decision of Boyd, C., 20 O. R. 158, that the Real Property Limitation Act did not apply so as to extinguish the rights of the plaintiffs to recover; the presumption being that the husband, after conveying to his wife, was in possession of the lands and in receipt of the rents and profits, for and on behalf of his wife ; and that, upon his wife's death, he entered into possession and receipt for and on behalf of his infant children and as their natural guardian ; and this being so, his possession and receipt were the possession and receipt of his wife, and, after her death, of his children and those claiming under them ; and the statute, therefore, never began to run. *Wall* v. *Stanwick*, 34 Ch. D. 763 ; *In re Hobbs*, 36 Ch. D. 553 ; *Lyell* v. *Kennedy*, 14 App. Cas. 437, followed. *Hickey* v. *Storer*, 11 O. R. 106 ; *Clarke* v. *Macdonell*, 20 O. R. 564, not followed. *Kent* v. *Kent*, 20 O. R. 445.

Affirmed by the Court of Appeal. *Kent* v. *Kent*, 19 A. R. 352.

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17. *Tenants in Common.*

Caretaker of one Tenant—*Partition—Adverse Possession.*]—The defendant was placed in possession of certain property as caretaker by one tenant in common, who was managing the piece of property in question, and other property, for the benefit of himself and his co-tenants. In 1866 a decree was made declaring that this co-tenant was a trustee for himself and the other co-tenants in certain proportions, and he was ordered to convey to the other co-tenants their shares, to be ascertained by the Master. Various proceedings were taken under the decree, and the shares of the different co-tenants were ascertained, the property in question being allotted to the plaintiffs in 1868, but no conveyances were executed. An order vesting the share of the plaintiffs in them was made in 1888 :—

Held, by the Court of Appeal, Hagarty, C.J.O., dissenting, that the effect of the decree and the ascertainment of the shares was to sever the interests in the property, and that from that time the possession of the defendant ceased to be that of the plaintiffs, who could not, after such time, contend that he was in possession as their caretaker; and therefore that he had acquired title by possession.

Judgment of Rose, J., reversed.

Subsequently, on appeal to the Supreme Court of Canada, the judgment of the Court of Appeal was reversed and the judgment of Rose, J., restored:—

Held, that the defendant had been in possession for over twenty years; that he was originally in as a caretaker for one of the owners; that afterwards the property was severed by judicial decree, and such owner was ordered to convey certain portions to the others; that after the severance the defendant performed acts shewing that he was still acting for the owners; and that he also exercised acts of ownership by enclosing the land with a fence and in other ways; and that the severance of the property did not alter the relation between the owners and the defendant; that no act was done by the defendant at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker, and he had acquired no title by possession. *Ryan* v. *Ryan*, 5 S. C. R. 487, followed. *Howard* v. *O'Donohoe*, 18 A. R. 529, 19 S. C. R. 341.

Partition—*Assignment of Share.*]—When a co-heir has assigned his share in a succession before partition, any other co-heir may claim such share upon reimbursing the purchaser thereof the price of such assignment, and such claim is imprescriptible so long as the partition has not taken place. *Baxter* v. *Phillips*, 23 S. C. R. 317.

Partition—*Discontinuance by One and Possession by the Other.*]—Where, by mutual arrangement between the plaintiff and his brother, two tenants in common of certain land sought to be partitioned in this action, the former discontinued possession, and the latter retained exclusive possession thereof, making extensive improvements and receiving the rents and profits for the statutory period of limitation, and the plaintiff removed to another lot, which they also held as tenants in common, he also retaining the possession, etc., thereof for the statutory period, the only apparent dispute between the parties being a claim which had been made by the plaintiff that it was agreed that an alleged excess in value of the lot taken by his brother should be accounted for:—

Held, that the action could not be maintained, as a good title to the lot had been acquired under the Statute of Limitations, and that the evidence failed to establish the agreement to pay the alleged value; the remedy for which in any event was also barred. *Haig* v. *Haig*, 20 O. R. 61.

Right of Entry—*Time.*]—Where there are several tenants in common of land, of whom all but one are in possession, and before the ten years have run the latter acquires another undivided share from or under one of those in possession, the Statute of Limitations runs as to both shares from the time the last one was acquired. *Hill* v. *Ashbridge*, 20 A. R. 44.

Will—*Mistake*—*Rents and Profits*—*Partition.*]—A testator, by his will, made on the 14th August, 1850, devised certain land to his widow for life, and, after her death, to two nephews, and in the case of the death of them, or either of them, in his own lifetime, he devised the share of such deceased to the heir-at law or heirs-at-law of such deceased, his, her, or their heirs and assigns. The Act commonly known as the Act abolishing primogeniture, 14 & 15 Vict. ch. 6, was passed on the 2nd August, 1851, and came into force on the 1st January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866, and his widow in 1870:—

Upon the death of the testator's widow, the three surviving children of the deceased nephew (one daughter had died a short time before, intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made, in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew, and one-sixth to each of the others. In 1885 a partition deed was executed of part of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards commenced by him, asking that the title might be declared, the partition deed set aside, and the rents and proceeds of sales received by the brother and sister repaid to him:—

Held, affirming the judgment of Robertson, J., 16 O. R. 341, that, as there was no consideration therefor, and no compromise or settlement of any disputed question, the partition deed and other dealings could not be supported as in the nature of family arrangements:—

Held, also, Galt, C.J. C. P., dissenting, reversing the judgment of Robertson, J., 16 O. R. 341, that the eldest son, having always received a share of the rents and profits of the undivided moiety, was in law always in possession of the whole of that moiety, and, therefore, that no title had been acquired against him by the brother and sister under the Statute of Limitations. *Baldwin* v. *Kingstone*, 18 A. R. 63.

Affirmed as to the first point by the Judicial Committee of the Privy Council. *See* 18 A. R., Appendix.

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18. *Uncleared Lands.*

See Stovel v. *Gregory*, 21 A. R. 137, *post* 631; *Re Bain and Leslie*, 25 O. R. 136, *ante* 627.

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19. *Vacant Lands.*

Mortgage—*Right of Entry.*]—*See Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11, *ante* 626.

20. *Wild Lands.*

Possession—*Trespass — Fencing*—"*State of Nature.*"]—The expression "state of nature," in sub-sec. 4 of sec. 5 of R. S. O. ch. 111, is used in contra-distinction to the preceding expression, "residing upon or cultivating," and unless the patentee of wild lands, or some one claiming under him, has resided upon the land or has cultivated or improved it or actually used it, the twenty years' limitation applies. Clearing or cultivating by trespassers will not avail to shorten this limit.

Per Burton and Maclennan, JJ.A.—Merely fencing in a lot without putting it to some actual, continuous use is not sufficient to make the statute run. *Storel* v. *Gregory*, 21 A. R. 137.

III. Personal Actions.

1. *Accounts.*

Laches—*Presumption.*]—*See Toothe* v. *Kittredge*, 24 S. C. R. 287, *post* 634.

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2. *Acknowledgment.*

Letters of Debtor to Creditor.]—The following letters written by a debtor to his creditor were held to take the debt out of the operation of the Statute of Limitations:

Hopewell, August 9th, 1876. Dear Uncle Finlay,—I received a letter from you some time ago about your money. I delayed writing because I did not know what to write. I did not know but something would turn up that would enable me to pay you. I have a good deal of property—too much for these hard times—and I want to sell some of it, but cannot in the meantime, as times are that bad that people do not want to buy anything, only what they cannot do without. But this state of matters will not continue long, and when the times get better I will make some arrangement to pay you your money. Be not afraid of it; as I have but a small family and no boys, I will have plenty to pay my debts. I did get somewhat behindhand by railway affairs, but have recovered, and I am now in possession of a good deal of property, and in a fair way of doing well whenever the times get better. I regret very much keeping it from you so long; however, I hope the time will soon come when I will be able to pay you. Yours very truly, Alex. McDonald.

Hopewell, June 19th, 1875. Dear Uncle,—I am in receipt of yours of the 31st of May about your money, and must say I am not astonished at you for wanting it. You ought to have had it long ago, and you would have had it, only I was unfortunate in a railroad contract I took, on the railroad between Truro and Pictou, in which I lost considerable money, and got largely in debt besides. After giving up the work I hired with the Government to carry on part of the work. At this time James and I commenced to build a cloth factory on a small scale, in order to have some permanent work. I borrowed most of what I put in. The man who had your money on mortgage, after having it two years, left. I had to sell the property, which I took from him by deed, for one thousand dollars ($1,000), losing by this likewise. I then got an offer from the Government to go to the Red River and North-West Territory to explore there for two years among the Indians, and got back last winter. I have now my debt nearly paid, and the amount of your claim secure in property, viz., land property, so that you will be as sure of your money in a short time as if you had it. Do not think, Finlay, that I intend to do you, or any other body, out of one shilling. So rest assured that I have your money secured in a manner that you will get it, although I cannot send it now. You had good patience, so I hope you will have a little more, and I will put you all right. I believe I worked as hard and travelled far more than you did, and have been much more unfortunate than you were since you left; but since two years I have done well, and hope soon to do well by you. Now, Finlay, rest assured that I have your money secured so that you will get it, whatever becomes of me. Very truly yours, Alex. McDonald. Mr. F. Thompson, Port Ludlow, British Columbia. *Grant* v. *Cameron*, 18 S. C. R. 716.

Letters of Debtor after Creditor's Decease — *Administration.*] — An acknowledgment of indebtedness by letter written after the creditor's decease by the defendant to the person who is entitled to take out letters of administration to the creditor's estate, and who does, after the receipt of the letter, take out such letters, is a sufficient acknowledgment within the Statute of Limitations; Maclennan, J. A., dissenting. *Robertson* v. *Burrill*, 22 A. R. 356.

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3. *Commencement of Statute.*

See Miller v. *Ryerson*, 22 O. R. 369, *post* 633.

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4. *Disavowal.*

Petition—*Attorney.*]—The only prescription available against a petition in disavowal of an attorney is that of thirty years. *McDonald* v. *Dawson*, 11 Q. L. R. 181, followed. *Dawson* v. *Dumont*, 20 S. C. R. 709.

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5. *Executors and Administrators.*

See Robertson v. *Burrill*, 22 A. R. 356, *ante* 632.

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6. *Fraudulent Mortgage.*

Registration.]—Action to have a mortgage of land declared void on the ground of having been granted in fraud of the rights of creditors:—

Held, per Fournier, J., that the mortgage having been registered on the 13th January, 1884, the right of action to set it aside was prescribed at the expiration of one year from that date: Art. 1040, C. C. *Brossard* v. *Dupras*, 19 S. C. R. 531.

7. *Infant.*

Action Against Medical Practitioner.]—Infancy does not prevent the running of the statute R. S. O. ch. 148, sec. 40, in favour of a medical practitioner in an action for malpractice. *Miller* v. *Ryerson*, 22 O. R. 369.

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8. *Interruption of Statute.*

See Paré v. *Paré*, 23 S. C. R. 243, *post* 635.

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9. *Judgment.*

Period of Limitation.]—A judgment remains in force for twenty years at least, the only limitation that can be applicable to it being R. S. O. ch. 60, sec. 1. In view of the amendment made in R. S. O. 1877 ch. 108, sec. 23, by the Revision of 1887, R. S. O. ch. 111, sec. 23, the English authorities, such as *Jay* v. *Johnstone*, [1893] 1 Q. B. 189, and cases there cited, do not apply. *Boice* v. *O'Loane*, 3 A. R. 167, followed. *Mason* v. *Johnston*, 20 A. R. 412.

Period of Limitation — *Execution.*] — The limit of twenty years being fixed by R. S. O. ch. 60, sec. 1, after which, in the absence of payment or acknowledgment, an action cannot be brought upon a judgment, the analogy of the statute applies to applications for leave to issue execution after the lapse of twenty years from the date of the judgment or the return of the last execution.

An issue directed under Rule 886, to try the question of liability upon a judgment more than twenty years old, is an action within the meaning of R. S. O. ch. 60, sec. 1, and the Statute of Limitations would be a good defence. *Price* v. *Wade*, 14 P. R. 351.

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10. *Laches.*

See Toothe v. *Kittredge*, 24 S. C. R. 287, *post* 634.

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11. *Medical Practitioner.*

Malpractice—*Commencement of Statute.*]—An action for malpractice against a registered member of the College of Physicians and Surgeons of Ontario was brought within one year from the time when the alleged ill effects of the treatment developed, but more than a year from the date when the professional services terminated :—

Held, that the action was barred under the Ontario Medical Act, R. S. O. ch. 148, sec. 40. *Miller* v. *Ryerson*, 22 O. R. 369.

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12. *Money Had and Received.*

Investment—*Trust.*]—H., having funds belonging to one T. J. C. for investment, agreed to invest them with M. of Winnipeg in a certain land speculation, and, after correspondence, accepted and paid M.'s draft for $2,375, mentioning in the letter notifying M. of the acceptance of the draft the understanding H. had as to the share he was to get, and adding : "I also assume that the lands are properly conveyed, and the full conditions of the prospectus carried out, and if not, that money will be at once refunded." The lands were never properly conveyed, and the conditions of the prospectus never carried out. T. J. C. transferred *sous seing privé* this claim to the plaintiff, who brought an action against M. for the amount of the draft :—

Held, affirming the judgment of the Courts below, that the action being for the recovery of a sum of money intrusted to the defendant for a special purpose, the prescription of two years did not apply : Art. 2262, C. C. *Moodie* v. *Jones*, 19 S. C. R. 266.

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13. *Negligence.*

See Webb v. *Barton and Stoney Creek Consolidated Road Co.*, 26 O. R. 343, *post* 635.

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14. *Novation.*

See Paré v. *Paré*, 23 S. C. R. 243, *post* 635.

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15. *Partnership.*

Laches—*Presumption*—*Accounts.*]—A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands, the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands and to take an account of the dealings between J. and K. In the Master's office K. claimed that in the course of the partnership business he signed notes which J. indorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he claimed a large sum to be due him from J. for such overcharge. The Master held that, as these transactions had taken place nearly twenty years before, K. was precluded by the Statute of Limitations and by laches and acquiescence from setting up such claim. His report was reversed by a Judge, whose decision was affirmed by the Court of Appeal, on the ground that the matter being one between partners, and the partnership affairs never having been formally wound up, the statute did not apply :—

Held, reversing the decision of the Court of Appeal and restoring the Master's report, that K.'s claim could not be entertained ; that there was, if not absolute evidence, at least a presumption of acquiescence from the long delay ; and that such presumption should not be rebutted by the evidence of the two partners, considering their relationship and the apparent concert between them. *Toothe* v. *Kittredge*, 24 S. C. R. 287.

16. *Period of Limitation.*

See Price v. *Wade*, 14 P. R. 351, *ante* 633; *Brossard* v. *Dupras*, 19 S. C. R. 531, *ante* 632; *Dawson* v. *Dumont*, 20 S. C. R. 709, *ante* 632; *Mason* v. *Johnston*, 20 A. R. 442, *ante* 633; *Paré* v. *Paré*, 23 S. C. R. 243, *post* 635; *Webb* v. *Barton and Stoney Creek Consolidated Road Co.*, 26 O. R. 343, *post* 635.

17. *Promissory Note.*

Security—*Deed*—*Novation*—*Interruption.*]—A prescription of thirty years is substituted for that of five years only where the admission of the debt from the debtor results from a new title which changes the commercial obligation to a civil one.

In an action of account instituted in 1887, the plaintiff claimed *inter alia* the sum of $2,361.10, being the amount due under a deed of obligation and *constitution d'hypothèque*, executed in 1866, and which on its face was given as security for an antecedent unpaid promissory note dated in 1862. The deed stipulated that the amount was payable on the terms and conditions and in the manner mentioned in the said promissory note. The defendants pleaded that the deed did not affect a novation of the debt, and that the amount due by the promissory note was prescribed by more than five years. The note was not produced at the trial:—

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the deed did not effect a novation: Arts. 1169 and 1171, C. C. At most, it operated as an interruption of the prescription and a renunciation of the benefit of the time up to then elapsed, so as to prolong it for five years if the note was then overdue: Art. 2264, C. C. And, as the onus was on the plaintiff to produce the note, and he had not shewn that less than five years had elapsed since the maturity of the note, the debt was prescribed by five years: Art. 2260, C. C. *Paré* v. *Paré*, 23 S. C. R. 243.

18. *Road Companies.*

Negligence—*Period of Limitation.*]—Where the defendants, a road company, incorporated under the General Road Companies' Act, R. S. O. ch. 159—sec. 99 of which requires them to keep their road in repair—constructed a culvert across it, with post and rail guard at the mouth thereof, in such an improper manner that, the wheel of the plaintiff's carriage striking the post, he was thrown out of it into the open ditch at the end of the culvert and injured:—

Held, that the construction of the culvert and the guard was a thing "done in pursuance of the Act" within the meaning of sec. 145, and that therefore the time for bringing the action was limited to within six months after the date of the accident. *Webb* v. *Barton and Stoney Creek Consolidated Road Co.*, 26 O. R. 343.

19. *Shares.*

Liability for Calls.]—*See In re Haggert Bros. Mfg. Co.—Peaker and Runions' Case*, 19 A. R. 582, *ante* 146.

20. *Trusts and Trustees.*

See Moodie v. *Jones*, 19 S. C. R. 266, *ante* 633.

LIQUIDATED DAMAGES.

See DAMAGES, IV.

LIQUIDATOR.

See COMPANY, VIII.

LIQUOR LICENSE ACT.

See CONSTITUTIONAL LAW, II.—CRIMINAL LAW, II.—INTOXICATING LIQUORS.

LOCAL IMPROVEMENTS.

See ASSESSMENT AND TAXES, II.—MUNICIPAL CORPORATIONS, XV.—SALE OF LAND, I.

LOCAL MASTER OF TITLES.

See LAND TITLES ACT.

LOCAL OPTION ACT.

See CONSTITUTIONAL LAW, II.

LOCATION TICKETS.

See CROWN LANDS, V.

LONG VACATION.

See VACATION.

LORD'S DAY.

See SUNDAY.

LUNATIC.

Action — *Next friend.*] — An action was brought in the name of the plaintiff, a lunatic not so found, confined in a public asylum, by his wife as next friend, to set aside a conveyance of land made by him as improvident, etc.:—

Held, that the action, being for the protection of the lunatic's property, not for the disposal of it, was properly brought by a next friend; and, although a married woman cannot

end.] — An action was
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a married woman cannot

fill such an office, the fact that in this case she did so did not make her proceedings void; and the defendants' only remedy was to apply to remove her and to stay proceedings until a proper next friend should be appointed:—

Held, also, that the objection that the action should have been brought by the inspector of prisons and public charities could not prevail, for it was discretionary with him to institute proceedings or not. *Mastin* v. *Mastin*, 15 P. R. 177.

Declaration of Lunacy—*Dispute.*]—Where a petition to have C. declared a lunatic was presented by one of his daughters, and it appeared that it was presented with a view to attack a disposition which C. had made of his estate in favour of another daughter, with whom he lived, for which purpose an action had already been begun in C.'s name by a son as next friend, and it also appeared to the Judge that there was no reason why C. should not remain in the custody and care of the daughter, the petition was dismissed, although C. was undoubtedly a lunatic. *Re Clark*, 14 P. R. 370.

Maintenance—*Money in Court.*]—Sections 48 and 49 of the Act respecting lunatic asylums and the custody of insane persons, R. S. O. ch. 245, providing that the inspector of prisons and public charities may take possession of the property of lunatics to pay for maintenance, do not apply to money in Court.

Where the property of the lunatic is money in Court, the inspector must apply for payment out under sec. 61, and must shew clearly that the person to whom the money in Court belongs is a lunatic, and that the purpose for which the money is sought is to pay charges for maintenance of the lunatic in a public asylum; but it is not necessary, having regard to sec. 1, sub-sec. 2, that the person shall have been, or shall be, declared a lunatic. *Re McKenzie, Re Lind, Re Campbell*, 14 P. R. 421.

MAGISTRATE.

See JUSTICE OF THE PEACE—POLICE MAGISTRATE.

MAINTENANCE.

See CHAMPERTY AND MAINTENANCE—DEED, II.—INFANT, IV.—LUNATIC.

MALICIOUS ARREST AND PROSECUTION.

I. ARREST UNDER CIVIL PROCESS.

Absconding Debtor—*Arrest—Discharge—Reasonable and Probable Cause—Departure from Ontario—False Affidavit.*]—In an action for damages for arrest under an order made in a former action the plaintiff recovered a verdict for $1,000. Upon motion to set it aside, made before a Divisional Court composed of Armour, C. J., and Falconbridge, J.:—

Held, per Armour, C. J., that so long as the order for arrest stood, an action for maliciously and without reasonable and probable cause arresting the plaintiff could not be maintained. *Erickson* v. *Brand*, 14 A. R. 614, distinguished.

2. Where a creditor, by affidavit, satisfies the Judge that there is good and probable cause for believing that his debtor, unless he be forthwith apprehended, is about to quit Ontario, the inference is raised that he is about to do so with intent to defraud; for he is removing his body, which is subject to the jurisdiction of the Courts of Ontario, and liable to be taken in execution, beyond the jurisdiction of such Courts.

Tuothe v. *Frederick*, 14 P. R. 287, commented on and not followed.

Robertson v. *Coulton*, 9 P. R. 16, approved and followed.

3. The fact that the plaintiff, being a resident of Ontario, and having numerous creditors therein, including the defendant, left the Province without paying them, and went to reside permanently in the United States, whether he left openly or secretly, and whether he announced his departure and intentions beforehand or concealed them, and that he came back to Ontario for a temporary purpose, intending to return to the United States, afforded reasonable and probable cause for and justified his arrest.

4. Considering the action as one for imposing upon the Judge by some false statement in the affidavit to hold to bail, and thereby inducing him to grant the order for arrest, the fact falsely suggested or suppressed must be a material one for the Judge to consider in granting the order, and the burden is upon the plaintiff of shewing that the Judge was imposed upon.

5. The word "absconded" truly described the going away of the plaintiff, whether he went away secretly or openly, and he was properly described as an absconding debtor.

Falconbridge, J., adhering to the views expressed in *Seane* v. *Coffey*, 15 P. R. 112, was of opinion that the plaintiff had a cause of action, but thought there should be a new trial on the grounds of excessive damages and misdirection: and concurred *pro formâ* in the decision of Armour, C. J.

Held, by the Court of Appeal, that where a man, having numerous creditors in Ontario, leaves the Province openly to reside in the United States, after publicly announcing his intention so to do, without paying his creditors, and after his departure it is found that statements made by him as to property available to pay his debts are false and that nothing is in fact available for that purpose, his arrest upon civil process upon his return to Ontario for a temporary purpose, intending to return to the United States, is justifiable.

Judgment of the Queen's Bench Division affirmed. *Coffey* v. *Scane*, 25 O. R. 22, 22 A. R. 269.

See Scane v. *Coffey*, 15 P. R. 112, *ante* 39.

II. Malicious Civil Proceedings.

Issue of Writ—*Malice—Special Damage.*]—Action for damages against solicitors for, as alleged in the statement of claim, "wrongfully and unlawfully without any instructions or retainer," issuing a writ of summons against the plaintiff in the name of a third party, by reason of which the plaintiff was injured in his occupation as a builder, suffered in his credit and reputation, and was hindered in the performance of his contracts, and had to borrow money at a higher interest than he would otherwise have had to do, and other creditors were induced to sue him, whose accounts he had to compromise and settle at great loss :—

Held, on demurrer, that neither malice and want of reasonable and probable cause, nor special damage, both of which are necessary in such an action, were sufficiently alleged.

Semble, that an allegation that by reason of the proceedings complained of the plaintiff was put into insolvency or bankruptcy, if such a thing were possible in this country, might be a sufficient allegation of special damage. *Mitchell* v. *McMurrich*, 22 O. R. 712.

III. Malicious Criminal Proceedings.

1. *Action, when it Lies.*

Information—*Jurisdiction—Warrant—Interference.*]—The defendant laid an information charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars, purporting to be made against J. M. in favour of T. A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was under it apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted :—

Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and an action of trespass was not maintainable against the defendant, even upon evidence of his interference with the arrest.

Semble, that if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, an action for malicious prosecution would nevertheless lie. *Anderson* v. *Wilson*, 25 O. R. 91.

Justice of the Peace—*Warrant—No Conviction.*]—In an action against a justice of the peace for false imprisonment and for acting in his office maliciously and without reasonable and probable cause, an application was made before statement of claim to set aside the proceedings under sec. 12 of R. S. O. ch. 73, on the ground that the conviction of the plaintiff, made by the defendant, had not been quashed. It appeared, however, that the plaintiff was arrested and imprisoned under a warrant issued by the defendant, which in fact had no conviction to support it :—

Held, not a case within sec. 12.

Per Robertson, J., that the plaintiff had a complete cause of action without setting aside the conviction.

Per Meredith, J., that the application was premature. *Webb* v. *Spears*, 15 P. R. 232.

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2. *Constable.*

See Scott v. *Reburn*, 25 O. R. 450, *post* 641; *Kelly* v. *Barton* and *Kelly* v. *Archibald*, 26 O. R. 608, 22 A. R. 522, *post* 641; *Gordon* v. *Denison*, 22 A. R. 315, *post* 643; *Humphrey* v. *Archibald*, 21 O. R. 553, 20 A. R. 267, *ante* 404.

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3. *Information.*

See Anderson v. *Wilson*, 25 O. R. 91, *ante* 639.

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4. *Jury.*

See Hamilton v. *Cousineau*, 19 A. R. 203, *post* 642; *Beatty* v. *Rumble*, 21 O. R. 184, *post* 643; *Gordon* v. *Rumble*, 19 A. R. 440, *post* 643; *Martin* v. *Hutchinson*, 21 O. R. 388, *post* 643; *Archibald* v. *McLaren*, 21 S. C. R. 588, *post* 642; *Wilson* v. *Tennant*, 25 O. R. 339, *post* 642; *Gordon* v. *Denison*, 22 A. R. 315, *post* 643.

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5. *Justice of the Peace.*

See Webb v. *Spears*, 15 P. R. 232, *ante* 640; *Gordon* v. *Denison*, 22 A. R. 315, *post* 643.

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6. *Municipal Corporations.*

Resolution—*Illegal Acts—Ratification.*]—A resolution of the executive committee of a city council authorizing the city solicitor to defend actions brought against police officers for their alleged illegal acts does not constitute a ratification thereof by the city corporation so as to make it liable in damages for such acts. *Kelly* v. *Barton*, *Kelly* v. *Archibald*, 26 O. R. 608.

7. *Notice of Action.*

Constable — *Malice.*]—Where in an action against a constable for false arrest it is found by the jury that the defendant acted in the honest belief that he was discharging his duty as a constable, and was not actuated by any improper motive, he is entitled to notice of action, and such notice must state not only the time of the commission of the act complained of, but that it was done maliciously. *Scott* v. *Reburn*, 25 O. R. 450.

Constable — *Malice — Reasonable and Probable Cause.*]—The object of the Act to protect justices of the peace and others from vexatious actions, R. S. O. ch. 73, is for the protection of those fulfilling a public duty, even though in the performance thereof they may act irregularly or erroneously; and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause; but where a person entitled to the protection of the Act voluntarily does something not imposed on him in the discharge of any public duty, such notice is not required.

A breach of a city by-law for driving an omnibus without the license required thereby does not justify the summary arrest of the offender, even though the officer arresting may have believed that he was acting legally and in the discharge of his official duty. *Kelly* v. *Burton, Kelly* v. *Archibald*, 26 O. R. 608.

Affirmed by the Court of Appeal, 22 A. R. 522.

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8. *Proof of Acquittal.*

Production of Record.]—In an action for malicious prosecution, the plaintiff sought but was not permitted to prove his acquittal before the County Judge's Criminal Court of a charge of misdemeanour, by means of the production of the original record, signed by the County Judge, under the Speedy Trials Act, R. S. C. ch. 175, and produced and verified by the Clerk of the Peace in whose custody it was, or else by being allowed to put in a copy thereof, certified by that officer:—

Held, that the evidence should have been admitted in either of the above two forms, and judgment dismissing the action was set aside and a new trial ordered. *O'Hara* v. *Dougherty*, 25 O. R. 347.

Production of Record.]—In an action for malicious prosecution, the indictment, with an indorsement thereon of the acquittal of the plaintiff of the criminal charge on which he had been prosecuted, was produced by the clerk of the Court, having been sent to him by the registrar of the Queen's Bench Division, to whom the indictment had been returned, and which he had been subpœnaed by the plaintiff to produce, the Court being informed that the Attorney-General had refused his *fiat* to enable a record of acquittal to be made up. The defendant's counsel objected to the admission of the indictment, and its admission was refused:—

Held, that the indictment so indorsed and produced was not, under the circumstances, sufficient evidence of the termination of the prosecution, but that the formal record of acquittal should have been produced; and that no such record, or a copy thereof, could be obtained without a *fiat* of the Attorney-General.

Quære, whether the termination of such prosecution can be proved by admissions made by the defendant on his examination for discovery. *Hewitt* v. *Cane*, 26 O. R. 133.

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9. *Reasonable and Probable Cause.*

Functions of Court and Jury.]—In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the Court. The jury may be asked to find on the facts from which reasonable and probable cause may be inferred, but the inference must be drawn by the Judge. *Lister* v. *Perryman*, L. R. 4 H. L. 521, followed. *Abrath* v. *North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, 11 App. Cas. 247, considered. *Archibald* v. *McLaren*, 21 S. C. R. 588.

Functions of Court and Jury.]—If, in an action for malicious prosecution, there is any conflict of evidence as to the facts upon which reasonable and probable cause depends, the jury must be allowed to find the facts. The Judge cannot withdraw the case from them, because in his opinion there was reasonable and probable cause for the prosecution: Burton, J. A., dissenting. *Hamilton* v. *Cousineau*, 19 A. R. 203.

Functions of Court and Jury — *Counsel's Advice.*]—A tenant is not liable to prosecution under 11 Geo. II. ch. 19 for the fraudulent and clandestine removal of goods from the demised premises, unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises.

In an action for malicious prosecution, the jury having found the facts in dispute, the question of reasonable and probable cause is for the Judge.

Where a prosecutor has *bonâ fide* taken and acted upon the opinion of counsel in the proceedings taken by him, laying all the facts of the case fully and fairly before such counsel, this is itself evidence to prove reasonable and probable cause. *Martin* v. *Hutchinson*, 21 O. R. 388.

Functions of Court and Jury — *Judge's Charge — Reasonable and Probable Cause in Part.*]—In an action for malicious prosecution of a charge of theft of several articles, the trial Judge held that there was no reasonable and probable cause for charging the theft of some of the articles, and withdrew the case as to them from the jury, but held otherwise as to the other articles, and directed the jury that the fact that there was reasonable and probable cause to charge the theft of some of the articles only bore upon the question of damages; and the jury found a verdict for the plaintiff:—

Held, that there was no misdirection.

Per Meredith, J., dissenting, that if the ruling of the trial Judge were right, the damages were excessive, and apparently assessed under a misunderstanding of the effect of such ruling; that the trial Judge could not in any case rightly have ruled as he did without first having findings of the jury upon certain material

facts; that there had been a mistrial, and that there ought to be a new trial. *Johnstone* v. *Sutton*, 1 T. R. 517, considered and distinguished. *Reed* v. *Taylor*, 4 Taunt. 616, followed. *Wilson* v. *Tennant*, 25 O. R. 339.

See Kelly v. *Burton*, *Kelly* v. *Archibald*, 26 O. R. 608, 22 A. R. 522, *ante* 641.

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10. *Sheriff and Bailiff.*

Execution — *Seizure* — *Interference.*]—The plaintiff, who was acting as a bailiff under a landlord's warrant to distrain for rent, attempted to remove some grain which had been previously seized by a sheriff under an execution, and while in the act was arrested by the sheriff's officer, who was also a county constable. He was committed for trial, and was tried but acquitted.

In an action for false arrest and malicious prosecution:—

Held, that the grain was properly under lawful seizure and in the custody of the law, and that, by R. S. C. ch. 164, sec. 50, anyone taking it away without lawful authority was guilty of larceny, and that by R. S. C. ch. 174, sec. 25, anyone found committing such an offence might be apprehended without a warrant and forthwith taken before a justice of the peace, and that the finding of the jury that the defendant acted as a sheriff's bailiff and not as a constable was immaterial, as it was incumbent on any bystander to do as he did; and the action was dismissed with costs. *Beatty* v. *Rumble*, 21 O. R. 184.

Execution—*Seizure*—*Interference.*]—A sheriff is identified in interest with his bailiff and liable for whatever the latter does under colour of the writ.

The plaintiff, assisting a person acting as bailiff under a landlord's distress warrant, attempted to remove some grain which was at the time under seizure by the defendant as sheriff's officer, and was arrested by the defendant:—

Held, reversing the judgment of the Queen's Bench Division, that the sheriff was liable for the act of his officer.

Beatty v. *Rumble*, 21 O. R. 184, distinguished.

The jury having assessed the damages against the officer at a nominal sum, the Court, instead of a new trial, directed judgment to be entered against his co-defendant, the sheriff, for a like amount. *Gordon* v. *Rumble*, 19 A. R. 440.

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11. *Warrant of Commitment.*

See Webb v. *Spears*, 15 P. R. 232, *ante* 640; *Anderson* v. *Wilson*, 25 O. R. 91, *ante* 639.

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12. *Witnesses.*

Warrant to Compel Attendance—*Arrest*—*Imprisonment*—*Search.*]—Where a police magistrate acting within his jurisdiction under R. S. C. ch. 174, sec. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice, liable to damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest.

Judgment of the Common Pleas Division, 24 O. R. 576, affirmed.

In an action for false imprisonment judgment cannot be entered upon answers to questions submitted to the jury, and a finding, in answer to a question, of a certain amount of damages, is not equivalent to the general verdict which must be given by them.

The right of police to search or handcuff a person arrested on a warrant to compel attendance as a witness and the duty of the constable on making the arrest, considered.

Judgment of the Common Pleas Division, 24 O. R. 576, reversed, Maclennan, J. A., dissenting. *Gordon* v. *Denison*, 22 A. R. 315.

MALPRACTICE.

See MEDICAL PRACTITIONER.

MANDAMUS.

Court of Revision — *Counsel.*]—Courts of Revision created under the Consolidated Assessment Act, 1892, are not obliged to hear counsel in support of an appeal against an assessment of property under that Act.

A mandamus for such purpose was refused. *Re Roebuck and Carlyle*, 23 O. R. 57.

Municipal Corporation—*Ditches and Watercourses Act*—*Engineer.*]—An owner of land, desiring to construct a drain on his own land and to continue it through that of an adjoining owner, served him with the notice provided by the Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vict. ch. 40, sec. 2 (O.), to settle the proportions to be constructed by each, and, on their failing to agree, served the clerk of the municipality with the notice provided for by such Act, requiring the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who declined to attend:—

Held, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises. *Dagenais* v. *Town of Trenton*, 24 O. R. 343.

Police Magistrate—*Refusal to Admit Evidence.*]—At the hearing of a criminal charge before a County Judge, sitting as police magistrate, evidence given before a special committee of the House of Commons, and taken down by stenographers, was tendered before the magistrate and refused by him:—

Held, that the Court had no power to grant a mandamus to the County Judge directing him to receive such evidence.

Rose, J., while concurring in the decision that a mandamus should not issue, was of opinion that, Parliament having ordered the prosecution, the evidence should have been received by the magistrate.

Subsequent resolution of the House of Commons authorizing the evidence to be given. *The Queen* v. *Connolly*, 22 O. R. 220.

Revising Officer—*Objection to Name on List—Notice—Grounds—Appeal.*]—A notice under sec. 19 of the Electoral Franchise Act, R. S. C. ch. 5, as amended by 52 Vict. ch. 9, sec. 4, to a person whose name was objected to, for the purpose of having the name taken off the voters' list at the final revision, simply gave "not qualified" as the ground of objection:—

Held, sufficient.

The revising officer (who was not a Judge) having ruled that the notice was valid, the person whose name was objected to appealed from that ruling to the County Judge, who held that the notice was invalid, and the revising officer thereupon refused to go on and hear the complaint:—

Held, that no appeal was given by sec. 33 of the Act from the revising officer's ruling; and therefore the proceedings before the County Judge were *coram non judice*.

A mandamus was granted.

Held, on appeal, that the Queen's Bench Division having ordered a mandamus to issue, directing a revising officer to consider the objections to the qualification of certain persons whose names appeared on the preliminary voters' lists, and the revising officer having obeyed the mandamus, the Court of Appeal should not consider the question of the right to grant the mandamus.

A notice of application to have a name removed from the voters' lists, giving as the ground of objection only the statement "not qualified," is sufficient: per Hagarty, C.J.O., Burton and Maclennan, JJ.A. *In re Lilley and Allin*, 21 O. R. 424, 19 A. R. 101.

See Auction and Auctioneer — Municipal Corporations, VIII.—Supreme Court of Canada, XV.

MARINE INSURANCE.

See Insurance, VI.

MARRIAGE.

Bigamy.]—*See* Criminal Law, II., IV.

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

Held, that, apart from the Indian marriage, there was evidence from which a legal marriage according to the recognized form amongst Christians could be presumed, and that the daughter was therefore his legitimate child and "legal heir." *Robb* v. *Robb*, 20 O. R. 591.

Solemnization of—*Minister—"Religious Denomination."*]—"The Reorganized Church of Jesus Christ of Latter Day Saints" is a religious denomination within the meaning of R. S. O. ch. 131, sec. 1; and a duly ordained priest thereof is a minister authorized to solemnize the ceremony of marriage.

Upon a case reserved, a conviction of such a priest for unlawfully solemnizing a marriage was quashed.

Semble, the words of the statute "church and religious denomination" should not be construed so as to confine them to Christian bodies. *Regina* v. *Dickout*, 24 O. R. 250.

See Foreign Law and Foreigner—Husband and Wife—Infant, I.

MARRIED WOMAN.

See Contribution — Costs, VI. — Husband and Wife.

MASTER.

See Ship, III.

MASTER IN CHAMBERS.

See Practice, X.

MASTER IN ORDINARY.

See Company, VIII.

MASTER AND SERVANT.

I. Dismissal of Servant.

Arbitrary Right—*Share of Profits.*]—By an agreement under seal between M., the inventor of a certain machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements on such machine and assign the same to McR., who, in consideration thereof agreed to employ M. for two years to place the patents on the market, paying him a certain sum for salary and expenses, and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation. By one clause of the agreement the employer was to be the absolute judge of the manner in which the employed performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal, but to have no claim whatever against his employer. M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders :—

Held, reversing the judgment of the Court of Appeal, 17 A. R. 39, and of a Divisional Court, 16 O. R. 495, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty, without notice and without specifying any particular act calling for such dismissal :—

Held, per Ritchie C.J., Fournier, Taschereau, and Patterson, JJ., that such dismissal did not deprive M. of his claim for a share of the profits of the business.

Per Strong and Gwynne, JJ., that the share of M. in the profits was only a part of his remuneration for his services which he lost by being dismissed, equally as he did his fixed salary. *McRae* v. *Marshall*, 19 S. C. R. 10.

Editor of Newspaper—*Change of Policy.*]—A. B. and C. B., who had published a newspaper as partners or joint owners, entered into a new agreement by which A. B. assumed payment of all the debts of the business, and became from that time sole proprietor of the paper, binding himself to continue its publication, and, in case he wished to sell out, to give C. B. the preference. The agreement provided that : "3. Le dit Charles Bélanger devient, à partir de ce jour, directeur et rédacteur du dit journal, son nom devant paraitre comme directeur en tête du dit journal, et pour ses services et son influence comme tel, le dit Arthur Bélanger lui alloue quatre cents piastres par année, tant par impressions, annonces, etc., qu'en argent jusqu'au montant de cette somme, et le dit Arthur Bélanger ne pourra mettre fin à cet engagement sans le consentement du dit Charles Bélanger." The paper was published for some time under this agreement as a supporter of the Liberal party, when C. B., without instructions from or permission of A. B., wrote editorials violently opposing the candidate of that party at an election, and was dismissed from his position on the paper. He then brought an action against A. B. to have it declared that he was "*rédacteur et directeur*" of the newspaper, and claiming damages :—

Held, reversing the decision of the Court of Queen's Bench, that C. B. by the agreement had become the employee of A. B., the owner of the paper ; that he had no right to change the political colour of the paper without the owner's consent ; and that he was rightly dismissed for so doing. *Bélanger* v. *Bélanger*, 24 S. C. R. 678.

Insurance Agent—*Rival Employer.*]—To act as agent for a rival insurance company is a breach of an insurance agent's agreement "to fulfil conscientiously all the duties assigned to him and to act constantly for the best interests of (his employer)," and is sufficient justification for his dismissal. *Eastmure* v. *Canada Accident Assurance Co.*, 22 A. R. 408.

Misconduct—*Particulars.*]—In an action for wrongful dismissal, where the defence is misconduct generally, it is proper to direct particulars shewing the nature and character of the instances relied on by the employer ; these particulars should set forth the dates, substantial particulars, and circumstances of all the instances and occasions wherein and whereon the plaintiff misconducted himself, on which the defendant means to rely ; and leave should be given to supplement with further particulars if discovered before trial. *Crabbe* v. *Harkson, Duncan, & Co.*, 14 P. R. 42.

II. Liability of Master for Acts of Servant.

Municipal Corporation—*Medical Health Officer.*]—Held, that the medical health officer of a municipal corporation appointed under R. S. O. ch. 205, sec. 37, is not a servant of the corporation so as to make them liable for his acts done in pursuance of his statutory duties. *Forsyth* v. *Cawiff and City of Toronto*, 20 O. R. 478.

III. Liability of Master for Injury to Servant.

1. *Crown.*

Negligence of Servants or Officers—*Common Employment—Law of Quebec.*]—A petition of right was brought by F. to recover damages for the death of his son, caused by the negligence of servants of the Crown while engaged in repairing the Lachine Canal.

Held, affirming the decision of the Exchequer Court, Taschereau, J., dissenting, that the Crown was liable under 50 & 51 Vict. ch. 16, sec. 16 (c) ; and that it was no answer to the petition to say that the injury was caused by a fellow-servant of the deceased, the case being governed by the law of the Province of Quebec, in which the doctrine of common employment has no place. *The Queen* v. *Filion*, 24 S. C. R. 482.

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2. *Liability at Common Law.*

Common Employment — *Defective Appliances.*]—One of the directors of a quarry com-

pany was appointed foreman of the works, with full powers of management, subject to the directors' control, and to such duties as might be delegated to him from time to time. The plaintiff, one of the company's labourers, claiming that he had sustained injury by reason of the foreman's negligence while acting under his instructions, brought an action at common law against the company:—

Held, so far as the action rested upon the liability of the company through the foreman, that there was no liability, as he was merely a fellow-servant of the plaintiff:—

Held, however, that an action might be sustained on proof of negligence of the company in not furnishing proper appliances for the quarrying operations. *Fairweather* v. *Owen Sound Stone Quarry Co.*, 26 O. R. 604.

Common Employment—*Evidence — Jury.*]—A gas company, engaged in laying a main in a public street, procured from a plumber the services of H., one of his workmen, for such work, and while engaged thereon H. was injured by the negligence of the servants of the company. In an action for damages for such injury:—

Held, affirming the decision of the Supreme Court of New Brunswick, that by the evidence at the trial negligence against the company was sufficiently proved:—

Held, further, that whether or not there was a common employment between H. and the servant of the company was a question of fact, and it having been negatived by the finding of the jury, and the evidence warranting such finding, an appellate Court would not interfere. *St. John Gas Light Co.* v. *Hatfield*, 23 S. C. R. 164.

Machinery—*Defect — Knowledge — Volenti Non Fit Injuria.*]—In an action by a servant against a master to recover damages for injuries sustained by the plaintiff, owing to an accident which occurred by reason of a defect in the machine which he was working, the defect being the giving way of a string which worked a brake automatically, thus saving the necessity of an attendant to work the brake by hand, it appeared that the plaintiff knew of the defect and of the likelihood of an accident, he having frequently replaced the string when worn, and that he worked and continued to work the machine without help from any other person, and without any complaint:—

Held, that the plaintiff was *volens* and could not recover at the common law. *Poll* v. *Hewitt*, 23 O. R. 619.

Machinery—*Defective System — Notice to Master of Defect.*]—A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself. At common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery, or a defective system of using the same, by reason of his failure to give notice to the employer of such defect. *Webster* v. *Foley*, 21 S. C. R. 580.

See The Queen v. *Filion*, 24 S. C. R. 482, *ante* 648; *O'Connor* v. *Hamilton Bridge Co.*, 25 O. R. 12, 21 A. R. 596, 24 S. C. R. 598, *post* 652; *Reid* v. *Barnes*, 25 O. R. 223, *post* 654.

3. *Liability of Employers (R. C. Act).*

Defect in Way—*Set of Cogs—New Trial.*]—Action by a workman in the defendants' mill for damages for injuries received while passing over a set of cogs, left uncovered, upon which he slipped, and his leg was dragged in by the cogs before they could be stopped. The jury found that there were other passage ways besides the cogs for the plaintiff to use in fulfilling his duties, but that none of them was sufficient, and the way used was more expeditious; that the non-covering of the cogs made the "way" defective; and that the plaintiff was not unduly negligent. The trial Judge, however, dismissed the action, upon the ground that the plaintiff voluntarily incurred the risk. His decision was reversed by the Supreme Court of British Columbia, and a verdict ordered to be entered for the plaintiff, with damages as assessed by the jury. The Supreme Court of Canada allowed an appeal by the defendants, and ordered a new trial, being of opinion that it was not sufficiently established that the plaintiff had of necessity (reasonable and practical necessity) to pass over a set of cogs which, being uncovered, were in a dangerous and defective state, as alleged in the statement of claim. *British Columbia Mills Co.* v. *Scott*, 24 S. C. R. 702.

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4. *Workmen's Compensation for Injuries Act.*

Accident—*Cause—Conjecture—Evidence.*]—Action under the Workmen's Compensation for Injuries Act, against a railway company, by the deceased's administratrix, for damages sustained through deceased's death, while engaged, as alleged, in coupling the defendants' cars, caused, as alleged, by his being struck by the overlopping lumber on a lumber car, through the absence of stakes in the sockets thereof. There was no direct evidence to shew how the accident happened, it being merely a matter of conjecture:—

Held, that the action was not maintainable.

The plaintiff was paid a sum of $250 by a benefit insurance society in connection with the railway, though a distinct organization, of which deceased was a member. The plaintiff gave a receipt stating that the railway company was relieved from all liability. The deceased's certificate did not profess to be an insurance against accidents, and the railway company were no party to the receipt:—

Held, that the receipt formed no bar to the action against the defendants; nor was there any right to deduct the amount received from the benefit society from the sum the plaintiff was entitled to as damages. *Hicks* v. *Newport, etc., R. W. Co.*, 4 B. & S. 403 *note*, distinguished. *Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 299.

Accident—*Explosion — Cause — Evidence of Experts.*]—Where a workman was killed by the explosion of a tank in which refuse was being boiled into soap, and there was no direct evidence as to the cause of the explosion, evidence of experts who had examined the tank, stating that the screws fastening the tank cover were defective, and that the explosion was probably due to this cause, was held sufficient to justify

the submission of the case to the jury. *Badcock* v. *Freeman*, 21 A. R. 633.

Machinery—*Danger—Employment of Infant Under Twelve—Factories Act.*]—The plaintiff, a boy under twelve years of age, was hired to work a hoist for the defendants in their factory. The elevator was worked by ropes on the outside of the cab or frame which were handled by the person standing within, through a square opening cut in the framework. The plaintiff was instructed for a few hours by a bigger boy how to raise and lower the hoist, and was cautioned not to put his head out of the opening when the hoist was going. On the occasion in question the elevator stopped when going up, and the plaintiff put his head out of the opening to see what stopped it, when, the elevator starting again, the plaintiff received the injuries complained of. On this evidence the plaintiff was nonsuited in his action, which he brought against the defendants for negligence:—

Held, that the nonsuit should be set aside and a new trial ordered with costs to the plaintiff in any event.

Per Boyd, C.—The employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Factories Act; and, for this reason, the employer has to exercise more than ordinary precautions for the well-being and safe-guarding of minors who have been put into factory work contrary to the prohibition of the Legislature. *O'Brien* v. *Sanford*, 22 O. R. 136.

Machinery—*Defect in—Volenti Non Fit Injuria.*]—The plaintiff was employed in the laundry department of the defendants' factory, and while she was standing on a bench to open a window for the purpose of letting steam and hot air escape, her hair was caught by an unguarded revolving horizontal shaft which passed through the room near the ceiling and in front of the window, and she was severely injured:—

Held, Burton, J. A., dissenting, affirming the judgment of the Queen's Bench Division in favour of the plaintiff, that she could not be said to have been doing an act so entirely unconnected with her employment and duties as to be regarded as a mere volunteer and as such outside the protection of the Act, and that there was a "defect in the arrangement" of the machinery within the meaning of the amending Act, 52 Vict. ch. 23, sec. 3 (6), that is, an element of danger arising from the position and collocation of machinery in itself perfectly sound and well fitted for the purpose to which it is to be applied and used.

The effect of sec. 7 of that Act and what is meant by voluntarily incurring risk of injury considered. *McCafferty* v. *Gale Manufacturing Co.*, 19 A. R. 117.

Machinery—*Defect—Factories Act.*]—The plaintiff, a lad of seventeen, worked at a stamp-machine in the defendants' factory, his duty being to keep it clean. Being refused proper material for this purpose, he resorted to pieces of bagging. Attempting to clean it while in motion, the bagging got caught in the cogwheel, and he was injured:

Held, that the defendants, knowing that the plaintiff was working with improper appliances in a dangerous place, were guilty of negligence in not making provision for his safety, by supplying him with proper material, and in not having the machinery stopped while the cleaning was going on, and the plaintiff was entitled to retain the verdict found in his favour at the trial.

As the place where the plaintiff worked was dangerous, and called for a guard under the provisions of the Factories Act, the failure to furnish one was *prima facie* evidence of negligence on the part of the defendants. *Thompson* v. *Wright*, 22 O. R. 127.

Machinery—*Defect—Factories Act.*]—An appeal by the plaintiff from the judgment of the Queen's Bench Division, 19 O. R. 76, was dismissed, the Court holding that on the evidence no negligence on the part of the defendants was shewn. The Court also held that, as the injury in question did not occur in connection with the user of the saw, it was unnecessary to consider whether the absence of a guard was a "defect" or not within the meaning of the Workmen's Compensation for Injuries Act; and also that, as there was no evidence as to the number of persons employed on the premises in question, it was not necessary to consider the points raised as to the construction of the Factories Act. *Hamilton* v. *Grawback*, 18 A. R. 337.

Machinery—*Defect—Factories Act.*]—A drilling machine manufactured by a well-known maker, and similar to those generally in use, was put up for the defendants in their factory. The plaintiff, a workman acting under the orders of the defendants' foreman, for the purpose of oiling the shafting on the arm in which the drill worked, tried to push a portion of it up and down the arm, and in order to do so, knowing that the machine was in motion, pressed his body against the revolving drill, which was not in motion when the order was given to him, and his clothes catching in an unguarded set-screw on the spindle, he was seriously injured. No other accident had occurred on the machine, which was quite new and in good order, and which, according to the evidence, was sometimes made with the set-screw sunk in the spindle.

In an action for damages the jury found that the accident was caused by the defendants' negligence, and without any negligence on the part of the plaintiff.

On appeal, a Divisional Court of the Common Pleas Division was equally divided.

Per Galt, C.J.—There was no evidence of negligence to submit to the jury either at common law or under the Workmen's Compensation for Injuries Act, nor any liability under the Factories Act.

Per Rose, J.—There was evidence of negligence both at common law and under the Workmen's Compensation for Injuries Act; the want of a guard to the set-screw, as required by the Factories Act, constituted such negligence at common law; and the absence of such guard was also a defect in the condition or arrangement of the machinery within the Workmen's Compensation for Injuries Act.

Held, by the Court of Appeal, that the absence of a guard to a projecting screw in a revolving spindle, part of a radial drill, which was used to fasten the drilling tool into the spindle, is a violation of the provisions of the Factories Act, R. S. O. ch. 208, sec. 15, the

spindle being a "moving part of the machinery," within the meaning of that Act, and it is also a "defect in the condition of the machinery," within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. ch. 141, sec. 3, as amended by 52 Vict. ch. 23, sec. 3 (O.), and in either view damages may be recovered for an accident caused by its absence.

Judgment of the Common Pleas Division affirmed; Burton, J.A., dissenting.

Held, by the Supreme Court of Canada, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the jury were warranted in finding that there was negligence in not having the screw guarded; that, as the foreman knew that the plaintiff had no experience as to the ordinary mode of doing what he was told, he was justified in using any reasonable mode; that he acted within his instructions in using the only efficient means that he could; and that under the evidence he used ordinary care. *O'Connor* v. *Hamilton Bridge Co.*, 25 O. R. 12, 21 A. R. 596, 24 S. C. R. 598.

Machinery—*Defect*—*Factories Act*—*Contributory Negligence.*]—The plaintiff was employed by a sub-contractor to do work upon lumber after it had left the defendants' saw-mill, and before it was shipped. To get some fresher water to drink than that supplied by the sub-contractor, the plaintiff went through the saw-mill (in which he had no business in connection with his work), and in returning, going out of his way through the mill, to assist a workman who was in difficulty with some plank, fell into an unguarded hole, in which a saw-working, and was injured:—

Held, that, under these circumstances, the plaintiff could have no claim against the defendants, either under the Ontario Factories Act, R. S. O. ch 208, or the Workmen's Compensation for Injuries Act, *ib.* ch. 141.

Even though the plaintiff might be a person in the service and employment of the defendants within the meaning of the Ontario Factories Act as amended, yet the duties prescribed by that Act can be enforced only by penalty; no civil liability is imposed on the owner of the factory, if, apart from the statute, he would not have been liable at common law, except that the Act may be used for evidential purposes in regard to the place of the accident being dangerous, and requiring protection (as *e.g.* per Ferguson, J., sec. 15 shews the hole in this case to have been.) But here the defendants would not be so liable, on account of the contributory negligence of the plaintiff. *Finlay* v. *Miscampbell*, 20 O. R. 29.

Machinery—*Defect*—*Factories Act*—*Volenti Non Fit Injuria.*]—In the defendants' dye-house, over the tanks containing the dye, was certain machinery consisting of a series of rollers for wringing the dye out of the warp as it came from the tanks, having cogwheels at the ends thereof where they connected with the frame of the machine. There were spaces between the tanks where planks were placed for the workmen to pass along, and which were always in a slippery condition. The plaintiff, a workman employed by the defendants, who was aware of the absence of a guard, but did not consider it a defect, while returning along one of these planks from the discharge of his duty in disentangling a warp, slipped, and by reason, as was found by the jury, of the defendants' negligence in not guarding the wheels, in trying to save himself, caught his hand therein and was injured:—

Held, that the cogwheels constituted part of the machinery, and, being dangerous, should have been guarded under sec. 15, sub-sec. 1, of the Factories Act, R. S. O. ch. 208; and that the non-guarding constituted a "defect in the condition of the machinery" under the Workmen's Compensation for Injuries Act, R. S. O. ch. 141. *McCloherty* v. *Gale Manufacturing Company*, 19 A. R. 417, commented on.

Held, also, following *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423, that the maxim *volenti non fit injuria* does not apply where an accident is caused by the breach of a statutory duty. *Rodgers* v. *Hamilton Cotton Co.*, 23 O. R. 425.

Machinery—*Defect*—*Knowledge*—*Appreciation of Risk.*]—To disentitle a workman to recover damages for a defect in a machine, under the Workmen's Compensation for Injuries Act, he must not only have a knowledge of the danger he incurs, but also a thorough comprehension or appreciation of the risk he runs.

The plaintiff, when formerly in the employment of the defendants, had knowledge of a defect in a machine in their factory, and after leaving had returned to such employment, and had again worked at the machine, knowing that the defect, of which the defendants were aware, had not been remedied. The jury having found that he did not fully appreciate the risk he ran:—

Held, that he was entitled to recover. *Haight* v. *Wortman and Ward Manufacturing Co.*, 24 O. R. 618.

Plant — *Defect* — *Master's Knowledge.*] — Where the workman is aware that the employer knows of the defect that ultimately causes the injury, he is not bound under sub-sec. 3 of sec. 6 of the Workmen's Compensation for Injuries Act, 1892, 55 Vict. ch. 30 (O.), to give information thereof to the employer, and his failure to give information in other cases will not bar his right of action if a reasonable excuse is shewn for the omission, this being a question of fact for the jury.

Where both the employer and the workman know of the defect, and it is the workman's own duty to see that the defect is remedied, but orders given by him with that object are not carried out, he cannot recover. *Truman* v. *Rudolph*, 22 A. R. 250.

Plant—*Defect*—*Street Railway Cars.*]—Having car buffers of different heights, so that in coupling the buffers overlap and afford no protection to the person effecting the coupling, is a "defect in the arrangement of the plant" within the meaning of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30, sec. 3 (O.); Burton, J.A., dissenting. *Boud* v. *Toronto Railway Co.*, 22 A. R. 78.

Affirmed by the Supreme Court of Canada. *Toronto Railway Co.* v. *Boud*, 24 S. C. R. 715.

"Servant in Husbandry"—*Knowledge of Danger — Jury — New Trial.*]—In an action under the Workmen's Compensation Act and at common law for damages for injuries sustained

by the plaintiff while engaged in digging a drain upon the defendant's farm, it did not appear that the plaintiff engaged with the defendant to do any particular work, but that he was first put by the defendant at mason work and then at digging the drain :—

Held, that it was a question for the jury whether the hiring of the plaintiff was as a servant in husbandry within the meaning of 56 Viet. ch. 26 (O.), and whether the work he was engaged in was in the usual course of his employment as such, and also whether the danger was known to the defendant and unknown to the plaintiff, or the converse.

The jury were asked certain questions, one being whether the hiring was as a servant in husbandry, but they were told that they might give a general verdict, and they gave one for the plaintiff, answering none of the questions. The trial Judge in his charge gave them no instruction on this point and no direction as to what the law was :—

Held, that they were not competent to find a general verdict, and there should be a new trial. *Reid* v. *Barnes*, 25 O. R. 223.

Way—*Defect—Contributory Negligence.*]—The plaintiff, in going to that part of the defendants' building where his work was, had to pass through a long room, the passage being nearly straight until within ten or twelve feet of a hoist, where it turned to the left. He was quite familiar with this passage, which was well lighted, but on the occasion in question, while looking at a man at work repairing the hoist, instead of turning toward his workroom he walked straight into the hole and fell to the cellar below, thus causing injury. As a rule there was a bar protecting the entrance to the hoist, but on the occasion in question this bar had been removed on account of the repairs :—

Held, by the Chancery Division, that the action must be dismissed upon the ground of contributory negligence on the part of the plaintiff :—

Held, by the Court of Appeal, that there was no defect in the condition of the "way," within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. ch 141, for which the defendants were responsible.

Judgment of the Chancery Division affirmed on other grounds.

Held, by the Supreme Court of Canada, affirming the decision of the Court of Appeal, Strong, C. J., *hesitante*, Taschereau, J., dissenting, that there was no evidence of negligence of the defendants to which the accident could be attributed, and W. was properly nonsuited at the trial :—

Held, per Strong, C. J., that though the case might properly have been left to the jury, as the judgment of nonsuit had been affirmed by two Courts, it should not be interfered with. *Headford* v. *McClary Mfg. Co.*, 23 O. R. 335, 21 A. R. 164, 24 S. C. R. 291.

Way—*Defect in—Superintendence — Plank.*]—The foreman of the defendant, a contractor for the erection of a building, desiring to pry up a part of the flooring, placed a new plank, supplied by the owners of the building, about eleven feet long by eight inches wide and three inches thick, which the evidence shewed had a knot in it two inches wide, and was cross-grained, across an opening in the ground floor, intending to use it as a fulcrum. The plaintiff, a labourer carrying a heavy scantling, was directed by the foreman to place it in another part of the building, and, while crossing the plank to do so, was precipitated into the cellar by the breaking of the plank at the knot, and was injured. It did not appear that there was any way beyond the plank :—

Held, that the plank was a "way" within the meaning of sub-sec. 1 of sec. 3 of the Workmen's Compensation for Injuries Act, and that the knot and cross-grain were defects in the way, for which the defendant was responsible. *Caldwell* v. *Mills*, 24 O. R. 462.

Way—*Defect—Public Street.*]—A public street in a defective condition, used by an employer in connection with his business, is not a "way used in the business of the employer," within the meaning of the Workmen's Compensation for Injuries Act, 55 Viet. ch. 30, sec. 3 (O.).

The defendants' factory was built immediately on the line of a public street, which was fourteen feet wide at the place, and on the other side there was a steep declivity without a fence. One of their workmen was on a load of straw on a waggon, unloading it into the defendants' premises through an aperture facing the street, when he lost his balance, fell off, and down the declivity, and was killed :—

Held, that the defendants were not liable. *Stride* v. *Diamond Glass Co.*, 26 O. R. 270.

See British Columbia Mills Co. v. *Scott*, 24 S. C. R. 702, *ante* 650.

MAXIMS.

"ACTIO PERSONALIS MORITUR CUM PERSONA."—*See Mason* v. *Town of Peterborough*, 20 A. R. 683.

"FALSA DEMONSTRATIO NON NOCET"—*See Guardian Assurance Co.* v. *Connely*, 20 S. C. R. 208.

"HE WHO SEEKS EQUITY MUST DO EQUITY."—*See Allen* v. *Furness*, 20 A. R. 34.

"OMNIA PRÆSUMUNTUR RITE ESSE ACTA."—*See Palmatier* v. *McKibbon*, 21 A. R. 441.

"RES IPSA LOQUITUR."—*See Roberts* v. *Mitchell*, 21 A. R. 433; *Sumpster* v. *T. Eaton Co.*, *ib.* 624.

"RES MAGIS VALEAT QUAM PEREAT."—*See Barthel* v. *Scotten*, 24 S. C. R. 367.

"VERBA FORTIUS ACCIPIUNTUR CONTRA PROFERENTEM."—*See Barthel* v. *Scotten*, 24 S. C. R. 367.

"VOLENTI NON FIT INJURIA."—*See McCloherty* v. *Gale Manufacturing Co.*, 19 A. R. 147; *Rodgers* v. *Hamilton Cotton Co.*, 23 O. R. 425; *Poll* v. *Hewitt*, *ib.* 619; *Hurdman* v. *Canada Atlantic R. W. Co.*, 25 O. R. 209, 22 A. R. 292.

MECHANICS' LIENS.

See LIEN, III.

MEDICAL PRACTITIONER.

Conduct — *Advertising — Discipline — Procedure.*]—Upon an appeal by a registered medical practitioner, under R. S. O. ch. 148, sec. 37, the Ontario Medical Act, as amended by 54 Viet. ch. 26, sec 5, from an order of the council of the College of Physicians and Surgeons of Ontario, directing that his name should be erased from the register, it appeared that he had advertised extensively in newspapers and by handbills, setting forth and lauding in extravagant language his qualifications for treating catarrh, shewing that that disease led to consumption, stating the symptoms of it, and giving testimonials from persons said to have been cured by him :—

Held, that mere advertising was not in itself disgraceful conduct in a professional respect; but that the advertisements published by the appellant were studied efforts to impose upon the credulity of the public for gain, and were disgraceful in a professional respect within the meaning of sec. 34 of the Act.

It appeared also that the appellant had represented to two persons, who were in fact in the last stages of consumption, that they were suffering from catarrhal bronchitis, and that he had the power to cure them, and that he had taken money from them upon the strength of such representations :—

Held, that this was conduct disgraceful in the common judgment of mankind, and much more so in a professional respect :—

Held, however, that publishing broadcast the symptoms of the disease known as catarrh was not in itself disgraceful conduct in a professional respect.

The council referred the complaint against the appellant for inquiry and report to their discipline committee, who took evidence, and reported it with their conclusions thereon to the council :—

Held, that the report of the committee could not be set aside or treated as a nullity because they took unnecessary evidence or because they drew conclusions from the facts ascertained by them.

Proper procedure under the Act pointed out. *Re Washington*, 23 O. R. 299.

Examination of Person by.]—*See* EVIDENCE, IV.

Malpractice—*Limitation of Actions—Infant.*]—An action for malpractice against a registered member of the College of Physicians and Surgeons of Ontario was brought within one year from the time when the alleged ill effects of the treatment developed, but more than a year from the date when the professional services terminated :—

Held, that the action was barred under the Ontario Medical Act, R. S. O. ch. 148, sec. 40.

Infancy does not prevent the running of the statute. *Miller* v. *Ryerson*, 22 O. R. 369.

Unlawfully Practising—*Apothecary.*] — A person went into a druggist's shop, stating he was sick, and describing his complaint, which the druggist said he believed to be diarrhœa, and after advising him as to diet, gave him a bottle of medicine, for which he charged 50 cents. The druggist stated that he had several kinds of diarrhœa mixture, and had sometimes to inquire as to symptoms in order to decide what mixture to give :—

Held, that this was practising medicine for gain within sec. 45 of the Medical Act, R. S. O. ch. 148 :—

Held, also, that the fact of the druggist being registered under the Pharmacy Act, R. S. O. ch. 151, which entitled him to act as an apothecary as well as a druggist, did not authorize the practice of medicine.

The meaning of "apothecary" considered. *Regina* v. *Howarth*, 24 O. R. 561.

Unlawfully Practising—*Summary Conviction—Costs.*]—Where a summary conviction, valid on its face, has been returned with the evidence upon which it was made, in obedience to a *certiorari*, the Court is not to look at the evidence for the purpose of determining whether it establishes an offence, or even whether there is any evidence to sustain a conviction.

Regina v. *Wallace*, 4 O. R. 127, followed.

But where a conviction for an offence over which the magistrate had jurisdiction is bad on its face, the Court is to look at the evidence to determine whether an offence has been committed, and if so, it should amend the conviction.

A conviction under the Ontario Medical Act, R. S. O. ch. 148, sec. 45, for practising medicine for hire :—

Held, bad for uncertainty in not specifying the particular act or acts which constituted the practising.

Re Donelly, 20 C. P. 165; *Regina* v. *Spain*, 18 O. R. 385; and *Regina* v. *Somers*, 24 O. R. 244, followed.

And the Court refused to amend and quashed the conviction, where the practising consisted in telling a man which of several patent medicines sold by the defendant was suitable to the complaint which the man indicated, and selling him some of it.

Costs against the informant refused. *Regina* v. *Somers*, 24 O. R. 244, followed. *Regina* v. *Coulson*, 24 O. R. 246.

But *see Regina* v. *Coulson*, 27 O. R. 59.

MERGER.

Of Cause of Action in Judgment.]—Judgment was recovered by the plaintiffs against the defendant upon a promissory note given for part of the purchase money of goods sold by the plaintiffs to the defendant.

Under execution issued upon the judgment, the goods sold were seized, and were claimed by the defendant's wife under a bill of sale from her husband, which recited that in purchasing the goods he acted as her agent :—

Held, upon the evidence, that fraudulent collusion between the husband and wife to defeat the plaintiffs' claim was not established; and, in the absence of fraud or mistake, the Court would not grant the plaintiffs the extraordinary relief of vacating the judgment against

the defendant in order to allow them to proceed against the wife :—

Held, also, that, so long as the judgment stood, no action could be brought upon the original cause of action, which had become merged. *Toronto Dental Manufacturing Co.* v. *McLaren*, 14 P. R. 89.

Of Contract in Conveyance.]—The defendant, an assignee for creditors, agreed with the plaintiff to exchange five houses, then in course of erection, for certain lands of the plaintiff. By the contract, which was dated 24th March, the houses were to be completed by 30th May, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within sixty days, *i.e.*, by 24th May, but as a matter of fact they were executed and exchanged about 9th May. The plaintiff subsequently, in the present action, claimed damages for non-completion of and defects in the finishing of the houses.

The deed from the defendant contained no covenants covering the matters complained of :—

Held, nevertheless, that the plaintiff was entitled to recover on the original contract.

A contract to perform work or to do things for the other contracting party on a sale of lands, at a period after the time fixed by the same contract for the execution and final delivery of the formal conveyance, does not become merged in the conveyance.

Held, also, that the loss of rents which might have been obtained for the houses, if completed at the proper time, was a proper measure of damages, the contracting parties having known that the houses were intended to be rented. *Smith* v. *Tennant*, 20 O. R. 180.

MINERAL LANDS.

Dominion Lands—*Reservation of Mines and Minerals.*]—Where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands, and there is no stipulation to the contrary, express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words. *Canadian Coal and Colonization Company (Ltd.)* v. *The Queen*, 3 Ex. C. R. 157.

Affirmed by the Supreme Court of Canada. *The Queen* v. *Canadian, etc., Co.*, 24 S. C. R. 713.

Expropriation—*Mineral Lands — Proof of Value.*]—In a case of expropriation the claimant is not obliged to prove by costly tests or experiments the mineral contents of the land. *Brown* v. *The Commissioner for Railways*, 15 App. Cas. 200, referred to.

Where, however, such tests or experiments have not been resorted to, the Court or jury must find the facts as best it can from the indications and probabilities disclosed by the evidence. *The Queen* v. *McCurdy*, 2 Ex. C. R. 311.

Municipal Corporations—*Highway—Natural Gas.*]—Natural gas is a mineral within the meaning of the Municipal Act, R. S. O. ch. 184, sec. 565, which gives power to the corporation of any county or township to sell or lease mineral rights under highways. *Ontario Natural Gas Co.* v. *Gosfield*, 18 A. R. 626.

Proceeds of Sale—*Statute of Frauds.*]—An agreement by the owner of an interest in a gold mine to transfer to another, in consideration of services performed in working the mine, a portion of such owner's share in the proceeds when it should be sold, is not a contract for sale of an interest in land within the Statute of Frauds. *Stuart* v. *Mott*, 23 S. C. R. 384.

Purchaser for Value without Notice—*Consideration.*]—An unpatented and undeveloped mining property, the value of which was purely speculative, and the Government dues on which were unpaid, was conveyed to the plaintiff, the consideration mentioned in the deed being $100, and he, for the express, but not actual, consideration of $750, conveyed the property for the purpose of selling it for his own benefit to one of the defendants, who, after holding it for a year, conveyed it to his co-defendant, who had no actual notice of the circumstances, in consideration of the release of a debt of $25 :—

Held, that the release of the debt was a sufficient consideration for the deed :—

Held, also, that, taking the circumstances and character of the property into account, the last grantee, who had made no inquiry, was not, by reason of the consideration expressed in the deeds to and from the plaintiff, put upon inquiry so as to affect him with constructive notice of the plaintiff's rights. *Moore* v. *Kane*, 24 O. R. 541.

Sale of Phosphate Mining Rights—*Option to Purchase other Minerals—Transfer of Rights.*]—M., by deed, sold to W. the phosphate mining rights of certain land, the deed containing a provision that "in case the said purchaser in working the said mines should find other minerals of any kind, he shall have the privilege of buying the same from the said vender or representative by paying the price set upon the same by two arbitrators appointed by the parties." W. worked the phosphate mine for five years, and then discontinued it. Two years later he sold his mining rights in the land, and by various conveyances they were finally transferred to B., each assignment purporting to convey "all mines, minerals, and mining rights already found or which may hereafter be found" on said land. A year after the transfer to B., the original vendor, M., granted the exclusive right to work mines and veins of mica on said land to W. & Co., who proceeded to develop the mica. B. then claimed an option to purchase the mica mines under the original agreement, and demanded an arbitration to fix the price, which was refused, and she brought an action to compel M. to appoint an arbitrator, and for damages :—

Held, affirming the decision of the Court of Queen's Bench, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica as to which B. claimed the option. *Baker* v. *McLelland*, 24 S. C. R. 416.

See CROWN LANDS, II.

MISBEHAVIOUR IN OFFICE.

See CRIMINAL LAW, IV.

MISDESCRIPTION.

See WILL, IV.

MISDIRECTION.

See NEW TRIAL, VII.

MISTAKE.

Overpayment of Interest—*Recovery back—Account.*]—Where a testator bequeathed a legacy to be paid by the devisee of certain lands, through the executor, in twenty semi-annual instalments, with interest at the rate of six per cent., payable at the time of such instalment on the amount of principal payment, to be computed from the time of the testator's decease; and, by mutual error, interest was paid with each instalment upon the whole amount of principal then remaining unpaid, which payments of interest were consumed by the legatee as income, while he invested the instalments of principal, and the legatee now brought this action against the executor and devisee claiming an instalment as still due, the defendants alleging that he had been overpaid, and asking an account:—

Held, by Meredith, J., that the overpayments of interest were made under mistake of fact, and could be recovered or set off; and that the plaintiff, by reason of the overpayments, was enabled to, and did, invest just so much of the *corpus*, at interest, and so in effect got and should be charged with interest upon the overpayments; and, it being admitted that upon this footing the plaintiff was fully paid, dismissed the action:—

Held, by the Divisional Court, affirming that judgment, that the overpayments were made under a mistake of fact and might be recovered or set off; but, varying it, that an account should be taken, and that all the payments made should be brought into account and applied, but without addition of interest, to the aggregate of the amounts properly due and payable under the will, and any balance due to plaintiff ascertained. *Corham* v. *Kingston*, 17 O. R. 432, and *United States* v. *Sanborn*, 135 U. S. R. 271, specially referred to. *Barber* v. *Clark*, 20 O. R. 522. Affirmed, 18 A. R. 435.

See MERGER—WILL, IV.

MONEY HAD AND RECEIVED.

Municipal Debenture—*Purchase of—Void By-law.*]—Action to recover the amount of a debenture, one of a series issued by the defendants pursuant to their by-law passed for the levying of a special rate upon a particular locality for the purpose of cleaning out and repairing a drain:—

Held, following *Alexander* v. *Township of Howard*, 14 O. R. 22, and *Re Clark and Township of Howard*, 16 A. R. 72, that the by-law was void, the defendants having no power to pass it for such a purpose.

The debenture was silent as to the purpose for which it was issued, but referred to the by-law, which disclosed such purpose. There was no representation by the defendants that it was good:—

Held, that, although the plaintiffs were innocent holders and had paid the full value of the debenture, they could not recover upon it, because the defendants had no power to make the contract professedly made by it. *Webb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642, distinguished. *Marsh* v. *Fulton County*, 10 Wallace U. S. R. 676, specially referred to.

Held, however, that as the defendants were bound to keep the drain in repair and to pay for repairs out of their general funds, and as they had received the price of the debenture directly from the plaintiffs and had the full benefit of it, without giving any consideration, the plaintiffs were entitled to recover for money received by the defendants. *Confederation Life Association* v. *Township of Howard*, 25 O. R. 197.

MORTGAGE.

I. Charge on Land.

Executory Agreement—*Registration.*]—A letter in the following form, "I agree to charge the east half of lot number 19 . . with the payment of the two mortgages . . amounting to $750 . . and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said mortgage," is not a mere executory agreement, but operates as a present charge in favour of the mortgagees named, upon the lands described, and may be registered against them. *Hoofstetter* v. *Rooker*, 22 A. R. 175. Affirmed by the Supreme Court of Canada, 26 S. C. R. 41.

II. Covenants and Obligations as to Payment.

1. *Acceleration of Payment.*

Default—*Setting Aside Judgment—Payment of Interest and Costs.*]—Where, by virtue of an acceleration clause in a mortgage deed, the whole of the mortgage money has become due by default of payment of interest, and judgment has been recovered for the whole by the mortgagee against the mortgagor in an action solely upon the covenant for payment contained in the mortgage deed, the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside.

The acceleration is not in the nature of a penalty, but is to be regarded as the contract of the parties.

Rules 359, 360, and 361, and the long form of the acceleration clause, R. S. O. ch. 107, schedule B., sec. 16, considered. *Wilson* v. *Campbell*, 15 P. R. 254.

See In re Parker, Parker v. *Parker*, 24 O. R. 373, *post* 671.

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2. *Enforcement After Exercise of Power of Sale.*

See Patterson v. *Tanner*, 22 O. R. 364, *post* 676.

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3. *Restriction of Liability.*

Dependent or Independent Covenants.]—The proviso for payment in a mortgage made by the defendant was that the mortgage was to be void on payment of $3,250 and interest. Then followed the usual printed short form covenant for payment, to which was added in writing the words, "but before proceeding upon the covenant the mortgagee shall realize upon the lands mortgaged, and that the mortgagor shall then be liable only to the amount of $600, or such lesser sum as will with the net proceeds from the lands make the $3,250 and interest." The last clause in the mortgage, also added in writing, was that "in no event shall the personal liability of the mortgagor on his covenant exceed $600;"—

Held, that the defendant was not to be subject to any liability until the lands were realized upon and the result shewed a deficiency, and then only to the extent of $600. *Wilson* v. *Fleming*, 24 O. R. 388.

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4. *Trustees.*

Personal Liability.]—Where a person holding land as a trustee, at the request of the beneficial owners, and without any consideration to him therefor or intention to become personally liable, for the benefit of such owners executed a mortgage on the land, the mortgage deed without his knowledge containing a covenant to pay the mortgage debt:—

Held, that the covenant was not enforceable against the mortgagor personally, by the assignee of the mortgage for value without notice; and that his remedy was restricted to foreclosure proceedings against the lands. *Patterson* v. *McLean*, 21 O. R. 221.

Personal Liability — *Indemnity.*]— Where lands held in trust are mortgaged by the trustee, the mortgagee is not entitled to the benefit of any equities and rights arising either under express contract or upon equitable principles, entitling the trustee to indemnity from his *cestui que trust*; Fournier and Taschereau, JJ., dissenting. *Williams* v. *Balfour*, 18 S. C. R. 472.

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5. *Upon Sale and Conveyance of Equity of Redemption.*

Indemnity—*Implied Obligation—Assignment—Evidence.*]—Although when a mortgagor conveys his equity of redemption, subject to the mortgage, there is an implied obligation on the part of the purchaser to indemnify the mortgagor against the mortgage debt, evidence is admissible of an express agreement between the parties to the contrary.

A claim against a purchaser of an equity of redemption for indemnification against the mortgage debt may be assigned by the mortgagor to the mortgagee, and is enforceable by the latter. *British Canadian Loan Co.* v. *Tear*, 23 O. R. 664.

Indemnity — *Nominal Purchaser.*] — The equitable doctrine of the right to indemnity of a vendor of land sold subject to a mortgage applies only as against a purchaser in fact, and therefore, where, at the request of the actual purchaser, the land in question was conveyed to his

nominee by deed absolute in form, but for the purpose of security only, this nominee was held not liable to indemnify the vendor.

It is not proper in an action for foreclosure to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title.

Application of Con. Rules 328, 329, 330, 331, 332, 333, discussed.

Lockie v. *Tennant*, 5 O. R. 52, approved. *Walker* v. *Dickson*, 20 A. R. 96.

Indemnity—*Rebuttable Presumption.*]—When a mortgagor conveys his equity of redemption in the mortgaged property without any stipulation in the conveyance as to payment of the incumbrance the right to indemnification against it does not arise from anything contained in the mortgage or conveyance, but from the facts, and this may be rebutted by parol evidence or otherwise. The right, where it exists, arises from implied contract. *Waring* v. *Ward*, 7 Ves. 322, explained. *Beatty* v. *Fitzsimmons*, 23 O. R. 245.

Indemnity—*Trustee for True Purchaser.*]—L. F. agreed in writing to sell land to C. F. and others, subject to mortgages thereon, C. F. to hold same in trust to pay half the proceeds to L. F., and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated, and L. F. became a member, receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company, but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property, C. F. was brought in as a third party to indemnify L. F., his vendor, against a judgment in said action:—

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau and King, JJ., dissenting, that the evidence shewed that the sale was not to C. F. as a purchaser on his own behalf, but for the company, and the company and not C. F. was liable to indemnify the vendor. *Fraser* v. *Fairbanks*, 23 S. C. R. 79.

Married Woman — *Implied Obligation.*]—Held, reversing the decision of the Common Pleas Division, 19 O. R. 739, that the power of attorney to the husband of the married woman defendant, authorizing him to sell her lands, did not authorize him to exchange such lands for others or to bind her to assume payment of a mortgage on the land given in exchange, and that on the evidence she was not bound thereby:—

Held, also, by Osler and Macleman, JJ.A., that the implied obligation to pay off the incumbrance which in the case of a conveyance of land to a person *sui juris* is imposed by a Court of Equity, is not enforceable against a married woman. It cannot be said to be a contract or promise in respect of separate property.

The practice as to giving relief to one defendant against a co-defendant considered. *McMichael* v. *Wilkie*, 18 A. R. 464.

Privity—*Mortgagee and Purchaser—Suretyship.*]—Where a mortgagor has assigned his equity of redemption, the assignee covenanting with him to pay the mortgage debt, though as between the mortgagor and the assignee the latter thus becomes primarily liable for the debt, this does not create any privity of contract between the assignee and the mortgagee; and the mortgagor cannot contend, as against the mortgagee, that he has become a mere surety for the debt, and, as such, has been released by certain dealings between the mortgagee and assignee of the equity of redemption, unless such dealings constitute a new contract between them. *Mathers* v. *Helliwell*, 10 Gr. 172, distinguished. *Abbous* v. *Hicks*, 21 O. R. 95.

Privity—*Mortgagee and Purchaser.*]—Although the purchaser of the equity of redemption in a mortgaged property covenants with the mortgagor to pay the mortgage money, as the expressed consideration for the conveyance, there is no privity of contract or any implied obligation created thereby, which will enable the mortgagee to sue the purchaser for the amount. *Frontenac Loan and Investment Society* v. *Hysop*, 21 O. R. 577.

Privity—*Mortgagee and Purchaser.*]—The purchaser of land, subject to a mortgage, does not *ipso facto* become personally liable to the mortgagee for the amount of the mortgage, nor does he become liable to the mortgagee by entering into a covenant with his vendor to pay the mortgage. In other words, the burden of a covenant to pay mortgage money does not run with the mortgaged lands. *Canada Landed and National Investment Co.* v. *Shaver*, 22 A. R 377.

III. Crops.

Entry — *Chattel Mortgage.*]—A mortgagor after default is, as far as crops growing upon the mortgaged land are concerned, in the position of a tenant at sufferance, and cannot by giving a chattel mortgage upon the crops confer a title thereto upon the chattel mortgagee to the prejudice of the mortgagee of the land, or any one claiming under him, who has entered into possession of the land before the crop is harvested. *Laing* v. *Ontario Loan and Savings Company*, 46 U. C. R. 114, explained. *Bloomfield* v. *Hellyer*, 22 A. R. 232.

IV. Dower in Mortgaged Lands.

Extent of — *Surplus.*]—Under secs. 5 and 6 of the Dower Act, R. S. O. ch. 133, a wife who joins to bar dower in a mortgage of land made by her husband to secure part of the purchase money is entitled to dower, notwithstanding a conveyance by him of the equity of redemption without her concurrence. The wife so joining in the mortgage is not merely a surety for her husband; and she is entitled to dower out of the surplus only of the land or money left after satisfying the mortgage debt. *Re Hague*, 14 O. R. 660; *Re Croskery*, 16 O. R. 207; and opinion of Patterson, J. A., in *Martindale* v. *Clarkson*, 6 A. R. 1, dissented from. *Pratt* v. *Bunnell*, 21 O. R. 1.

Extent of—*Whole Value.*]—Where lands mortgaged to secure a loan have been sold by the mortgagee, the wife of the mortgagor, who has joined in the mortgage to bar her dower, is entitled to dower out of the surplus, computed on what would be the full value of the land, if unincumbered. *Pratt* v. *Bunnell*, 21 O. R. 1, not followed so far as the reasoning and *dicta* therein are opposed to the above decision. *Gemmill* v. *Nelligan*, 26 O. R. 307.

Mortgage by Devisees—*Priorities.*]—Certain land was devised to the testator's sons charged with an annuity to his widow, who also had her dower therein. The devisees mortgaged the land to C. in March, 1879, and the mortgage was not registered until January, 1880. In November, 1879, a second mortgage was given to M. and registered the same month. In this mortgage the widow joined barring her dower and releasing her annuity for the benefit of M. She had had knowledge of the prior mortgage when it was made and had refused to join in it. The second mortgagee, not being aware, when his mortgage was executed, of the prior incumbrance, gained priority, and the land was sold to satisfy his mortgage. The proceeds of the sale being more than sufficient for that purpose, the surplus was claimed by both the widow and by C.:—

Held, reversing the judgment of the Court of Appeal for Ontario, Gwynne and Patterson, JJ., dissenting, that the security for which the dower had been barred and the annuity released having been satisfied, the widow was entitled to the fund in the Court, as representing her interest in the land, in priority to C. *Gray* v. *Coughlin*, 18 S. C. R. 553.

Omission of Dower Clause—*Rectification.*]—*See Bellamy* v. *Badgerow*, 24 O. R. 278, *ante* 338.

See Ayerst v. *McClean*, 14 P. R. 15, *post* 674; *Blong* v. *Fitzgerald*, 15 P. R. 467, *post* 674.

V. Fixtures.

See Fixtures.

VI. Foreclosure.

Illegal Consideration—*Defence.*]—The rule of law which holds contracts made upon immoral consideration to be invalid is confined to executory agreements, and therefore to an action for foreclosure of a mortgage given to secure part of the purchase money of a house it is no defence to shew that the house has been purchased, to the vendor's knowledge, for use as a house of ill-fame. The plaintiff being able to make out the right to relief by production of the mortgage without disclosing the illegal transaction, the defendant cannot set up the illegality as a defence.

Judgment of Street, J., 21 O. R. 27, affirmed. *Hager* v. *O'Neil*, 20 A. R. 198. *See* next case.

Illegal Consideration—*Defence—Possession—Pleading—Parties.*]—Judgment of the Court of Appeal in *Hager* v. *O'Neil*, 20 A. R. 198, affirmed.

Under the Judicature Act of Ontario an action for foreclosure is not to be regarded as including a right to recover possession of the mortgaged premises as in ejectment, and the rule that in such action the plaintiff may obtain an order for delivery of possession does not apply to a case in which the mortgage sought to be foreclosed is held void and the plaintiff claims possession as original owner and vendor.

Under said Judicature Act, as formerly, the plea to an action on a contract that it was entered into for an immoral or illegal consideration must set out the particular facts relied upon as establishing such consideration.

Quære: Can the purchaser of the equity of redemption set up such defence as against a mortgagee seeking to foreclose, or is the defence confined to the immediate parties to the contract? *Clark* v. *Hager*, 22 S. C. R. 510.

Opening Foreclosure—*Power of Sale—Attack by Judgment Creditor.*]—Mortgagees of a property, with a power of sale exercisable on default without notice, took foreclosure proceedings on their mortgage, and pending these obtained judgment in a separate action on the covenant against the executors of the mortgagor, and, after foreclosure of the mortgage, issued execution on the judgment, and sold thereunder other lands of the mortgagor, crediting the proceeds on the mortgage debt.

Previous to the foreclosure proceedings the mortgaged lands had been offered for sale by public auction under the power of sale and also privately, but without result.

About a year after the foreclosure the mortgagees sold the premises by private contract, conveying to the purchaser by ordinary short form deed without recitals, and the purchaser shortly afterwards sold again at a large advance, both purchaser and sub-purchasers being aware of the sale of the other lands under execution on the judgment on the covenant.

The plaintiff, a creditor of the mortgagor at the time of his death, did not recover a judgment for his debt until a year after the sale of the property by private contract, and subsequently purchased it at sheriff's sale under his own execution, and now claimed to be let in to redeem, or, in the alternative, that the mortgagees should account to him for the value of the property:—

Held, that the foreclosure was opened by the proceedings on the covenant, and any person entitled to redeem had a right to bring the action without first setting aside the final order; the right to redeem under such circumstances not being merely a personal equity in the mortgagor:—

Held, however, that the sale by private contract and conveyance must be deemed an exercise of the power of sale, the equity of redemption then being at large. *Carver* v. *Richards*, 27 Beav. 488, and *Kelly* v. *Imperial Loan Co.*, 11 A. R. 526, 11 S. C. R. 516, followed.

Held, also, that the mortgagees had not acted negligently or carelessly in the sale, but had taken all reasonable care, and that they were not bound to offer the property a second time by public auction without some reasonable prospect of a sale.

Held, lastly, that under any circumstances, the plaintiff not being an incumbrancer at the time of the sale, and the legal and equitable

title having been vested in the purchaser before the sheriff's sale to the plaintiff, the latter was not entitled to an account from the mortgagees. *Chatfield* v. *Cunningham*, 23 O. R. 153.

See Re Essex Law and Timber Co.—Trout's Case, 21 O. R. 367, *post* 684.

VII. Foreign Lands.

Action for Redemption—*Jurisdiction.*]—*See Henderson* v. *Bank of Hamilton*, 23 O. R. 327, 20 A. R. 646, 23 S. C. R. 719, *post* 689.

VIII. Insurance Moneys.

Application of—*Arrears—Interest.*]—Under ordinary circumstances a mortgagee can claim interest only from the time the money is advanced.

Where insurance moneys are received by a mortgagee under an insurance effected by the mortgagor pursuant to a covenant to insure, contained in a mortgage made under the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid; nor, though he applies part upon overdue principal, is he bound to apply the balance in discharge of overdue interest.

Corbum v. *Kingston*, 17 O. R. 432, considered. Judgment of the Queen's Bench Division, 19 O. R. 677, varied. *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

Application of—*Prior Mortgage.*]—The owner of a parcel of land mortgaged the same, and subsequently mortgaged it to the same person again, the second mortgage comprising other lands, on which were buildings, and containing a covenant to insure. The mortgagor subsequently made an assignment for the benefit of his creditors, and the equity of redemption was sold by his assignee, the purchaser covenanting to pay off the mortgages. The purchaser then insured the buildings included in the second mortgage in his own name, "loss, if any, payable to the mortgagees as their interest might appear," subject to the conditions of the mortgage clause. A fire took place by which the buildings comprised in the second mortgage were destroyed. The insurance moneys payable being more than sufficient to pay the balance due on the second mortgage, which was in default, the mortgagees claimed the right to apply the surplus in payment of the first mortgage, which was also in default:—

Held, that the mortgagees were not entitled to consolidate their mortgages so as to be paid the whole of the insurance moneys, but were restricted to the right to recover the amount remaining unpaid on the second mortgage. *Re Union Assurance Co.*, 23 O. R. 627.

Machinery—*Lien Agreement.*]—The plaintiffs sold certain mill machinery under an agreement which provided that a mortgage of the mill property was to be given to them by the purchasers to secure the price; that the machinery was not to form part of the real estate, but was to remain personal property; that the title was not to pass till payment of the price; and that the plaintiffs might insure the machinery.

After the machinery was placed in the mill, the purchasers gave to the plaintiffs a mortgage on the mill property, and this mortgage contained a covenant to insure.

Subsequently the plaintiffs insured the mill and machinery, and the purchasers, without their knowledge, also placed insurance thereon.

The mill and machinery were destroyed by fire, and the plaintiffs were unable to recover on the policies held by them, owing to the breach of statutory condition 8, and they claimed the benefit of the purchasers' insurance of the machinery:—

Held, per Hagarty, C.J.O., and Maclennan, J.A., that the plaintiffs were entitled to the moneys payable to the purchasers under their policy, the mortgage being the governing instrument.

Per Burton and Osler, JJ.A., that they were not so entitled, the machinery being by the agreement personal property and not included in the mortgage or protected by the covenant to insure.

In consequence of the division of opinion, the judgment of Falconbridge, J., in favour of the plaintiff, was affirmed. *Waterous Engine Works Co.* v. *McCann*, 21 A. R. 486.

Subrogation—*Mortgagor and Mortgagee.*]—Mortgagees of real estate insured the mortgaged property to the extent of their claim thereon under a clause in the mortgage by which the mortgagor agreed to keep the property insured in a sum not less than the amount of the mortgage, and, if he failed to do so, that the mortgagees might insure it and add the premiums paid to their mortgage debt. The policy was issued in the name of the mortgagor, who paid the premiums, and attached to it was a condition that whenever the company should pay the mortgagees for any loss thereunder, and should claim that as to the mortgagor no liability therefor existed, said company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment. A loss having occurred, the company paid the mortgagees the sum insured, and the mortgagor claimed that his mortgage was discharged by such payment. The company disputed this and insisted that they were subrogated to the rights of the mortgagees under the said condition. In an action to compel the company to give a discharge of the mortgage:—

Held, per Fournier, Taschereau, and Gwynne, JJ., that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause, which was inserted in the policy without the knowledge and consent of the mortgagor, could not have the effect of converting the policy into one insuring the interest of the mortgagees alone; that the interest of the mortgagees in the policy was the same as if they were assignees of a policy effected with the mortgagor; and that the payment to the mortgagees discharged the mortgage:—

Held, also, that the company was not justified in paying the mortgagees without first contest-

ing their liability to the mortgagor and establishing their indemnity from liability to him; not having done so they could not, in the present action, raise any questions which might have afforded them a defence in an action against them on the policy.

Decision of the Court of Appeal, 15 A. R. 421, and of a Divisional Court, 14 O. R. 322, affirmed. *Imperial Fire Insurance Co.* v. *Bull*, 18 S. C. R. 697.

IX. Interest.

Arrears of—*Period—Rate.*] — R. S. O. ch. 111, sec. 17, which provides that no more than six years' arrears of interest upon money charged upon land shall be recoverable, only applies where a mortgagee is seeking to enforce payment, out of the lands, of his mortgage money and interest, and does not apply to an action for redemption or to actions similar in principal.

In this action the mortgagee was held entitled to interest at the rate fixed by the mortgages up to the maturity thereof, and afterwards at the rate of six per cent.; in all for about sixteen years. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

Commencement—*Insurance Moneys—Application.*]—Under ordinary circumstances, a mortgagee can claim interest only from the time the money is advanced.

Where insurance moneys are received by a mortgagee under an insurance effected by the mortgagor, pursuant to a covenant to insure contained in a mortgage made under the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid; nor, though he applies part upon overdue principal, is he bound to apply the balance in discharge of overdue interest. *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

Default—*Acceleration of Principal.*] — *See Wilson* v. *Campbell*, 15 P. R. 254, *ante* 663.

Instalments—*Payment Ante Diem.*]—Under a mortgage given to secure the balance of purchase money, and in which the principal is payable by instalments extending beyond five years, the mortgagor is, at any time after such last named period, entitled to a discharge under sec. 7 of R. S. C. ch. 147, an Act respecting interest, upon payment of the principal and interest, together with three months' additional interest. *In re Parker—Parker* v. *Parker*, 24 O. R. 373.

Payment—*Statute of Limitations.*]—*See Trust and Loan Company of Canada* v. *Stevenson*, 20 A. R. 66, *post* 674.

Payment to Solicitor.]—*See In re Tracy—Scully* v. *Tracy*, 21 A. R. 454, *post* 675.

Rate Post Diem.] — A mortgage of real estate provided for payment of the principal money secured on or before a fixed date "with interest thereon at the rate of ten per centum per annum until such principal money and interest shall be fully paid and satisfied:"—

Held, affirming the judgment of the Court of Appeal for Ontario, that the mortgage carried interest at the rate of ten per cent. to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of six per cent. on the unpaid principal. *St. John* v. *Rykert*, 10 S. C. R. 278, followed. *People's Loan and Deposit Co.* v. *Grant*, 18 S. C. R. 262.

X. Parties to Mortgage Actions.

Lessee of Mortgagor—*Protection of Interest—Staying Proceedings—Order for Sale.*]—In an action for foreclosure of a mortgage, the defendants were the administrator and heirs-at-law of the mortgagor and certain devisees in trust of deceased heirs. Subsequent incumbrancers, judgment creditors of some of the heirs, and the lessee of the Queen Hotel, part of the mortgaged property, under lease from some of the heirs, were not made parties. None of the defendants appeared, and the equity of redemption of the mortgagor and those claiming under him was barred and foreclosed, and the lands ordered to be sold on a day named. On that day, on application of the lessee of the Queen Hotel, an *ex parte* order was made by the Chief Justice directing that, on payment into Court of $37,019 by S. & K., further proceedings by the plaintiff should be stayed until further order, and that the plaintiff should convey the mortgaged lands and the suit and benefit of proceedings therein to S. & K., which direction was complied with. On 26th December, 1889, the defendants moved to rescind this order. The motion was refused, and the order amended by a direction that the lessee should be made a defendant to the action, and S. & K. joined as plaintiffs, and that the stay of proceedings be removed. On 4th January, 1890, a further order was made directing that the Queen Hotel property be sold subject to the rights of the lessee. From the two last mentioned orders the defendants appealed to the full Court, which affirmed that of 26th December and set aside that of 4th January. Both parties appealed to this Court:—

Held, that the order of 26th December, 1889, was rightly affirmed. The stay of proceedings under the order affirmed by it was no more objectionable than if effected by injunction to stay a sale under a writ of *fi. fa.*, and, being made at the instance of a lessee, and as such a purchaser *pro tanto*, of the mortgaged lands, who had a right to redeem, it was in the discretion of the Chief Justice so to order. To the direction that the plaintiff should convey the lands to S. & K., the defendants had no *locus standi* to object, and they were not prejudiced by the addition of parties made by the order. Nor had the defendants a right to object to the removal of the stay of proceedings; and any right subsequent incumbrancers not before the Court might have to complain would not be effected by the order made in their absence. Moreover, between the date of the order and the appeal to the full Court the property having been sold under the decree, the purchaser not being before the Court was a sufficient ground for dismissing the appeal.

Held, further, that the order of 4th January, 1890, should also have been affirmed by the full Court. In selling the mortgaged property the Court had a right to endeavour to preserve the rights of the lessee by selling first the portions in which she had no interest. *Collins* v. *Cunningham, Cunningham* v. *Drysdale*, 21 S. C. R. 139.

Personal Representative—*Heirs-at-Law.*]—In a mortgage action for foreclosure, although it may be that since the Devolution of Estates Act, as a matter of title, the record is complete with the general administrator of the deceased owner of the equity of redemption as the sole defendant; yet, as a matter of procedure, the infant children of the deceased are proper parties, and as such should appear as original defendants, unless some good reason exists for excluding them.

Rules 369 and 1005 considered. *Keen* v. *Codd*, 14 P. R. 182.

Personal Representative—*Heirs-at-Law.*]—In an action upon a mortgage made by a deceased person, who died in 1889, payment, foreclosure, and possession were claimed, and the executors, to whom the real estate had been devised, were the only defendants. Judgment for possession, *inter alia*, was recovered, and a writ of possession placed in the sheriff's hands. The widow, who was one of the executors, and the infant children of the deceased mortgagor had an interest under the will in the mortgaged lands, and were in possession when the sheriff attempted to execute the writ. The infants, and the widow as their guardian, made a claim to the possession as against the writ, based on the ground of the infants not having been made parties to the action:—

Held, that the sheriff, by virtue of Rule 1141 (*b*), was entitled to interplead:—

Held, also, that the action, as regards the claim for possession, was properly constituted; and the infants were bound by the judgment against the executors.

Keen v. *Codd*, 14 P. R. 182, distinguished. *Emerson* v. *Humphries*, 15 P. R. 84.

Personal Representative—*Heirs-at-Law.*]—A mortgage action against the surviving husband and infant children of the mortgagor, who died intestate in February, 1892, was begun before the lapse of a year from the death:—

Held, that the plaintiff was entitled, after the lapse of a year, to judgment for the enforcement of her mortgage, without having a personal representative of the mortgagor before the Court, no administrator having been appointed, and no caution registered under 54 Vict. ch. 18, sec. 1, amending the Devolution of Estates Act. *Ramus* v. *Dow*, 15 P. R. 219.

Personal Representative—*Heirs-at-Law.*]—Since the Judicature Act the proceeding by demurrer for misjoinder of parties is no longer available.

Werderman v. *Société Générale D'Electricité*, 19 Ch. D. 246, followed.

In an action upon a mortgage for foreclosure, immediate payment, and immediate possession, the plaintiff joined as defendants the heirs-at-law of the deceased mortgagor (who died after the Devolution of Estates Act) with the administrator of the real and personal estate. One of the heirs-at-law demurred to the statement of claim, on the grounds that the administrator represented the estate in all regards, that the heirs-at-law were not bound by any covenants of the deceased, and that no relief was claimed or could be granted against them:—

Held, that the demurrer was in effect one for misjoinder of parties, and that the proper remedy was a motion under Rule 324 (*a*) to strike out the name of the demurring defendant. *Carter* v. *Clarkson*, 15 P. R. 379.

Purchaser of Equity—*Indemnity.*]—It is not proper in an action for foreclosure to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnity his predecessor in title. *Walker* v. *Dickson*, 20 A. R. 96.

Wife of Mortgagor—*Dower.*]—The wife of a mortgagor who has joined in a mortgage, made after 11th March, 1879, only for the purpose of barring her dower, is properly made a defendant to an action of foreclosure, in order that she may either redeem or protect her interest by asking for a sale; and being so made a defendant, and submitting to a foreclosure, no question can arise as to her dower being effectually extinguished. *Ayerst* v. *McClean*, 14 P. R. 15.

Wife of Mortgagor—*Dower.*]—The wife of a mortgagor, who has joined in the mortgage for the purpose of barring her dower, to the extent of the mortgage only, has the right to redeem during her husband's lifetime, and is a necessary party to an action of foreclosure in the first instance.

And where she was not so made a party, and judgment of foreclosure was recovered in her absence, she was after judgment and report added as a defendant upon her own petition, and permitted to redeem or pay off and obtain an assignment of the mortgage. *Blong* v. *Fitzgerald*, 15 P. R. 467.

See Brookfield v. *Brown*, 22 S. C. R. 398, *post* 683; *Clark* v. *Hagar*, 22 S. C. R. 510, *ante* 667; *Sparks* v. *Purdy*, 15 P. R. 1, *post* 678; *Scottish American Investment Co.* v. *Prittie*, 20 A. R. 398, *post* 679.

XI. Payment.

Interest—*Subsequent Mortgage — Statute of Limitations.*]—The assignee in insolvency, under the Insolvent Act of 1865, of the plaintiffs' mortgagor, in 1869 conveyed in part satisfaction of his claim, without covenants on either side, the mortgaged property to a subsequent mortgagee, who had valued his security, the plaintiffs' mortgages being referred to in a recital. The subsequent mortgagee shortly afterwards conveyed the property to a third person, but, notwithstanding this conveyance, continued to pay interest to the plaintiffs till within ten years of this foreclosure action:—

Held, on a case stated in the action for the opinion of the Court, with liberty to draw inferences of law and fact, that it was proper to infer

that the provisions of sec. 19 of the Insolvent Act of 1865 had been complied with; that under that section the subsequent mortgagee, taking over his security, would be primarily bound to pay off the prior incumbrances; and that therefore his payments kept alive the plaintiffs' rights.

Judgment of the Chancery Division, 21 O. R. 571, reversed, Osler, J.A., dissenting. *Trust and Loan Company of Canada* v. *Stevenson*, 20 A. R. 66.

Solicitor—*Authority of.*]—The onus of shewing that a solicitor, who is in possession of a mortgage and collects the interest, has authority also to collect the principal, is upon the mortgagor, and unless this onus is clearly discharged, the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds. *In re Tracy—Scully* v. *Tracy*, 21 A. R. 454.

XII. Power of Sale.

Form—*Short Forms Act—Assigns.*]—A mortgage, made in alleged pursuance of the Short Forms Act, contained the following provisions as to sale: "Provided that the said mortgagees, on default of payment for one month, may, on ten days' notice, enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice. And also that any contract of sale made under the said power may be varied and rescinded. And also that the said mortgagees, their heirs, executors, administrators, and assigns, may buy in and re-sell without being responsible for any loss or deficiency on re-sale;"—

Held, Burton, J.A., dissenting, that the power of sale could be validly exercised by the assigns of the mortgagees. *In re Gilchrist and Island*, 11 O. R. 557, and *Clark* v. *Harvey*, 16 O. R. 159, considered. *Barry* v. *Anderson*, 18 A. R. 247.

Notice of Sale — *Demand of Payment — Advertising—Injunction.*]—An advertisement for sale of lands is a "proceeding" within the meaning of the words "no further proceedings" in sec. 30 of R. S. O. ch. 102.

Where a mortgagee served upon the mortgagor a notice demanding payment of the mortgage money, and stated that, unless payment were made within a month from the service, the mortgagee would proceed to sell, an injunction was granted restraining the mortgagee from publishing, until after the expiry of the month, an advertisement of the sale of the mortgaged premises. *Smith* v. *Brown*, 20 O. R. 165.

Notice of Sale—*Execution Creditors.*] — In taking proceedings under a power of sale in a mortgage drawn under the Short Forms Act, execution creditors of the mortgagor come within the scope of the word "assigns," and as such are entitled to notice under power of sale, but only those having executions in the sheriff's hands at the time notice of default is given need be served. *Re Abbott and Medcalf*, 20 O. R. 299.

Obligation to Carry Out Sale.]—A mortgagee, having exercised the power of sale in a mortgage and sold the land for sufficient to pay the mortgage and costs, cannot without sufficient reason treat the sale as a nullity, and fall back on the mortgage as if the exercise of the power was a mere matter of form.

Three joint owners of property mortgaged it and then sold to the plaintiff, who covenanted to pay off the mortgage. The plaintiff sold to the defendant, taking a similar covenant. The mortgagees exercised the power of sale in their mortgage, and one of the original owners became the purchaser, at a price sufficient to pay the mortgage and costs. The purchaser, though able, not being willing to carry out the sale, the mortgagees refrained from compelling him to do so, and, under threats of legal proceedings by the mortgagor, collected the arrears and costs from the plaintiff.

In an action by the plaintiff to recover from his vendee the amount thus paid:—

Held, that he was not entitled to recover. *Patterson* v. *Tanner*, 22 O. R. 364.

Sale by Way of Exchange.]—A mortgagee with power of sale under the Short Form Mortgage Act can exercise the power by way of exchange for other land instead of, in the usual way, by sale for money. The words "absolutely dispose of" in the power are appropriate to an exchange. *Smith* v. *Spears*, 22 O. R. 286.

Sale of Timber Only — *Notice of Sale.*]—A mortgagee of timbered land, whose mortgage contained the ordinary short form of power of sale authorized by R. S. O. ch. 107, in the exercise of such power sold the timber without the land;—

Held, that the sale as an exercise of the power was void:—

Held, also, that there being an existing interest in the land vested in or claimable by the plaintiff, of which the mortgagee had express notice, the plaintiff was entitled to notice of the sale, and, upon the evidence, that no such notice of sale was given him as he was entitled to under the power. *Stewart* v. *Rowson*, 22 O. R. 533.

See McMichael v. *Wilkie*, 18 A. R. 464, *ante* 635; *Chatfield* v. *Cunningham*, 23 O. R. 153, *ante* 668; *Brethour* v. *Brooke*, 23 O. R. 658, *post* 678.

XIII. Practice in Mortgage Actions.

1. *Amendment.*

Amending Writ of Summons after Judgment.]—Under the liberal powers of amendment now given by Rules 444 and 780, the writ of summons and all subsequent proceedings may be amended after judgment.

And where the plaintiff by mistake omitted from the description of the lands in the writ of summons in a mortgage action, a parcel included in the mortgage, an order was made, after judgment and final order of foreclosure, vacating the final order, directing an amendment of the writ and all proceedings, and allowing a new day for redemption by a subsequent incumbrancer who did not consent to the order; and in default the usual order to foreclose. *Clarke* v. *Cooper*, 15 P. R. 54.

2. *Costs.*

Executors—*Personal Order.*]—Where an action to enforce a mortgage by foreclosure is brought against the executors of a deceased mortgagor, and an order for payment of the mortgage debt is, in addition, asked against the executors, and judgment is entered for default of appearance, only the additional costs occasioned by the latter claim should be taxed against the executors personally. *Miles* v. *Brown*, 15 P. R. 375.

3. *Judgment.*

Appearance Disputing Amount Claimed.]—In a mortgage action for payment, foreclosure, etc., the defendant entered an appearance in which she stated that she did not require the delivery of the statement of claim, and added: "Take notice that the defendant disputes the amount claimed by the plaintiff:"—

Held, that the record was then complete, and that a statement of claim was unnecessary and irregular. *Peel* v. *White*, 11 P. R. 177, approved and followed.

Held, also, that the case was not within Rule 718, and the plaintiff could not obtain a judgment on præcipe.

Upon motion to the Court upon the record as contained in the writ of summons and the appearance, an order was made under Rules 551 and 753, directing a reference to take the mortgage account, and directing that if the referee should find any amount due to the plaintiff, the plaintiff should have judgment according to the writ with costs. *Mahoney* v. *Hopkins*, 14 P. R. 117.

Default of Appearance—*Noting Pleadings Closed.*]—By analogy to Rule 393, where, in a mortgage action for foreclosure or sale, some of the defendants do not appear to the writ of summons, and others do appear, against whom judgment cannot then be obtained, the officer may note the pleadings closed as against the former, and the action may be brought on for judgment against them without further notice to them. *Morse* v. *Lamb*, 15 P. R. 9.

Setting Aside Judgment on Payment of Interest and Costs.]—*See Wilson* v. *Campbell*, 15 P. R. 254, *ante* 663.

4. *Period for Redemption.*

Foreclosure after Abortive Sale.]—In deciding as to whether there should be a long or short period for redemption, or, in default, foreclosure, after an abortive sale of the mortgaged premises, in an action to enforce a mortgage, the facts and circumstances of the case should be taken into consideration.

And where the amount of money to be paid was about $150,000, and the mortgaged property was of very great value, though at the time there was much difficulty in converting it into ready money, the period of three months was allowed. *Campbell* v. *Holyland*, 7 Ch. D. 166, followed. *Goodall* v. *Burrows*, 7 Gr. 449, and *Girdlestone* v. *Gunn*, 1 Ch. Chamb. R. 212, considered. *Scarlett* v. *Birney*, 15 P. R. 283.

5. *Service of Writ.*

Infants—*Personal Service.*]—In a mortgage action, where possession is claimed, the writ of summons need not be served personally on the infant heirs of the mortgagor, if they are not personally in possession. *Sparks* v. *Purdy*, 15 P. R. 1.

XIV. Proviso for Entry.

Short Forms Act—*Lease—Notice—Timber.*]—There is nothing in the covenant (No. 7) in the Act respecting Short Forms of Mortgages, R. S. O. ch. 107, that on default the mortgagee shall have quiet possession of the lands, repugnant to the proviso in the same Act (No. 14), that the mortgagee, on default of payment, may, on giving notice, enter on and lease or sell the lands; and a mortgagee, when his mortgage is in default, may, under the covenant, without giving notice, make any lease which will not interfere with the mortgagor's right to redeem.

The action intended by the proviso is not the mere taking possession for the purpose of keeping down the interest, but the entering on the lands to lease or sell in such wise that the right of redemption shall be postponed or destroyed.

When the security in arrear is scanty, it is competent for the mortgagee to make the best provision he can for his own safety, even to the cutting down of trees, which power he can confer upon others under him, subject to an account to the owner of the equity of redemption at the proper time. *Millett* v. *Davey*, 31 Beav. 470, applied. *Brethour* v. *Brooke*, 23 O. R. 658. Affirmed, 21 A. R. 144.

XV. Railway Lands.

Compensation—*Rights of Mortgagee.*]—An action of trespass to vacant lands will lie by the mortgagee thereof.

In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by the defendant railway company for the purpose of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

Compensation—*Rights of Mortgagee.*]—A mortgagor does not represent his mortgagee for purposes of the Railway Act of Ontario, and is not included in the enumeration of the corporations or persons who, under sec. 13 of R. S. O. ch. 170, are enabled to sell or convey lands to the company. He can only deal with his own

equity of redemption, leaving the mortgagee entitled to have his compensation for lands taken separately ascertained. *In re Toronto Belt Line R. W. Co.*, 26 O. R. 413.

Compensation—*Rights of Mortgagee.*]—A railway company took possession of certain lands under warrant of the County Court Judge, and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs, who received no notice of, and took no part in, the arbitration proceedings, and gave no consent to the taking of possession. An award was made, but was not taken up by either the railway company or the owners. The plaintiffs brought this action against the railway company and the owners for foreclosure, offering in their claim to take the compensation awarded, and release the lands in the possession of the railway company:—

Held, that the railway company were proper parties to the action, and that the plaintiffs were entitled to a judgment against all the defendants with, in view of the offer, a provision for the release of the lands in the possession of the railway company on payment to the plaintiffs of the amount of the award.

Per Osler and Maclennan, JJ.A.—Sub-sec. 25 of sec. 20, R. S. O. ch. 170, applies only where the compensation has been actually ascertained and paid into Court. *Scottish American Investment Co.* v. *Prittie*, 20 A. R. 398.

XVI. Redemption.

Delay after Judgment—*Statute of Limitations—Quieting Title.*]—That lapse of time which would be a statutory bar to the assertion of a claim before litigation should, as a general rule, apply by analogy to induce the Court to exercise its discretion by holding its hand when the laches occur in the prosecution of an action, whether before or after judgment.

After the usual decree for redemption had been pronounced in favour of a mortgagor, who was at the time and continued afterwards to be a lunatic residing in Scotland, no proceedings were taken under it for over twenty years. Although several communications with reference to the suit passed between the mortgagor's solicitor and his *curator*, the latter never intervened. For some years before, and during all the time after, the making of the decree, the mortgagee, or those claiming under him, had been in possession of the mortgaged premises; and the petitioner in this matter, claiming under the mortgagee, sought, after notifying the *curator* of the facts and proceedings, to quiet his title under the Quieting Titles Act, R. S. O. ch. 113:—

Held, that after the great and unexplained delay in the redemption suit, the decree made therein was no obstacle to the petitioner's obtaining a certificate of title. *Re Leslie*, 23 O. R. 143.

Jurisdiction—*Foreign Lands.*]—An Ontario Court will not grant a decree for redemption of a mortgage over lands in Manitoba at suit of a judgment creditor of a mortgagor, whose judgment being registered is, by statute in Manitoba, a charge upon the lands, the judgment creditor and mortgagee both having domicile in Ontario.

The only *locus standi* the judgment creditor would have in an Ontario Court would be to have direct relief against the lands by means of a sale, to which relief he would be restricted in such a case in a suit in the Courts of Manitoba, and a decree for a sale would have been unenforceable in the latter Province.

A Court of equity will, where personal equities exist between two parties over whom it has jurisdiction, though such equities may refer to foreign lands, give relief by a decree operating not directly upon the lands but directly *in personam*, but such relief will never be extended so far as decreeing a sale in the nature of an equitable execution.

Judgment of the Court of Appeal, 20 A. R. 646, reversing the judgment of the Queen's Bench Division, 23 O. R. 327, affirmed. *Henderson* v. *Bank of Hamilton*, 23 S. C. R. 716.

Lands Taken for Railway—*Compensation.*] *See Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11, *ante* 678.

Opening Foreclosure.]—*See Chatfield* v. *Cunningham*, 23 O. R. 153, *ante* 668.

Period for Redemption.]—*See Scarlett* v. *Birney*, 15 P. R. 283, *ante* 677.

XVII. Registration.

Building Mortgage—*Subsequent Mortgage—Priorities—Application of Registry Act.*]—*See Pierce* v. *Canada Permanent L. & S. Co.*, 24 O. R. 426, 25 O. R. 671, *post* 680.

Indian Lands — *Mortgage before Patent—Notice—Priorities.*]—*See Re Reed* v. *Wilson*, 23 O. R. 552, *post* 685.

Judgment—*Mistake—Priorities.*]—*See Miller* v. *Duggan*, 21 S. C. R. 33, *ante* 578.

Witness—*Affidavit of Execution—Irregularity.*]—*See Hoofstetter* v. *Rooker*, 22 A. R. 175, 26 S. C. R. 41, *post* 862.

XVIII. Rights and Liabilities under Several Mortgages.

Priorities—*Building Mortgage.*]—After purchasing land under an agreement which provided that $2,000 of the purchase money was to be secured by mortgage subsequent to a building loan not exceeding $12,000, the purchaser executed a building mortgage to a loan company for $11,500, which was at once registered, but only part of that sum was then advanced. The plaintiff, who had succeeded to the rights of the vendor under the above agreement, then registered her mortgage for $2,000, and claimed priority over subsequent advances made by the loan company under their mortgage, but without actual notice of the plaintiff's mortgage, or of the terms of the agreement for the sale of the land:—

Held, Robertson, J., dissenting, that the plaintiff was not entitled to the priority claimed by her.

Decision of Ferguson, J., 24 O. R. 426, reversed.

Per Boyd, C.—The further advances were made upon a mortgage providing for such advances, and to secure which the legal estate had been conveyed, and equity as well as law protected the first mortgage so advantageously placed, as against the subsequent mortgage, even though registered, where notice had not as a fact been communicated to the first mortgagee respecting the subsequent instrument, and the Registry Act did not apply. *Pierce* v. *Canada Permanent Loan and Savings Co.*, 25 O. R. 671. Affirmed by the Court of Appeal, 23 A. R.

See now 57 Vict. ch. 34 (O.).

Priorities—*Payments by Stranger—Agreement.*]—A testator devised the north half of his farm to one son and the east half of the south half to another son, the latter half being subject to mortgage. The devisee of the north half made several payments to the mortgagee without any demand from them, reducing the mortgage debt to about $100. The devisee of the east half of the south half gave a mortgage on his land, this mortgagee, before advancing the money, communicating with the former mortgagees and obtaining from them a statement shewing the balance due to be about $100, and then registering the mortgage. Subsequently the owner of the north half paid this balance and took an assignment expressed to be in consideration of $1, and in these proceedings he claimed that he was entitled to hold the assignment for the full amount paid by him:—

Held, per Hagarty, C. J. O., and Osler, J. A., that there was nothing to shew that the payments, other than the last, were made on the faith of getting the assignment, and that even if they had been so made, the right to an assignment was an equitable one and could not prevail against the duly registered second mortgage.

Per Burton, J. A., that, on the evidence, it was not shewn that the payments had been made with the intention of taking an assignment.

Per Maclennan, J. A., that the payments by the devisee of the north half were properly made, in view of the possible resort to the north half in case of deficiency in value of the south half, but that the equitable right could not prevail against the duly registered second mortgage.

In the result the judgment of Meredith, J., 23 O. R. 351, was affirmed. *McMillan* v. *McMillan*, 21 A. R. 343.

Priorities—*Subrogation.*]—The plaintiff paid off a first mortgage on certain lands, and procured its discharge, taking a new mortgage to himself for the amount of the advance in ignorance of the fact of the existence of a second mortgage. Shortly afterwards on ascertaining this fact he notified the defendant, the holder, that he would pay it off, and the defendant, relying thereon, took no steps to enforce his security. Subsequently, on the property becoming depreciated and the mortgagor insolvent, the plaintiff brought an action to have it declared that he was entitled to stand in the position of first mortgagee:—

Held, that the plaintiff by his acts and conduct had precluded himself from asserting such rights. *Brown* v. *McLean*, 18 O. R. 533, and *Abell* v. *Morrison*, 19 O. R. 669, distinguished. *McLeod* v. *Wadland*, 25 O. R. 118.

Right to Assignment—*Consolidation.*]—Mortgagors of land sold it subject to the mortgage, the purchaser giving them a second mortgage to secure part of the purchase money. He then sold the land subject to both mortgages, which his sub-purchaser covenanted to pay off. Subsequently the first mortgagors, under threat of action, paid the claim of the first mortgagees, and took an assignment of the first mortgage to one of their number:—

Held, that the sub-purchaser, on being called on by the first mortgagors and first purchaser for indemnity against the first mortgage, was bound to pay it, and was not entitled to an assignment thereof, without also paying the second mortgage. *Thompson* v. *Warwick*, 21 A. R. 637.

Right to Assignment—*Covenant.*]—The owner of property mortgaged it to the plaintiff, and then sold subject to the mortgage, taking from the purchaser a second mortgage as part of his purchase money, which he assigned to the plaintiff. The purchaser then sold to one of the defendants, who, to obtain an extension of time on the first mortgage, entered into a covenant with the plaintiff to pay it, and afterwards sold the property.

In a foreclosure action the plaintiff claimed an order for the payment of the first mortgage by the covenantor under his covenant, and the latter refused to pay the amount due on it unless the plaintiff would assign the mortgage to him:—

Held, that the plaintiff was not bound to assign to the covenantor unless he paid off both mortgages. *Muttlebury* v. *Taylor*, 22 O. R. 312.

Right to Assignment—*Payment.*]—Where a mortgagor of land subsequently conveyed his equity of redemption to several grantees, one of whom agreed to pay off the mortgage, and some of whom also executed further mortgages upon the land, and the first mortgagee proceeding to foreclose and to sue the mortgagor upon his covenant, the latter requested him to assign his mortgage to a third party who had advanced the money and paid off the mortgage:—

Held, that the first mortgagee was bound under R. S. O. ch. 102, sec. 2, to execute the assignment as asked, notwithstanding the subsequent incumbrances. *Teevan* v. *Smith*, 20 Ch. D. 724, distinguished. *Kinnaird* v. *Trollope*, 39 Ch. D. 636, followed.

Per Boyd, C.—Even if the redemption money had been that of the mortgagor himself, it would have made no difference. *Queen's College* v. *Claxton*, 25 O. R. 282.

Right to Assignment—*Payment.*]—Where the plaintiff, the mortgagor of certain lands, sold the same for a sum in excess of the amount of his mortgage, the purchaser raising such excess by a mortgage to the defendant, the original mortgagee, the plaintiff was held entitled to an assignment of the mortgage made by him on his paying the defendant merely the amount due thereon. *Wheeler* v. *Brooke*, 26 O. R. 96.

Right to Assignment—*Tacking—Consolidation.*]—The plaintiffs, being mortgagees in possession of certain lands, afterwards acquired by transfer a second mortgage on the same property, and sued the covenantors in the first mortgage, who had parted with the equity of redemption before the second mortgage was given, and who demanded a reconveyance upon payment of the amount of the first mortgage subject to equities of redemption existing in other parties:—

Held, that the defendants were entitled to this, and that the plaintiffs could not tack the amount of the second mortgage to the first and require payment of both.

Kinnaird v. *Trollope*, 39 Ch. D. 636, followed.

The defendants before action tendered, with the amount due on the first mortgage, an assignment thereof, which the plaintiffs, being mortgagees in possession, were not bound and declined to give, under R. S. O. ch. 102, sec. 2, and subsequently, but without tender, the defendant offered to take a reconveyance:—

Held, that the plaintiffs' claim to consolidate was not misconduct so as to deprive them of their costs of the action.

Decision of Street, J., varied upon the question of costs. *Stark* v. *Reid*, 26 O. R. 257.

See Re Union Assurance Co., 23 O. R. 627, *ante* 669.

XIX. Timber on Mortgaged Lands.

See Stewart v. *Rowsom*, 22 O. R. 533, *ante* 676; *Brethour* v. *Brooke*, 23 O. R. 658, 21 A. R. 144, *ante* 678.

XX. Trespass to Mortgaged Lands.

Possession—*Mortgagor and Mortgagee—Transfer of Interest.*]—Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold, though after the trespass and before action brought he has parted with his equity; Gwynne, J., dissenting.

Mortgagees out of possession cannot, after their interest has ceased to exist, maintain an action for such trespass and injury committed while they held the title.

Per Gwynne, J.—A mortgagee in possession at the time the trespass and injury is committed is the only person damnified thereby, and can maintain an action therefor after he has parted with his interest, nor is he estopped therefrom by having consented to a sale to one of the trespassers of the personal property as to which the trespass was committed. The tort feasors could not set up such estoppel, even though the amount recovered from them with the sum received by such mortgagee for his interest should exceed his mortgage debt. *Brookfield* v. *Brown*, 22 S. C. R. 398.

Vacant Lands—*Mortgagee—Entry.*]—Where a right to entry has accrued to a mortgagee without actual entry by him, and the mortgaged lands are subsequently left vacant before a title by possession has been acquired by anyone, the constructive possession thereof is in the mortgagee, and the Statute of Limitations does not run against him so as to extinguish his title to the lands; the mortgage being in default, and no presumption of payment arising.

An action of trespass to vacant lands will lie by the mortgagee thereof.

In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by a railway company for the purposes of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages, as he would have been in respect of the land. *Delaney* v. *Canadian Pacific R. W. Co.*, 21 O. R. 11.

XXI. Miscellaneous Cases.

Company—*Winding-up—Foreclosure—Security for Indorsement—Banks.*]—On a petition by a mortgagee in the winding-up proceedings of a company, under R. S. C. ch. 129, asking for the conveyance to him by the liquidator of the company's equity of redemption, the Court has jurisdiction to make the usual order for foreclosure or sale.

It is a matter of discretion with the Court whether an action will be directed or summary proceedings sanctioned.

A mortgage upon land, given to secure indorsement, upon negotiable paper to be made by the mortgagee for the benefit of the mortgagor, becomes operative only upon the indorsements being made; and an assignment of such mortgage to a bank, before the making of the indorsements, is not a violation of sec. 45 of the Banking Act, R. S. C. ch. 120. *Re Essex Land and Timber Co.—Front's Case*, 21 O. R. 367.

Creation of Tenancy by Mortgage.]—*See Hobbs* v. *Ontario Loan and Debenture Co.*, 18 S. C. R. 483, *ante* 605.

Creditors—*Mortgagees—Voluntary Settlement.*]—Mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within the 13 Eliz. ch. 5, nor is the mortgage debt a debt within that statute, unless it is shewn that the mortgage security at the time of the alleged transfer was of less value than the amount of the loan.

Where, therefore, shortly after the making of a mortgage, the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the value of the mortgaged property at the time being greatly in excess of the amount of the loan, and deemed by all parties to be ample security, and no intention to defraud being shewn, the settlement was upheld; although, from the stagnation in real estate when the mortgage matured, a sale of the property for the amount of the indebtedness thereon could not be effected. *Crombie* v. *Young*, 26 O. R. 194.

Cutting Down Absolute Conveyance to Mortgage.]—*See McMicken* v. *Ontario Bank*, 20 S. C. R. 548, *ante* 338.

Devisee—*Devolution of Estates Act.*]—The devisee of real estate under the will of a testator, subject to the Devolution of Estates Act and amendments, has a transmissible interest in the lands during the twelve months after the death of the testator, pending which time they are vested by the Act in the legal personal representatives.

And where real estate devised by a will so subject, of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered, was, during such period, mortgaged by the devisee in good faith :—

Held, that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to the land and against the personal representatives when the year expired, in the absence of any warning that it was needed for their purposes. *Re McMillan, McMillan* v. *McMillan*, 24 O. R. 181.

Highway—*Closing of — Adjoining Lands—Rights of Mortgagee.*]—A mortgagee of land adjoining a highway is one of the persons in whom the ownership of it is vested for the purposes of sub-sec. 9 of sec. 550 of the Consolidated Municipal Act, 1892, and as such is entitled to pre-emption thereunder, subject to the right of the mortgagor to redeem it along with the mortgage, or to have it sold to the mortgagor subject to the mortgage, if the mortgagor so prefer. *Brown* v. *Bushey*, 25 O. R. 612.

Indian Lands—*Patent—Notice—Registration—Priorities.*]—A patent of Indian lands was obtained by the patentee by virtue of his title under certain assignments from the original locatee duly registered in the Indian Department, and it appeared that certain prior assignees from the locatee had executed a mortgage on the lands to the plaintiff, of which the patentee had no actual notice, neither the assignment to the mortgagors nor the mortgage having been registered in the department, though the mortgage was registered in the county registry office, and the plaintiff now sought to foreclose his mortgage :—

Held, that the patentee was entitled to priority over the mortgage to the extent of the moneys paid for obtaining the patent, and that the registration of the mortgage in the county registry office was not notice to him. *Re Read* v. *Wilson*, 22 O. R. 552.

Rectification of Mortgage.]—*See Utterson Lumber Co.* v. *Rennie*, 21 S. C. R. 218, *ante* 328 ; *Bellamy* v. *Badgerow*, 24 O. R. 278, *ante* 338.

Sale — *Distribution of Surplus — Assignment for Benefit of Creditors—Priority Over Executions.*]—Where, after a sale of mortgaged premises in an action for that purpose, the mortgagor made an assignment for the benefit of his creditors under R. S. O. ch. 124, before certain prior execution creditors had established their claims in the Master's Office to the balance of purchase money, after satisfying the amount of the mortgage :—

Held, that the assignee for creditors was entitled to such balance freed from any liability to satisfy the executions out of it. *Carter* v. *Stone*, 20 O. R. 340.

MORTMAIN.

See WILL, IV.

MUNICIPAL CORPORATIONS.

I. Appropriation for Expenditure.

Illegality—*Annulment—Rights of Elector—Time.*]—It was enacted by sec. 12 of 42 & 43 Vict. ch. 53 (Q.) that any municipal elector might demand the annulment of the corporate appropriation for expenditure within three months from the date thereof on the ground of illegality, but that thereafter the right was prescribed and the appropriation valid:—

Held, that on the expiration of the three months, upon a non-juridical day, the elector's statutory right was at an end, and could not be extended by any procedure clause (see sec. 3 of the Civil Procedure Code) which presupposed an existing right of action and regulated its exercise. *Dechêne* v. *City of Montreal*, [1894] A. C. 640.

See In re Otter and City of Ottawa, 20 A. R. 529, *post* 697; *Village of Georgetown* v. *Stimson*, 23 O. R. 33, *post* 696; *Regina ex rel. Cavanagh* v. *Smith*, 26 O. R. 632, *post* 700; *Fleming* v. *City of Toronto*, 20 O. R. 547, 19 A. R. 318, *post* 723.

II. Arbitrations under the Municipal Act.

1. *Generally.*

Appeal—*Increase of Award—Expense.*]—Held, per Hagarty, C.J.O., and Maclennan, J.A., that in an arbitration within secs. 401 and 404 of the Consolidated Municipal Act, 55 Vict. ch. 42 (O.), a Judge to whom an appeal is taken against the award cannot, merely on his own understanding of the evidence and on a view of the premises, increase the amount awarded.

Per Burton and Osler, JJ.A., that the Judge can deal with the award on the merits, and can increase or reduce the amount or vary the decision as to costs.

In the result the judgment of Rose, J., 24 O. R. 443, was affirmed.

Remarks as to the great expense of land arbitrations under the Municipal Act. *In re Christie and Toronto Junction*, 22 A. R. 21. Affirmed by the Supreme Court of Canada, 25 S. C. R. 551.

Compensation—*Expropriation—Date of By-law—Motion to Set Aside Award—Time.*]—When a municipal corporation expropriates lands, the date of the passing of the by-law defining the lands and the nature of the rights required is the date in relation to which the compensation should be assessed.

Judgment of Falconbridge, J., reversed, Osler, J.A., dissenting.

Section 4 of 52 Vict. ch. 13 (O.), which requires motions to set aside awards of a specified kind to be made within fourteen days from the filing thereof, and sec. 6 of the same Act, which allows motions to set aside awards of another kind, to be made within three months from the making and publication thereof, do not apply to arbitrations under the Municipal Act, and a motion made on the 10th February, 1891, to set aside an award made in an arbitration under the Municipal Act on the 31st December, 1890, and filed on the 19th January, 1891, was held to be in time.

The scope and meaning of the several sections of the Act considered. *In re Prittie and Toronto*, 19 A. R. 503.

Compensation—*Lands Injuriously Affected—Joint Work by City and County.*]—Where a bridge over a river, which formed the boundary line between a city and a township, within a county, was erected by the councils of the city and county jointly, and in raising the approaches on the township side certain lands were injuriously affected, for which the owner claimed compensation from both municipalities:—

Held, by Boyd, C., that, having regard to sec. 483 of the Municipal Act, 55 Vict. ch. 42 (O.), the owner had no remedy except by arbitration under the Act. *Pratt* v. *City of Stratford*, 14 O. R. 260, 16 A. R. 5, followed.

Held, also, that the case was covered by sec. 391 of the Act; the expression "a municipal corporation," by force of the Interpretation Act, R. S. O. ch. 1, sec. 8 (24), being capable of being read as a plural.

Held, also, that it was competent for the County Judge to appoint the same arbitrator for both corporations, upon their making default in naming an arbitrator, and that he could proceed to do so *ex parte*.

Held, lastly, that sec. 487 did not apply to the case of a joint claim against city and county.

Prohibition to the arbitrators refused.

Held, by the Queen's Bench Division, that, having regard to secs. 530, 532, and 535 of the Municipal Act, 55 Vict. ch. 42, the county only could be compelled to arbitrate in respect of such compensation. *Pratt* v. *City of Stratford*, 16 A. R. 5, followed.

Held, also, that sec. 391 did not apply to permit an arbitration between the land-owner and the city and county together, nor was such an arbitration otherwise provided for by law.

Prohibition against proceeding with such an arbitration.

Decision of Boyd, C., reversed. *Re Cummings and County of Carleton*, 25 O. R. 607, 26 O. R. 1.

Compensation—*Lands Injuriously Affected—Railway.*]—A railway company obtained permission from a municipal corporation to run their line along a certain street, agreeing not to raise the grade to more than a certain height. They built the line and raised the grade of the street to more than the specified height, the corporation not consenting, but not taking any steps to prevent the violation of the agreement:—

Held, affirming the judgment of MacMahon, J., that as against the plaintiffs, who were owners of property injuriously affected by the unauthorized raising of the grade, the railway company were liable in an action for damages; but:—

Held, also, reversing the judgment of MacMahon, J., Maclennan, J. A., dissenting, that as against the corporation the plaintiffs were restricted to the remedy by arbitration, and that in any event the cause of action was not of such a nature as to entitle the corporation to bring in the railway company under sec. 531 (4) of R. S. O. ch. 184. *Baskerville* v. *City of Ottawa*, 20 A. R. 108.

Compensation—*Expropriation—View—Evidence—Value—Improvements—Interest.*]—A municipal corporation expropriated land for a road, under a by-law which described the land, and provided "that the same is hereby taken and expropriated for and established and confirmed as a public highway or drive," pursuant to which the corporation took possession.

Upon appeal from an award by which the land-owners were allowed $5,505 as compensation for the land taken, and $10,095 for other lands injuriously affected, and interest on both sums from the date of the by-law:—

Held, that where an arbitrator has viewed the premises, but has not proceeded upon his view, the Court should not give any greater effect to his findings than if he had not taken a view.

2. As to the weight of evidence: there was ample testimony to warrant the arbitrator, if he gave credit to it, in his findings; and it was not for the Court to say that he should have preferred the evidence of one set of witnesses to that of the other, in a matter especially where so much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions.

3. That the arbitrator was justified in taking into account the potential value of the property, when improved, after allowing for the cost of improving it, as a means of arriving at its actual value. *Ripley* v. *Great Northern R. W. Co.*, L. R. 10 Ch. 435; *Wilder* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 425; and *Boom Co.* v. *Patterson*, 98 U. S. R. 403, followed.

4. That the whole sum allowed must be taken upon the face of the award to have been allowed as purchase money of the land taken. *James* v. *Ontario and Quebec R. W. Co.*, 12 O. R. 624, 15 A. R. 1, specially referred to.

5. That the land must, from the date of the passing of the by-law, be deemed to have been "taken" by the city corporation, and interest was payable on the whole sum from that date. *Rhys* v. *Dare Valley R. W. Co.*, L. R. 19 Eq. 93, and *In re Shaw and Corporation of Birmingham*, 27 Ch. D. 614, followed.

6. That the arbitrator had jurisdiction to award interest. *Re Macpherson and City of Toronto*, 26 O. R. 558.

Maintenance of Bridges—*Award—Statute—Repeal.*]—The saving provisions of sec. 14 of the Municipal Amendment Act, 1894, 57 Vict. ch. 50 (O.), do not operate so as by implication necessarily to exclude the application of the Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 43.

A township corporation which had obtained an award against a county corporation under sec. 533*a* of the Consolidated Municipal Act, 1892, for part of the cost of the maintenance of certain bridges were, notwithstanding the repeal of sec. 533*a* by sec. 14 of 57 Vict. ch. 50 (O.), held entitled to recover the amount expended on the same up to the date of the passing of the latter Act. *Township of Morris* v. *County of Huron*, 26 O. R. 689.

Varied by a Divisional Court, 27 O. R. 341.

Withdrawal from Arbitration.]—Sub-section 6 of sec. 1 of 49 Vict. ch. 66 (O.), the Don Improvement Act, makes applicable to an arbitration under that Act all the provisions of the Consolidated Municipal Act of 1883 as to arbitrations, including sec. 404, which enables the council to refuse to ratify the award, and not merely the provisions for determining the amount of compensation; Osler, J.A., dissenting on this point.

Per Osler, J.A.—Though the wording of sub-sec. 6 of sec. 1 of 49 Vict. ch. 66 (O.) is not wide enough to give the council this power, yet such power may be exercised, for the land expropriated under the Don Improvement Act is real property entered upon, taken, or used by the corporation in the exercise of its powers, within the meaning of sec. 393 of the Consolidated Municipal Act of 1883, 46 Vict. ch. 18 (O.), so that sec. 404 applies. *In re McColl and City of Toronto*, 21 A. R. 256.

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2. *Drainage Matters.*

See Sub-title, "DRAINAGE," X.

III. BONUSES, EXEMPTIONS, AND PRIVILEGES.

Bonus—*Factory—Conditions—Breach.*]—By a by-law passed by the city of Three Rivers on the 3rd March, 1886, granting a bonus of $20,000 to a firm for establishing a saw-mill and a box factory within the city limits, and a mortgage for a like amount of $20,000 granted by the firm to the corporation on the 26th November, 1886, it was provided that the entire establishment of a value equivalent to not less than $75,000 should be kept in operation for the space of four consecutive years from the beginning of said operation, and that 150 people at least should be kept employed during the space of five months of each of the four years. The mill was in operation in June, 1886, and the box factory on the 2nd November, 1886. They were kept in operation, with interruptions, until October, 1889, and at least 600 men were employed in both establishments during that time.

On a contestation by subsequent hypothecary claimants of an opposition *afin de conserver*, filed by the corporation for the amount of their conditional mortgage on the proceeds of sale of the property :—

Held, reversing the judgment of the Courts below, that even if the words "four consecutive years" meant four consecutive seasons, there was ample evidence that the whole establishment was not in operation as required until November, 1886, when the mortgage was granted, the mill only being completed and in operation during that season; and therefore there had been a breach of the conditions; Fournier, J., dissenting. *City of Three Rivers* v. *La Banque du Peuple*, 22 S. C. R. 352.

Bonus — *Factory — Conditions — Breach — Damages.*]—The plaintiffs agreed to give to the defendants a bonus of $1,000 in five equal consecutive annual instalments of $200 each, in consideration of their establishing a factory and working it for ten years. The defendants covenanted to carry on the factory, and to employ therein continuously not less than twenty persons during the term. The agreement provided that the annual payments were to cease if the defendants ceased to carry on business within five years, but there was nothing in the agreement as to return of any part of the bonus in case of cesser after that time. The defendants were paid the full amount of the bonus, carried on business for six years, and then closed their factory. The plaintiffs were unable to prove any specific substantial damage :—

Held, that the damages could not be assessed on the principle of apportioning the bonus with reference to the term and the period for which the business had been carried on :—

Held, also, that the plaintiffs were entitled to nominal damages at least, and, under the circumstances, the defendants having deliberately broken their covenant, to the costs of the action.

Judgment of Galt, C.J., varied, Maclennan, J.A., dissenting. *Village of Brighton* v. *Auston*, 19 A. R. 305.

Bonus—*Factory—Evasion of Act.*]—A municipal corporation cannot grant a bonus for promoting any manufacture, and what it cannot do directly it will not be allowed to do indirectly or by subterfuge.

Therefore a by-law, valid on its face, purporting to purchase a water privilege for electric lighting purposes, but shewn to be really a by-law to aid the owner of the water privilege in rebuilding a mill, was quashed. *Scott* v. *Corporation of Tilsonburg*, 13 A. R. 233, applied. *In re Campbell and Village of Lanark*, 20 A. R. 372.

Bonus—*Railway.*]—*See* RAILWAYS AND RAILWAY COMPANIES, I.

Bonus—*Street Railway—Petition—Voting on By-law.*]—Although under 54 Vict. ch. 42, sec. 36 (O.), it is necessary, when aid is sought to be granted to a street railway by a portion of a municipality, that a majority in number representing one-half in value of the persons shewn by the last assessment roll to be the owners of real property in such portion should petition for the passing of the by-law, it is sufficient if the by-law is carried at the poll by a majority of those voting upon it. *Adamson* v. *Township of Etobicoke*, 22 O. R. 341.

Exemption—*Factory—Repeal—Good Faith—Acquiescence.*]—A by-law, on the faith of which land had been purchased and a manufactory erected, was passed by a municipal council, under sec. 366 of the Municipal Act, R. S. O. ch. 184, by which the property was exempted from all taxation, etc., for a period of ten years from the date at which the by-law came into effect.

The council subsequently, within the period of exemption, on the alleged ground that it was "expedient and necessary to promote the interests of the ratepayers," passed another by-law repealing the exempting by-law. The Court, being of opinion, on the facts as set out in the case, that the repealing by-law was passed in bad faith, to enable the council to collect taxes upon a property which was exempt under the section, and, in the absence of any forfeiture by the applicant of his rights, quashed the by-law as not within the powers of the council.

In this application a ground relied on by the council was that the applicant had erected more than two dwelling houses on the exempted lands, whereby, under the terms of the by-law, the exemption ceased. This was done through oversight, and on the applicant's attention being called thereto, and on his undertaking to pay taxes thereon, a by-law was passed agreeing thereto and validating the exempting by-law; but, through inadvertence, was not sealed. The dwellings were subsequently assessed, and the taxes paid on them :—

Held, that the corporation by their acts and conduct were precluded from now setting this up as a breach of the by-law.

Semble, the words "manufacturing establishment" in the exempting by-law included land and everything necessary for the business.

Semble, also, the period of exemption was within the statute. *Alexander* v. *Village of Huntsville*, 24 O. R. 665.

Exemption—*Railway Company—Absorption of Exempted Lands into City.*]—*See City of Windsor* v. *Canada Southern R. W. Co.*, 20 A. R. 388, *post* 751.

Privilege — *Street Railway — Monopoly.*]—Where a municipal council granted to a railway company authority to construct, maintain, and operate railways in its streets, with the exclusive right to such portion of any street as should be occupied by the railway, but with the plain intent that the company should have no concern whatever with any portions of any street not in actual occupation by their railway —

Held, that a subsequent agreement in the deed of grant giving to the company the refusal, on terms, of other streets in the city for railway purposes, was insufficient to constitute, contrary to the plain meaning of the previous stipulations, a right of monopoly in any of the streets of the city.

Quære, whether if a monopoly had been conceded, it was *ultra vires* of the municipal council. *Winnipeg Street Railway Co.* v. *Winnipeg Electric Street Railway Co.*, [1894] A. C. 615.

Privilege—*Telephone Company—Monopoly.*]—A by-law passed by the city council ratified an agreement between the city and a telephone company, providing that no other person, firm, or company should, for five years, have any

license or permission to use any of the public streets, etc., of the city for the purpose of carrying on any telephone business: —

Held, that this by-law was in contravention of sec. 286 of the Municipal Act, 55 Vict. ch. 42, and was *ultra vires* of the council. *Re Robinson and City of St. Thomas*, 23 O. R. 489.

IV. Bridges.

Repair — *Liability — Non-feasance.*]—Public corporations to which an obligation to keep public roads and bridges in repair has been transferred are not liable to an action in respect of mere non-feasance, unless the legislature has shewn an intention to impose such liability upon them.

In an action for damages for injuries caused by the neglect of the appellant municipality to repair a bridge:—

Held, that by the County Incorporations Act, 1879, under which it was incorporated, there was no indication of an intention to impose the liability sought to be enforced. *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400, followed. *The Bathurst Case*, 4 App. Cas. 256, distinguished. *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524.

Width of Stream.]—Under secs. 532 and 534 of the Municipal Act, R. S. O. ch. 184, county councils are directed to build and maintain "all bridges crossing streams or rivers over 100 feet in width . . connecting any main highway:"—

Held, by the Queen's Bench Division, that, upon the proper construction of these sections, the county council is, by the former provision given exclusive jurisdiction over all bridges, whomsoever built, crossing streams or rivers over 100 feet in width, within the limits of any incorporated village in the county, and connecting any main highway leading through the county; and is, by the latter provision, compellable to build such bridges only where necessary to connect any main public highway leading through the county.

Held, also, that the place at which the width of a stream or river is to be ascertained is the place at which the bridge crosses; and the width is to be determined by the width of the natural channel of such stream or river, taking it in its highest ordinary state.

The Court of Appeal was divided in opinion:—

Held, per Hagarty, C. J. O., and Burton, J. A., agreeing with the Queen's Bench Division, that the width of the water in its natural flow at ordinary high water-mark was the test of the width of the stream or river for the purpose of the sections; and

Per Osler and Maclennan, JJ.A., that the width of the water at the highest or flood levels which are ordinarily reached every year was the width to be measured for bridge purposes.

Held, by the Supreme Court of Canada, reversing the decisions below, that the width of a river at the level attained after heavy rain and freshets each year should be taken into consideration in determining the liability under the Act; the width at ordinary high-water mark is not the test of such liability. *Village of New Hamburg* v. *County of Waterloo*, 22 O. R. 193, 20 A. R. 1, 22 S. C. R. 296.

See Re Cummings and County of Carleton, 25 O. R. 607, 26 O. R. 1, *ante* 688; *Township of Morris* v. *County of Huron*, 26 O. R. 689, 27 O. R. 341, *ante* 690.

V. Buildings.

County Buildings — *Removal — Injunction.*]—By R. S. N. S., 5th ser., ch. 20, sec. 1, as amended by 49 Vict. ch. 11, "county or district gaols, court houses, and sessions houses, may be established, erected, and repaired by order of the municipal councils in the respective municipalities." In 1891 an Act was passed empowering the municipality of Lunenburg to borrow a sum not exceeding $20,000 "for the purpose of erecting and furnishing a court house and gaol for the county of Lunenburg, or repairing and improving the present court house in said county," provision being made for the municipality of Chester and the town of Lunenburg (separate corporations in said county) respectively contributing towards payments of said loan. The town of L. is the shire town of said county, where the sittings of the Supreme Court are held as required by statute, and where the county court house and gaol had always been situated. In pursuance of the above authority to borrow, the council of the municipality, by resolution, proposed to build a court house and gaol at B., another town in the county, intending after they were built to petition the legislature to transfer the sittings of the Supreme Court to B. The corporation of L. caused an injunction to be applied for and obtained, restraining the municipal council from erecting a court house and gaol, for the general purposes of the county, at B., or expending in such erection any funds in which the municipality of C. or the town of L., or either of them, were interested.

On appeal from the judgment granting such injunction:—

Held, that the municipality could not, under statutory authority to establish and erect a court house and gaol, remove these buildings from the town of L. and so repeal and annul the statutes of the legislature which had established them in L. Without direct legislative authority therefor, the county buildings could only be erected in the shire town. The injunction was, therefore, properly granted. *Municipality of Lunenburg* v. *Attorney-General for Nova Scotia*, 20 S. C. R. 596.

Fire Limits.]—*See Regina* v. *Hart*, 20 O. R. 611, *ante* 584.

Liability for Non-repair.]—*See Schmidt* v. *Town of Berlin*, 26 O. R. 54, *post* 715.

Nuisance—*Pulling Down Buildings—Absence of By-law.*]—*See McNab* v. *Township of Dysart*, 22 A. R. 508, *post* 727.

VI. By-laws.

1. *Absence of By-law.*

Drain Fringing Down Noxious Matter—*Remedy by Action.*]—*See Close* v. *Town of Woodstock*, 23 O. R. 99, *post* 730.

Local Improvements—*Lands Injuriously Affected—Remedy by Action.*]—*See City of New Westminster* v. *Brighouse*, 20 S. C. R. 520. *post* 724.

See, also, *McNab* v. *Township of Dysart*, 22 A. R. 508, *post* 727; *McDonald* v. *Dickenson*, 25 O. R. 45, 21 A. R. 485, *post* 726; *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581, *post* 698; *Waterous Engine Works Co.* v. *Town of Palmerston*, 19 A. R. 47, 21 S. C. R. 556, *post* 699; *Canadian Pacific R. W. Co.* v. *Township of Chatham*, 25 O. R. 465, 22 A. R. 330, 25 S. C. R. 608, *post* 713.

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2. *Motions to Quash.*

Appeal—*Quebec Law.*]—*See* SUPREME COURT OF CANADA, XVI.

Discretion.]—*See In re Huson and Township of South Norwich*, 19 A. R. 343, 21 S. C. R. 669, *post* 697.

Drainage—*Policy of Legislature—Interference.*]—In drainage matters the policy of the legislature is to leave the management largely in the hands of the localities, and the Court should refrain from interference, unless there has been a manifest and indisputable excess of jurisdiction, or an undoubted disregard of personal rights. *Re Stephens and Township of Moore*, 25 O. R. 600.

Estoppel—*Acting on By-law—Costs.*]—Upon a motion to quash a by-law authorizing the expropriation of an easement for the construction of a sewer, it appeared that the sewer was part of a system, but the upper end thereof, and not an outlet for any part already constructed:—

Held, that no money having been spent under the by-law, it had not been so acted upon as to prevent its being quashed.

The applicants for an order quashing the by-law had, before moving, appeared on a notice given by them to name an arbitrator, before a Judge, who raised the objection to the by-law upon which they afterwards moved, whereupon they gave notice of abandonment:—

Held, that they were not estopped, but that they should have no costs. *Re Davis and City of Toronto*, 21 O. R. 243.

Recognizance.]—A condition precedent to the entertaining of a motion to quash a municipal by-law is the entering into, allowance, and filing of a recognizance, in the manner provided by sec. 332 of the Municipal Act, 55 Vict. ch. 42 (O.); and a bond, even though allowed by a County Court Judge, cannot be effectively substituted for a recognizance. *Re Burton and Village of Arthur*, 16 P. R. 160.

See Village of Georgetown v. *Stimson*, 23 O. R. 33, *post* 696.

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3. *Petitions For.*

Qualifications of Petitioners—"*Freeholder.*"]—By the term "freeholder," as used in R. S. O. 1887 ch. 184, sec. 9, which enables a county council to pass a by-law constituting a village corporation, upon the petition of a certain number of freeholders, is meant a person actually seized of an estate of freehold, legal or equitable: and it does not include persons in possession of lands under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions.

Judgment of Street, J., reversed, Maclennan, J. A., dissenting. *In re Platt and United Counties of Prescott and Russell*, 18 A. R. 1.

See Adamson v. *Township of Etobicoke*, 22 O. R. 341, *ante* 691.

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4. *Procedure at Meetings of Council.*

Third Reading—*Two-thirds Vote.*]—A by-law to regulate the proceedings of a town council required that every by-law should receive three readings, and that no by-law for raising money or which had a tendency to increase the burdens of the people should be finally passed on the day on which it was introduced, except by a two-thirds vote of the whole council.

A by-law to fix the number of tavern licenses, and which therefore required such two-thirds vote, was read three times on the same day, and was declared passed. It did not, however, receive the required two-thirds vote. A special meeting of council was then called for the following evening, when the by-law was merely read a third time, receiving the required two-thirds vote:—

Held, that the by-law was bad, for, having been defeated when first introduced by reason of not having received a two-thirds' vote, it was not validated by merely reading it a third time at the subsequent meeting.

The by-law did not shew, as required by the Liquor License Act, the year to which it was to be applicable:—

Held, that it was bad for this reason also. *Re Wilson and Town of Ingersoll*, 25 O. R. 439.

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5. *Publication.*

See In re Huson and Township of South Norwich, 19 A. R. 343, 21 S. C. R. 669, *post* 697; *Village of Georgetown* v. *Stimson*, 23 O. R. 33, *post* 696; *Re Chambers and Township of Burford*, 25 O. R. 276, *post* 714.

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6. *Registration.*

Debt—*Payment by Instalments—Inequality.*]—A by-law, passed under formalities required by law for contracting a debt for a purpose within the jurisdiction of the council under the Municipal Act, R. S. O. ch. [illegible] sec. 340 *et seq.*, provided for payment by instalments, but in settling the amount payable in each year the total existing debenture debt of the municipality was estimated, and although the aggregate annual amount payable under all the by-laws was approximately equal to that payable in other years, there was a very large variance in the amounts payable in the different years under the present by-law. The by-law was duly registered under sec. 351, and notice published under sec. 354, and no application to quash was made within three months after the said registry:—

Held, that the by-laws and debentures issued thereunder were valid and binding on the municipality. *Village of Georgetown* v. *Stimson*, 23 O. R. 33.

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7. *Resolutions of Council.*

See In re Olver and City of Ottawa, 20 A. R. 529, *post* 697.

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8. *Submission to Ratepayers.*

Disfranchisement of Class of Voters.]—A local option by-law, carried by a vote of seventy-one to fifteen, was quashed where it appeared that the returning officer had refused to accept the votes of tenant voters, seventy-four of whom were on the list and had the right to vote, though it was not shewn that more than a very small number of these voters had made any attempt to vote, or had expressed any intention of voting, or had heard of the returning officer's refusal.

The election doctrine that irregularities should not be held fatal unless they actually affect the result does not apply where a class is disfranchised in a by-law contest.

In re Croft and Peterborough, 17 A. R. 21, applied. *Woodward* v. *Sarsons*, L. R. 10 C. P. 733, considered.

Judgment of Galt, C.J., reversed, Maclennan, J.A., dissenting. *In re Pounder and Village of Winchester*, 19 A. R. 684.

Necessity for Submission—*Contract—Expenditure—Resolutions.*]—A municipal corporation has no power, without a by-law assented to by the electors, to enter into contracts involving expenditure not payable out of the ordinary rates of the current financial year, and resolutions for the execution of contracts for the building of a bridge, payment for which was to be made partly in the current financial year and partly in the next, were quashed, as being a contravention of secs. 344, 357, and 359 of the Municipal Act. *In re Olver and City of Ottawa*, 20 A. R. 529.

Publication — *Polling Places — Quashing — Discretion.*]—The Ontario Municipal Act, R. S. O. 1887 ch. 184, requires, by sec. 293, that before the final passing of a by-law requiring the assent of the ratepayers, a copy thereof shall be published in a public newspaper published either within the municipality or in the county town or in an adjoining local municipality.

Notice of intention to submit a local option by-law of the township of South Norwich to the votes of the electors was given in proper form and for the requisite number of times, in a newspaper published in the village of Norwich, the bounds of which did not actually touch, though they came close to, those of the township in question. This paper was the nearest paper; it had a large circulation in the township; and was that in which the township council had been in the habit of publishing their notices and by-laws. No paper was published in the township in question.

One of the polling places was described merely as being "at or near" a certain village. It was shewn that this village was a very small one, and that the description was the same as that used in the by-laws appointing the places for holding municipal elections. It was also shewn that the poll was held in a house close to the house in which the poll had been held in the next preceding municipal election, that house itself having been moved away.

Another polling place was specifically described by place, lot, and concession, but there was an error in the number of the concession.

It was shewn that all the proceedings had been taken in good faith, and that the poll was very large, and it did not appear that any one had been misled by any of these informalities:—

Held, therefore, by the Court of Appeal, that the Court might, in the exercise of its discretionary power so to do, refuse to quash the by-law in question.

Held, by the Supreme Court of Canada, affirming the decision of the Court of Appeal, that, as the village of Norwich was geographically within the adjoining municipality, the statute was sufficiently complied with by the said publication. *In re Huson and Township of South Norwich*, 19 A. R. 343, 21 S. C. R. 669.

See Adamson v. *Township of Etobicoke*, 22 O. R. 341, *ante* 691.

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9. *Other Cases.*

Penalty.]—A by-law omitting to provide a penalty for its violation is not necessarily bad. *In Re Local Option Act*, 18 A. R. 572.

Street Railway—*Limits of Municipality—Validating Act.*]—*See Dwyer* v. *Town of Port Arthur*, 19 A. R. 555, 22 S. C. R. 241, *ante* 122.

Summary Conviction—*Show or Exhibition.*]—*See Regina* v. *Whitaker*, 24 O. R. 437, *ante* 269.

Vehicles—*Bicycles.*]—*See Regina* v. *Justin*, 24 O. R. 327, *post* 714.

Water Rates—*Discount—Public Buildings.*]—*See Attorney-General* v. *City of Toronto*, 20 O. R. 19, 18 A. R. 622, 23 S. C. R. 514, *post* 730.

See, also, cases under the following subtitles:—ARBITRATIONS UNDER THE MUNICIPAL ACT, II.; BONUSES, EXEMPTIONS, AND PRIVILEGES, III.; CONTRACTS, VII.; DRAINAGE, X.; LICENSING POWERS, XIV.; LOCAL IMPROVEMENTS, XV.; OFFICERS OF CORPORATIONS, XVIII.; PROHIBITORY POWERS, XX.; SEWERS, XXII.

And *see* PUBLIC SCHOOLS.

VII. CONTRACTS.

Executed Contract—*Seal—Absence of By-law.*]—A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations; Ritchie, C.J., and Strong, J., dissenting.

In sec. 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law; Ritchie, C.J., and Strong, J., dissenting. *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581.

Executed Contract—*Seal—Absence of By-law—Drainage Works.*]—*See Canadian Pacific R. W. Co.* v. *Township of Chatham*, 25 O. R. 465, 22 A. R. 330, 25 S. C. R. 608, *post* 713.

Executory Contract—*Seal—Absence of By-law.*]—Section 282 of the Municipal Act, R. S. O. 1887 ch. 184, enacts that the powers of municipal councils shall be exercised by by-law when not otherwise authorized or provided for. Section 480 of the Act authorizes the council to purchase fire apparatus, etc., but says nothing about passing a by-law for the purpose.

The plaintiffs sued upon an alleged contract for the sale by them to the defendants, the corporation of a town, of a fire engine and hose. The alleged contract was signed by the mayor of the town and by the clerk of the council, and the seal of the corporation was attached. No by-law was, however, passed authorizing the purchase. The engine was sent by the plaintiffs to the defendants, but was not accepted by them:—

Held, that the want of a by-law was fatal, and that the instrument under the seal of the corporation was invalid.

Judgment of the Chancery Division, 20 O. R. 411, affirmed. *Waterous Engine Works Co.* v. *Town of Palmerston*, 19 A. R. 47.

Affirmed by the Supreme Court of Canada. *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581, distinguished. *Waterous Engine Works Co.* v. *Town of Palmerston*, 21 S. C. R. 556.

Expenditure Beyond Current Year—*Absence of By-law—Quashing Resolutions.*]—*See In re Olver and City of Ottawa*, 20 A. R. 529, *ante* 697.

Interest in Contract — *Mayor of City—Disqualification*]—*See Regina ex rel. McGuire* v. *Birkett*, 21 O. R. 162, *post* 700.

Reference to Engineer—*Bias.*]—*See Farquhar* v. *City of Hamilton*, 20 A. R. 86, *ante* 31.

Reference to Superintendent of Works—*Bias.*]—*See McNamee* v. *City of Toronto*, 24 O. R. 313, *ante* 32.

VIII. Controverted Elections.

Bribery by Agents.]—A person cannot be found guilty of bribery under secs. 209-13 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), unless the evidence discloses in him an intention to commit the offence. A candidate desiring and intending to have a pure election cannot be made a *quasi* criminal by the act of an agent who, without the knowledge or desire of the principal, violates the statute to advance the election of such candidate.

Municipal elections are not avoided for bribery of agents without authority, where the candidate has a majority of votes cast. *Regina ex rel. Thornton* v. *Dewar*, 26 O. R. 512.

Disclaimer—*Award of Seat.*]—At an election under the Municipal Act, 55 Vict. ch. 42 (O.), for a deputy reeve of a town, there were three candidates, and after the election and before the first meeting of the council, the two who had received the highest number of votes successively disclaimed, whereupon the remaining candidate, who had received the lowest number of votes, made the declaration of office and took his seat. On a motion in the nature of a *quo warranto* made by the candidate who had received the highest number of votes to have it declared that there was no election and that the seat was vacant:—

Held, that what took place constituted an election of the respondent and entitled him to the seat. *Regina ex rel. Percy* v. *Worth*, 23 O. R. 688.

Diversion of Sinking Fund—*Disqualification.*]—No special appropriation is necessary in order to create a special rate applicable to payment of principal and interest of a municipal debt; if the provisions of the Municipal Act are observed, such separate rate, and the sinking fund as part of it, arise as the taxes are collected; and where, no such appropriation having been made, one of the municipal council voted for defraying certain of the current expenses of the municipality out of the amount attributable to that fund, his subsequent election as reeve was set aside, and he was declared disqualified from any municipal office for a period of two years, pursuant to 55 Vict. ch. 42, sec. 373.

When, without any such appropriation, so much of the year's income of the municipality has been expended as to leave no more than sufficient to cover such sinking fund, the balance is impressed with that character, and to apply it otherwise is a diversion within the meaning of the above enactment. *Regina ex rel. Cavanagh* v. *Smith*, 26 O. R. 632.

Interest in Contract—*New Election.*]—The defendant had a contract with the corporation of the city for the supply of iron up to the end of 1890, but on the 26th November, 1890, he wrote informing the corporation that he withdrew from his contract, and enclosing his account up to date.

On the 9th December, 1890, the then mayor of the city notified the defendant that he would be held responsible for any expense the corporation should be put to in consequence of his refusal to fulfil his contract.

On the 15th December, 1890, the city council adopted a resolution cancelling the defendant's contract and releasing him from any further obligation in connection therewith. At the same meeting a notice of reconsideration was given, which by the rules of the council had the effect of staying all action on the resolution until after reconsideration. There was no reconsideration and no subsequent meeting of the council till the 7th January, 1891, previous to which the defendant had been elected mayor for 1891. At the time of his election his account above mentioned had not been paid:—

Held, by the Master in Chambers, that the resolution had no direct effect to release the defendant from liability under his contract, either at law or in equity; and, whether or not the resolution was to be considered in force, it did not touch the account, the existence of which unpaid was sufficient to invalidate the election, under the other circumstances of the case.

The election was therefore set aside; but, although the relator had notified the electors of the objection to the defendant's qualification, the seat was not awarded to the candidate having the next largest vote, on account of the resolution of the council, which taught the electors to disregard the relator's warning; and a new election was ordered. *Regina ex rel. McGuire* v. *Birkett*, 21 O. R. 162.

Jurisdiction of Master in Chambers.]—Held, by MacMahon, J., that the Master in Chambers had, by the combined effect of Rule 30 and 51 Vict. ch. 2, sec. 4 (O.), all the powers of a Judge to determine the validity of the election of the defendant, and that his determination was final; and it was within the competence of the provincial legislature to clothe the Master with such powers.

Held, by a Divisional Court, following the principle of the decision in *Re Wilson* v. *McGuire*, 2 O. R. 118, that the provincial legislature had power to invest the Master with authority to try controverted municipal election cases. *Regina ex rel. McGuire* v. *Birkett*, 21 O. R. 162.

Practice — *Amendment.*]— The notice of motion did not shew any interest in the relator, as required by sec. 187 of the Act; but it having been shewn by affidavit filed in support of it that the relator was a candidate, an amendment of the motion would, if necessary, have been allowed under Con. Rule 444. *Regina ex rel. Percy* v. *Worth*, 23 O. R. 688.

Practice — *Notice of Motion — Affidavits.*]— In a proceeding in the nature of *quo warranto* under the Municipal Act, it is necessary, upon the true construction of Rule 1041, for the relator to file the affidavits and material to be used in support of his motion before serving the notice of motion, even in a case where *viva voce* evidence is to be taken under sec. 212 of R. S. O. ch. 184; but the omission to file such affidavits and material does not constitute a good reason for setting aside the service of the notice of motion; the effect simply is that the relator cannot read affidavits or material not so filed in support of his motion; and mentioning an affidavit or other material in the notice of motion, when there is none such filed, does not vitiate the motion. *Regina ex rel. Mangan* v. *Fleming*, 14 P. R. 458.

Practice — *Recognizance — Appeal.*]—Where the Judge of a County Court has allowed the relator's recognizance and the sureties as sufficient, pursuant to sec. 188 of R. S. O. ch. 184, a Judge of the High Court cannot interfere upon an appeal.

There is no necessity for the signatures to the recognizance of the persons to be bound by it.

Although sec. 188 directs that the recognizance shall be entered into before the Judge or a commissioner for taking affidavits, a recognizance appearing on its face to have been entered into before a commissioner for taking bail, is good; for all commissioners for taking bail are also commissioners for taking affidavits. *Regina ex rel. Mangan* v. *Fleming*, 14 P. R. 458.

Property Qualification.] — A town councillor, when nominated, was possessed of a sufficient leasehold qualification, the term of which, however, expired before the election; in the meanwhile he had acquired another leasehold property on which he sought to qualify:—

Held, on *quo warranto* proceedings, that he could do so under R. S. O. ch. 184, sec. 73, as amended by 51 Vict. ch. 28, sec. 9, since the cesser of the term of the first leasehold amounted to an alienation by operation of law within the meaning of the statute. *Regina ex rel. Chick* v. *Smith*, 22 O. R. 279.

Re-count of Ballot Papers.]—A mandamus was refused to compel a County Judge to proceed with a re-count, where the ballot papers cast at a municipal election were not sealed up as provided by sec. 155 of 55 Vict. ch. 42 (O.). *Re Ottawa Municipal Election — By Ward — Rideau Ward*, 26 O. R. 106.

Trial — *Combination.*] — The meaning of 55 Vict. ch. 42 (O.), sec. 191, is that cases which have so much in common that they can conveniently be tried together, may be combined in one proceeding. *The Queen ex rel. St. Louis* v. *Reaume*, 26 O. R. 460.

Voters' Lists — *Irregularities — Result.*]—An election, though by a majority of sixty-six votes, of a deputy reeve of a municipality, who had participated in a transaction by which before polling day some eighty names were added to the voters' list, over and above those certified by the Judge to be properly there, was voided, although only some thirty-one of those illegally added cast votes, notwithstanding 55 Vict. ch. 42 (O.), sec. 175, which provides that no election shall be invalid for want of compliance with the principles of the Act, when the result is not affected. *Regina ex rel. St. Louis* v. *Reaume*, 26 O. R. 460.

IX. Convictions under Municipal By-laws.

Auctioneer.]—*See Regina* v. *Rawson*, 22 O. R. 467, *post* 720.

Bicycle.]—*See Regina* v. *Justin*, 24 O. R. 327, *post* 714.

Building.]—*See Regina* v. *Hart*, 20 O. R. 611, *ante* 584.

Express Waggon.]—*See Regina* v. *Latham*, 24 O. R. 616, *post* 721.

Livery Stable.]—*See Regina* v. *Gurr*, 21 O. R. 499, *post* 721.

Omnibus.]—*See The Queen* v. *Butler*, 22 O. R. 462, *post* 722.

Profane Swearing.]—*See Regina* v. *Bell*, 25 O. R. 272, *ante* 273.

Public Health.]—*See Regina* v. *Redmond*, 24 O. R. 331, *ante* 273; *The Qu* [illegible] 26 O. R. 685, 27 O. R. 181, *pa* [illegible].

Show or Exhibition.] *See Regina* v. *Whitaker*, 24 O. R. 437, *ante* 269.

X. Drainage.

1. *Actions for Damages.*

By Tenant.]—A tenant of land may recover damage suffered during his occupation from construction of drainage work, his rights resting upon the same foundation as those of a freeholder. *Hiles* v. *Township of Ellice*, *Crooks* v. *Township of Ellice*, 23 S. C. R. 429.

See Fitzgerald v. *City of Ottawa*, 22 A. R. 297, *post* 703; *Sage* v. *Township of West Oxford*, 22 O. R. 678, *post* 706; *Township of Sombra* v. *Township of Chatham*, 18 A. R. 252, 21 S. C. R. 305, *post* 710; *Corporation of Raleigh* v. *Williams*, [1893] A. C. 540, *post* 711.

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2. *Added Territory.*

Adoption of Old Drain.]—Where a municipality makes an alteration in and thus adopts as part of its own drainage system a drain existing in territory acquired from another municipality, it is liable for damages caused by subsequent neglect to keep the drain in repair.

Judgment of Boyd, C., 25 O. R. 658, affirmed, Maclennan, J.A., dissenting. *Fitzgerald* v. *City of Ottawa*, 22 A. R. 297.

Adoption of Old Drain as Sewer—*Nuisance.*]—Drains originally constructed under township authority for the drainage of surface water merely, may, after the territory has been added to a city, be adopted by the city as common sewers, after which householders using them with the consent or approval of the city are not responsible for nuisance at the outlet.

Judgment of Meredith, J., reversed, Burton, J.A., dissenting. *Lewis* v. *Alexander*, 21 A. R. 613.

Affirmed by the Supreme Court of Canada, 24 S. C. R. 551.

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3. *Arbitrations Under Drainage Laws.*

Constitution—*Municipalities Interested.*]—A question arose under sec. 590 of the Municipal Act, R. S. O. ch. 184, between the townships of H. and R., whether H. caused waters to flow on R. to the detriment of R., which ought to be drained from R. at the expense of H. The township of T. also discharged waters over the other side of R., opposite H.:—

Held, that T. was not "interested" within the meaning of sec. 389 of the Act; and therefore that a board of three arbitrators appointed pursuant to that section, one by each of the three municipalities, was not properly constituted to determine the question; and their award was set aside. *Re Townships of Harwich and Raleigh*, 20 O. R. 154.

Constitution—*Municipalities Interested.*]—Where in a drainage scheme initiated by one township, assessments are made against more than one other township, each township is "interested," within the meaning of sec. 389 of R. S. O. 1887 ch. 184, only in the question of its own assessment; and on appeal from the assessment, the arbitration provided for by the Act is one between each appellant township and the initiating township, not a joint arbitration between the latter and all the other townships assessed.

The scheme of the Act is to make the total cost of the proposed work fall upon the initiating municipality, less such sums as may be properly chargeable against other municipalities for the benefits received by them respectively, and if benefit is disproved, the attempted charge fails and is not to be reimposed elsewhere. *Re Townships of Harwich and Raleigh*, 20 O. R. 154, approved. *Re Essex and Rochester*, 42 U. C. R. 523, questioned. *In re Townships of Romney and Tilbury West*, 18 A. R. 477.

See Township of Carradoc v. *Township of Metcalfe*, 21 O. R. 309, *post* 706; *Corporation of Raleigh* v. *Williams*, [1893] A. C. 540, *post* 711; *Re Township of Anderdon and Township of Colchester North*, 21 O. R. 476, *post* 712.

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4. *Assessment.*

See Re Stephens and Township of Moore, 27 O. R. 660, *post* 705; *In re Townships of Romney and Tilbury West*, 18 A. R. 477, *post* 708; *Brompton* v. *Township of Grey*, 26 O. R. 694, *post* 708; *Township of Stephen* v. *Township of McGillivray*, 18 A. R. 516, *post* 708; *Re Jenkins and Township of Enniskillen*, 25 O. R. 599, *post* 709; *Hiles* v. *Township of Ellice and Crooks* v. *Township of Ellice*, 23 S. C. R. 429, *post* 709; *In re Township of Harwich and Township of Raleigh*, 21 A. R. 677, *post* 710; *Township of Sombra* v. *Township of Chatham*, 21 S. C. R. 305, *post* 710.

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5. *By-laws.*

Amending By-law—*Extra Work—Power Pass.*]—A by-law amending a drainage by-law under sec. 573 of the Consolidated Municipal Act, 1892, "in order to fully carry out the intention thereof," where sufficient funds have been authorized by the original by-law, is one which provides for the completion of the work so as to make it efficient, although there may be some deviations and variations, or even additions to the work as originally planned.

During the construction of a drain, it was found that stone portals were needed for the work, and that the outlet to the lake had to be deepened, and certain other extra work and necessities were recommended by the engineer:—

Held, that the by-law providing for them was an amending by-law, under sec. 573 of the Consolidated Municipal Act, 1892, and that the township council had power to pass it under that section. *Re Suskey and Township of Romney*, 22 O. R. 664.

Construction By-law—*Ordinary Expenditure—Submission to Ratepayers—Extra Terri-*

torial Limits.]—The construction of a drain being necessary both from a sanitary point of view and for the purpose of keeping in repair the highway under which a portion of it passed, the defendants resolved to construct it, if necessary, as part of the ordinary expenditure of the current year, but, nevertheless, submitted a by-law for its construction to the electors, which was defeated. They, however, proceeded with its construction, and again, a second time in the same year, submitted the by-law to the vote, when it was carried. It appeared that the drain might have been paid for out of the ordinary expenditure of the year without exceeding the statutable limit of taxation:—

Held, that the first by-law having been defeated did not prevent the submission of the second in the same year, nor did the fact of the work having been commenced as an item of ordinary expenditure for the year, after the defeat of the by-law, incapacitate the defendants from again submitting a by-law for its construction:—

Held, also, that the defendants had power to pass the by-law notwithstanding that part of the work was to be done on land outside the territorial limits, and without the consent of the adjacent municipality. *Kerfoot* v. *Village of Watford*, 24 O. R. 235.

Maintenance and Repair — *Assessment of Lands Benefited—Intra Vires—Notice—Irregularities.*]—A township council has power under sec. 569 (2) of the Consolidated Municipal Act, 55 Vict. ch. 42, to maintain and repair a beneficial drain, originally constructed out of general funds, at the expense of the local territory benefited, by passing a by-law to that effect, without a petition therefor. And, although such a by-law refers to lands "to be benefited," it does not bring the work within the category of drains to be constructed under sec. 563 of the Act.

Application to quash the by-law in question being made by several persons, who among them owned one of the lots assessed, alleging that they were not benefited by the original drain and could not be by its continuance and repair, and that the amount charged against their lot was not duly apportioned among them:—

Held, that they should have applied to the Court of Revision for relief; and not having done so, and the work having all been done and the benefit of it enjoyed, this Court would not interfere to declare the by-law invalid:—

Held, also, having regard to sec. 571 (2), that the applicants had sufficient notice of the by-law, service having been effected upon a grown-up person at the house where they all lived as members of one family:—

Held, also, that upon this application the Court would not inquire what other persons were not served who were not seeking relief, nor consider irregularities or errors in the assessment of such others.

It appeared on the face of the by-law that the drain in question was an old one, constructed out of general funds, and out of repair; and, although the assessment was referred to as on the property "to be benefited," yet the same clause spoke of it as "upon the property benefited:"—

Held, that the by-law was not bad on its face.

In drainage matters the policy of the legislature is to leave the management largely in the hands of the localities, and the Court should refrain from interference, unless there has been a manifest and indisputable excess of jurisdiction, or an undoubted disregard of personal rights. *Re Stephens and Township of Moore*, 25 O. R. 600.

Maintenance and Repair —*Special Rate—Debenture — Ultra Vires.*]—Action to recover the amount of a debenture, one of a series issued by the defendants pursuant to their by-law passed for the levying of a special rate upon a particular locality for the purpose of cleaning out and repairing a drain:—

Held, following *Alexander* v. *Township of Howard*, 14 O. R. 22, and *Re Clark and Township of Howard*, 16 A. R. 72, that the by-law was void, the defendants having no power to pass it for such a purpose.

The debenture was silent as to the purposes for which it was issued, but referred to the by-law, which disclosed such purposes. There was no representation by the defendants that it was good:—

Held, that, although the plaintiffs were innocent holders and had paid the full value of the debenture, they could not recover upon it, because the defendants had no power to make the contract professedly made by it. *Webb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642, distinguished. *Marsh* v. *Fulton County*, 10 Wallace U. S. R. 676, specially referred to.

Held, however, that as the defendants were bound to keep the drain in repair and to pay for repairs out of their general funds, and as they had received the price of the debenture directly from the plaintiffs and had the full benefit of it, without giving any consideration, the plaintiffs were entitled to recover for money received by the defendants. *Confederation Life Association* v. *Township of Howard*, 25 O. R. 197.

See In re Township of Mersea and Township of Rochester, 22 A. R. 110, *post* 707; *Broughton* v. *Township of Grey*, 26 O. R. 694, *post* 708; *Re Jenkins and Township of Innisfillen*, 25 O. R. 399, *post* 709; *Hiles* v. *Township of Ellice*, 23 S. C. R. 429, *post* 709; *Close* v. *Town of Woodstock*, 23 O. R. 99, *post* 730; *Re Township of Anderdon and Township of Colchester North*, 21 O. R. 476, *post* 712; *Canadian Pacific R. W. Co.* v. *Township of Chatham*, 22 A. R. 330, *post* 713; *Re Stephens and Township of Moore*, 25 O. R. 600, *post* 713; *Gibson* v. *Township of North Easthope*, 21 A. R. 504, 24 S. C. R. 707, *post* 713.

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6. *Drainage Trials Act, 1891.*

Effect on Pending Arbitrations.]—The Drainage Trials Act, 1891, 54 Vict. ch. 51 (O.), has not the effect of abrogating pending proceedings before arbitrators who have previously been appointed and have proceeded to act. *Township of Caradoc* v. *Township of Metcalfe*, 21 O. R. 309.

Jurisdiction to Refer Compulsorily.]—In an action against a township corporation for damages for flooding the plaintiffs' lands, they alleged that the defendants, in executing certain work and making certain drains under the

drainage clauses of the Municipal Act, had brought water down upon the lands without providing any sufficient outlet for it:

Held, that the damages complained of arose, if not from the "construction," at all events from the "operation," of the drainage works of the defendants; and therefore the Court or a Judge had jurisdiction under sec. 11 of the Drainage Trials Act, 1891, to compulsorily refer it to the Referee appointed under that Act.

Semble, there was no jurisdiction to refer this case under sec. 9 of the Act; for, according to the construction placed by the Supreme Court of Canada upon sec. 591 of the Municipal Act, which is in the same words as sec. 9, the damages complained of did not arise from the construction of the drain within the meaning of sec. 9.

Williams v. *Township of Raleigh*, 21 S. C. R. 103, considered. *Sage* v. *Township of West Oxford*, 22 O. R. 678.

Powers of Referee—*Amendment—Compensation—Damages—Route Selected by Engineer.*]—Held, by the Court of Appeal, that under the Drainage Trials Act, 1891, 54 Vict. ch. 51 (O.), the referee has power to award either damages or compensation, whether the case before him be framed for damages only or for compensation only, and on such a reference it is unnecessary to consider whether the by-laws in question are or are not invalid.

Reports of the referee upheld, Barton, J.A., dissenting on the ground that in the one case there was a reference of the action and not a transfer under 54 Vict ch. 51, sec. 19, and that in the other case the reference was not within the Act.

Held, by the Supreme Court of Canada, that upon reference of an action to a referee under the Drainage Trials Act, whether under sec. 11 or sec. 19, the referee has full power to deal with the case as he thinks fit, and to make, of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under sec. 11 into a claim for damages arising under sec. 591 of the Municipal Act:—

Held, also, that the referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law. *Hiles* v. *Township of Ellice*, *Crooks* v. *Township of Ellice*, 20 A. R. 225, 23 S. C. R. 429.

Powers of Referee—*Questions Relating to Assessment.*]—*See In re Township of Hurwich and Township of Raleigh*, 21 A. R. 677, *post* 710.

Powers of Referee—*Setting Aside By-law.*]—Per Hagarty, C.J.O., and Maclennan, J.A.—The drainage referee has jurisdiction to set aside a by-law of a minor municipality charging other minor municipalities with a portion of the expense of such repairs.

Per Burton and Osler, JJ.A.—The drainage referee has no jurisdiction. His jurisdiction depends upon that of the township. If they have exercised it wrongly or mistakenly, he may review their action, but he cannot set aside a by-law which they had no power under any circumstances to pass.

In the result, the referee's judgment, holding that he had jurisdiction and setting aside the by-law, was affirmed. *In re Township of Mersea and Township of Rochester*, *In re Township of Gosfield North and Township of Rochester*, 22 A. R. 110.

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7. *Drains Extending Through Several Municipalities.*

By-law—*Obligations of Initiating and Contributory Townships.*]—Where a township municipality passed a by-law, purporting to be under sec. 585 of the Consolidated Municipal Act, 1892, for the purpose of making certain alterations and improvements in a drain, and served an adjoining municipality, which was to be benefited by the work, with a copy of the engineer's report, etc., shewing the sum required to be contributed by the latter, as directed by sec. 579, and the by-law of the initiating township was irregular and invalid:—

Held, per Meredith C. J., that the contributory township was nevertheless not only entitled, but bound, within the four months prescribed by sec. 580, to pass the necessary by-law to raise its share of the estimated cost:—

Held, per Rose, J., that the contributory township could not be required to pass a by-law raising its share until the initiating municipality had passed a valid by-law adopting the report providing for the doing of the work, including, provisionally, measures for the raising of its proportion of the funds:—

Held, per MacMahon, J., that the contributory township had no power to pass a by-law for raising its share of the proposed expenditure until the initiating municipality had passed its by-law for the construction of the works:—

Held, however, MacMahon, J., *haesitante*, that in this case the portion of the by-law of the initiating township providing for the construction of the work was a sufficient compliance with sec. 569, and severable from the other portion of it, providing for the raising of the funds.

Where the council for one municipality assumed, under the supposed authority of 55 Vict. ch. 42, sec. 585 (O.), in a by-law for the improvement of a drain, to assess lands of the plaintiff situated in another municipality:—

Held, that such assessment was wholly nugatory and void and the plaintiff could not be bound by it, and was therefor not entitled to a declaration that it was illegal and invalid. *Broughton* v. *Township of Grey*, 26 O. R. 694.

Cost of Work—*Contribution.*]—The scheme of the Municipal Act is to make the total cost of the proposed work fall upon the initiating municipality, less such sums as may be properly chargeable against other municipalities for the benefits received by them respectively, and if benefit is disproved, the attempted charge fails, and is not to be re-imposed elsewhere. *In re Townships of Romney and Tilbury West*, 18 A. R. 477.

Cost of Work—*Contribution—Appeal.*]—An adjoining township cannot be charged under sec. 576 of R. S. O. ch. 184 with a proportion of the cost of drainage works which extend beyond the limits of a third township. It is

only, if at all, when the works are done by a county council, under the appropriate provisions of the Act, that an adjoining township can, under such circumstances, be assessed.

Per Osler and Macleman, JJ.A.—Objections to the legality of a drainage scheme may be taken by way of appeal under the arbitration clauses of the Act, but they need not necessarily be so taken, and it is not too late to set them up in answer to an action. *Township of Stephen* v. *Township of McGillivray*, 18 A. R. 510.

Cost of Work — *Proportion — Agreement — Report of Engineer.*]—Although a township council is not powerless with regard to the drainage report of its engineer, it is contrary to the spirit and meaning of the Act that the councils of two adjoining townships should agree upon a drainage scheme, and upon the proportion of its cost to be borne by each, and that the engineer of one of them should be instructed to make a report for carrying out the scheme and charging each municipality with the sums agreed on; for such a course would interfere with the independent judgment of the engineer, and pledge each township in advance not to appeal against the share of the cost imposed upon it, to the possible detriment of the property owners assessed for the portions of that share.

And where such a course was pursued, a by-law of one of the councils adopting the engineer's report was quashed.

In describing lands for assessment, "the north east part," even with the addition of the acreage, is an ambiguous description; and *quære* as to the effect upon the validity of a by-law. *Re Jenkins and Township of Enniskillen*, 25 O. R. 399.

Outlet—*Assessment—By-law—Compensation—Injury to Lands in Adjoining Township.*]—In a drainage scheme for a single township the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. *Stephen* v. *McGillivray*, 18 A. R. 516, and *Missouri* v. *Dorchester*, 14 O. R. 294, distinguished.

One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the Drainage Trials Act, that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law.

A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality. *Hiles* v. *Township of Ellice*, *Crooks* v. *Township of Ellice*, 23 S. C. R. 429.

Outlet—*Contribution—Natural Watercourse.*]—Section 590 of R. S. O. ch. 184 applies only to drains strictly so called, that is, to such outlets as have been artificially constructed; and a municipality from which surface water flows, whether by drains or by natural outlets, into a natural watercourse, cannot be called on to contribute to the expense of a drainage scheme, merely because the natural watercourse is used as a connecting link between drains constructed under that scheme, and because the drainage scheme is in part necessitated by the large amount of surface water brought into the natural watercourse by the municipality in question.

Judgment of Robertson, J., affirmed; Burton, J.A., dissenting. *In re Townships of Orford and Howard*, 18 A. R. 496.

Outlet—*Contribution—Natural Watercourse.*]—Held, per Hagarty, C.J.O., and Burton, J.A., that where a drain constructed or improved by one municipality affords an outlet, either immediately or by means of a drain or natural watercourse flowing from lands in another municipality, the municipality that has constructed or improved the outlet can, under sec. 590 of the Consolidated Municipal Act of 1892, 55 Vict. ch. 42 (O.), assess the lands in the adjoining municipality for a proper share of the cost of construction or improvement, and the Drainage Referee has jurisdiction to decide all questions relating to the assessment.

Per Osler and Macleman, JJ.A., that the section applies only to drains properly so called, and does not extend to or include original watercourses which have been artificially deepened and enlarged, and *In re Orford and Howard*, 18 A. R. 496, still governs.

The Court being divided in opinion, the judgment of the Drainage Referee upholding the right to assess was affirmed. *In re Township of Harwich and Township of Raleigh*, 21 A. R. 677.

Repair — *Contribution.*] — Where drainage works affecting several minor municipalities are constructed by the county, each minor municipality must keep in repair the part of the works within its own limits, and cannot call upon the other minor municipalities to contribute to the expense of repairs. *In re Township of Mersea and Township of Rochester, In re Township of Gosfield North and Township of Rochester*, 22 A. R. 110.

See Re Townships of Harwich and Raleigh, 20 O. R. 154, *ante* 703; *Township of Sombra* v. *Township of Chatham*, 21 S. C. R. 305, *post* 710; *Re Township of Anderdon and Township of Colchester North*, 21 O. R. 476, *post* 712.

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8. *Mandamus.*

Non-completion of Works — *Maintenance and Repair — Action — Damages—Nuisance.*]—The township of C., under the provisions of the Ontario Municipal Act, R. S. O. ch. 184, relating thereto, undertook the construction of a drain along the town line between the townships of C. and S., but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the lands of M. adjoining said town line. M. and the township of S. joined in an action against the township of C., in which they alleged that the effect of the work on the said drain was to stop up the outlets to other drains in S. and cause the waters thereof

to flow back and flood the roads and lands in the township, and they asked for an injunction to restrain C. from so interfering with the existing drains, and a mandamus to compel the completion of the drain undertaken to be constructed by C., as well as damages for the injury to M.'s land and other land in S.:—

Held, affirming the decision of the Court of Appeal, that M. was entitled to damages; and, reversing such decision, Taschereau, J., dissenting, and Patterson, J., hesitating, that the township of S. was entitled to a mandamus, but the original decree should be varied by striking out the direction that the work should be done at the cost of the township of C., it not being proved that the original assessment was sufficient:—

Held, per Ritchie, C. J., Strong and Gwynne, JJ., that sec. 583 of the Municipal Act, providing for the issue of the mandamus to compel the making of repairs to preserve and maintain a drain, does not apply to this case, in which the drain was never fully made and completed, but that the township of S. was entitled to a mandamus under the Ontario Judicature Act, R. S. O. ch. 44:—

Held, further, that the flooding of lands was not an injury for which the township of S. could maintain an action for damages, even though a general nuisance was occasioned. The only pecuniary compensation to which S. was entitled was the cost of repairing and restoring roads washed away:—

Held, per Patterson, J., that it might be better to leave the decision of the Court of Appeal undisturbed and let the township of S. give notice to repair under sec. 583 of the Municipal Act and work out its remedy under that section.

Judgment of the Court of Appeal, 18 A. R. 252, reversed. *Township of Sombra* v. *Township of Chatham*, 21 S. C. R. 305.

Notice in Writing — *Damages* — *Want of Maintenance and Repair—Remedy by Action—Negligent Construction—Remedy by Arbitration.*]—Under the Ontario Municipal Act, R. S. O. ch. 184, an action for damages lies against a municipality at the suit of any person who can shew that he has sustained injury from the non-performance of the statutory duty of maintaining and repairing its drainage works:—

Held, that sec. 583, sub-sec. 2, applies to a case which falls within sec. 586, and, while prescribing a notice in writing as a condition precedent to a mandamus, does not, on its true construction, preclude an action for damages without such notice.

In an action brought without notice in writing against a municipality for damages for injury caused to the plaintiffs' lands and for a mandamus to prevent a recurrence of the injury:—

Held, that so far as such injury was occasioned by the municipal drain and embankment being out of repair, or from their not being kept in such a state as to carry off, in relief of the plaintiffs' lands, all the water which the drain was capable of carrying off as originally constructed, the action was maintainable:—

Held, further, that so far as the injury was occasioned by the negligent construction by the municipality under its statutory powers of another drain, the action must be dismissed. The remedy in such case (see sec. 591) was by arbitration as directed by the statute.

Judgment of Supreme Court of Canada, 24 S. C. R. 103, varied. *Corporation of Raleigh* v. *Williams*, [1893] A. C. 540.

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9. *Negligence.*

Construction of Work — *Liability.*]—Held, by Burton, J. A., that an action for negligence is not maintainable against the municipality unless the council has interfered in or undertaken the construction of the work; and *quære* whether in such a case the members of the council might not be be personally liable.

Held, by the Supreme Court of Canada, that where a scheme for drainage work to be constructed under a valid by-law proves defective and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construction, as *tort feasors*, but are liable under sec. 591, Municipal Act, for damage done in construction of the work or consequent thereto. *Hiles* v. *Township of Ellice*, *Crooks* v. *Township of Ellice*, 20 A. R. 225, 23 S. C. R. 429.

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10. *Petitions.*

Necessity for—*New Work.*]—On a petition therefor a by-law was passed and the usual proceedings taken for the construction of a drain from a point in the township of C. to the town line between the townships of A. and C., where it connected with an existing drain, whereupon certain landowners on the said town line petitioned the council of C. threatening that if their lands were damaged by the said drain they would hold the township of C. liable therefor, and prayed that they would order the surveyor to continue the drain to a sufficient outlet. Instructions were given to the surveyor, who made the necessary examination, and reported in favour of a drain along the town line; and a by-law was introduced for the construction thereof, reciting that a majority of the landowners benefited had petitioned (referring to the petition last mentioned), and assessing the cost on the lands benefited, etc., and naming the proportion thereof to be borne by the lands in A. On receiving notice of the proposed by-law the township of A. gave notice of appeal, and arbitrators were appointed. Subsequently the township of A. moved for an order of prohibition forbidding the arbitrators from further proceeding in the matter, on the ground of the absence of a proper petition for such drain:—

Held, per Street, J., that the drain in question came within either sec. 569 or 598 of the Municipal Act, R. S. O. ch. 184, and not within sec. 585, and that a petition was an indispensable preliminary to the passing of the by-law, whereas the alleged petition was clearly insufficient; that the mere fact of its not being quashed within the period limited by sec. 572 would not prevent its being treated as invalid in other proceedings as here; and that prohibition would be granted, notwithstanding the by-law was good on its face, especially as there had been no laches.

reme Court of Canada, 24
d. *Corporation of Raleigh*
A. C. 540.

Negligence.

Work — *Liability.*]—Held, at an action for negligence against the municipality as interfered in or under- on of the work; and *quære* case the members of the le personally liable.

eme Court of Canada, that drainage work to be con id by-law proves defective been skilfully and properly cipality constructing it and whose lands are damaged in defects and improper con- *sors*, but are liable under Act, for damage done in ork or consequent thereto. *Ellice, Crooks* v. *Township* 25, 23 S. C. R. 429.

Petitions.

ew Work.]—On a petition as passed and the usual the construction of a drain wnship of C. to the town ships of A. and C., where existing drain, whereupon the said town line peti- C. threatening that if the it by the said drain they hip of C. liable therefor. would order the surveyor to a sufficient outlet. In- to the surveyor, who made nation, and reported in ng the town line; and a ed for the construction a majority of the land- petitioned (referring to fened), and assessing the ncited, etc., and naming to be borne by the lands otice of the proposed by- A. gave notice of appeal, appointed. Subsequently oved for an order of pro- e arbitrators from further er, on the ground of the ition for such drain:— that the drain in ques- r sec. 569 or 598 of the . ch. 184, and not within tition was an indispens- e passing of the by-law, petition was clearly in- re fact of its not being eriod limited by sec. 572 being treated as invalid here; and that prohibi- notwithstanding the by- e, especially as there had

On appeal, a Divisional Court was equally divided, and the appeal therefore failed. *Re Township of Anderdon and Township of Colchester North*, 21 O. R. 476.

Necessity for—*Old Drain—Maintenance and Repair.*]—A township council has power, under sec. 586 (2) of 55 Viet. ch. 42, to maintain and repair a beneficial drain, originally constructed out of general funds, at the expense of the local territory benefited, by passing a by-law to that effect, without a petition therefor. *Re Stephens and Township of Moore*, 25 O. R. 600.

Necessity for—*Old Work—New Culvert.*]—Where drainage works for the benefit of lands in two townships prove, as originally initiated and constructed, insufficient, an addition thereto costing more than $200 must be authorized by petition and by-law under the Act; and a contract entered into under seal by one township binding itself to pay the cost of the additional work cannot, even after completion and acceptance of the work, be enforced.

Bernardin v. *North Dufferin*, 19 S. C. R. 581, considered.

Judgment of the Common Pleas Division, 25 O. R. 465, affirmed, Osler, J. A., dissenting. *Canadian Pacific R. W. Co.* v. *Township of Chatham*, 22 A. R. 330. Reversed by the Supreme Court of Canada, 25 S. C. R. 608.

Necessity for—*Old Work—New Outlet.*]—A township council, finding that a government drain in the township did not carry off the water, by reason of the natural flow being in another direction, accepted a report made by their engineer and passed a by-law adopting a scheme for a new drain leading from the middle of the government drain into an adjoining township, where it was to find an outlet:—

Held, that the proposed drain properly came within the description of a new outlet, although not at the end of the government drain, and although the former outlet remained to serve to carry off a part of the water; and, so long as the proposed drain was designed merely as an outlet for the water from the government drain, it might, under sec. 585 of the Municipal Act of 1892, be provided for without any petition under sec. 569, even although it should incidentally benefit the locality through which it ran, nothing being included in the plan beyond what was reasonably requisite for the purpose intended. *Re Jenkins and Township of Enniskillen*, 25 O. R. 399.

Withdrawal.]—The plaintiff in 1884, after signing a petition for the construction of a drain, wrote to the council objecting to the work for reasons set out, but in 1885 the council passed the necessary by-law and issued debentures. Subsequently the plaintiff gave notice of his intention to move to quash the by-law, but afterwards he withdrew this notice and tendered for the work. In 1889 he attacked the by-law, alleging, among other grounds, that it was void by reason of his withdrawal:—

Held, per Hagarty, C. J. O., that before 53 Viet. ch. 50, sec. 35 (O.), a petitioner could not withdraw.

Per Barton, J. A., that there was no power of withdrawal, and that in any event the question whether there had been withdrawal or not, was for the council.

Per Osler and Maclennan, JJ. A., that there was a power of withdrawal, but that there had in fact been no withdrawal, and that, even if there had, the plaintiff was estopped from maintaining the action, his conduct having been such as to induce the council to believe that their jurisdiction was not contested. *Gibson* v. *Township of North Easthope*, 21 A. R. 504.

Affirmed by the Supreme Court of Canada, 24 S. C. R. 707.

See Hiles v. *Township of Ellice, Crooks* v. *Township of Ellice*, 23 S. C. R. 429, *ante* 709; *Re Saskey and Township of Romney*, 22 O. R. 664, *ante* 704.

XI. Expropriation of Land.

See In re Prittie and Toronto, 19 A. R. 503, *ante* 688; *Re Macpherson and City of Toronto*, 26 O. R. 558, *ante* 689; *In re McColl and City of Toronto*, 21 A. R. 256, *ante* 690; *McVicar* v. *Town of Port Arthur*, 26 O. R. 391, *post* 728; *Re Davis and City of Toronto*, 21 O. R. 243, *post* 729.

XII. Highways.

Bicycle —*By-Law—Sidewalk.*]—A bicycle is a "vehicle," and riding it on the sidewalk is "incumbering" the street within the meaning of sub-sec. 27 of sec. 496 of the Consolidated Municipal Act, and of a by-law of a municipality passed under it.

A *certiorari* to bring up a conviction under the by-law was refused.

Regina v. *Plummer*, 30 U. C. R. 41, approved. *Regina* v. *Justin*, 24 O. R. 327.

Establishment of Highway — *By-law — Description—Publication.*]—A municipal by-law establishing a public highway is not void for uncertainty when the boundaries of the land so declared are described in the by-law with sufficient precision to enable them to be traced upon the ground, and, if so properly described, it is not necessary when private ground has been taken to distinguish it as such.

The fact that one of two parallel courses in a description has by obvious clerical error been incorrectly given in the published notice is not a valid objection to such a by-law.

Where there is no paper published in the township, weekly or oftener, it is not obligatory to publish the required statutory notice of the by-law in a paper issued therein semi-monthly. *Re Chambers and Township of Burford*, 25 O. R. 276.

Maintenance of County Road — *Liability of City.*]—Held, that the legislation and proceedings thereunder, set out in the judgment of the Court, relating to the Queenston and Grimsby road and the city of St. Catharines, did not make the city liable to pay to the county of Lincoln any part of the expenditure of the latter in connection with that road.

Effect of the withdrawal of city from jurisdiction of county upon roads owned by the county passing through the city, considered.

Regina v. *Louth*, 13 C. P. 615; *Regina* v. *Brown and Street*, *ib.* 356; *St. Catharines Road Co.* v. *Gardner*, 21 C. P. 190, specially referred to.

Unless specially retained by statute, the withdrawal of a city from the jurisdiction of the county terminates all liability of the former to taxation for county purposes.

An agreement by a city withdrawn from the jurisdiction of the county to contribute towards the maintenance and repairs of a county road is *ultra vires* the city corporation. *County of Lincoln* v. *City of St. Catharines*, 21 A. R. 370.

Natural Gas—*Right to Bore.*]—Natural gas is a mineral within the meaning of the Municipal Act, R. S. O. ch. 184, sec. 565, which gives power to the corporation of any county or township to sell or lease mineral rights under highways. *Ontario Natural Gas Co.* v. *Gosfield*, 18 A. R. 626.

Noxious Weeds — *Removal of.*]—Municipal corporations are not "owners" or "occupants" of highways in their municipalities within R. S. O. ch. 202, "An Act to Prevent the Spread of Noxious Weeds," etc., nor does the word "land" therein include street or highway.

The appointment of an inspector under the Act being discretionary with the council unless petitioned for by the necessary number of ratepayers, and that of an overseer being altogether discretionary, in the absence of such appointments, no duty is cast on the council to cut down noxious weeds growing in the streets. *Osborne* v. *City of Kingston*, 23 O. R. 382.

Obstruction by Private Person—*Declaratory Judgment — Injunction.*]—A municipal corporation has the right to have it declared, as against a private person, whether or not certain land is a public highway, and whether such person has the right to possess, occupy, and obstruct the same.

And in an action brought by the municipal corporation for the purpose, a declaration may be made according to the facts, and the defendant enjoined from possessing or occupying the land so as to obstruct the use of it as a public highway. *Fenelon Falls* v. *Victoria R. W. Co.*, 29 Gr. 4, followed.

Gooderham v. *City of Toronto*, 21 O. R. 120, 19 A. R. 641, applied and followed. *City of Toronto* v. *Lorsch*, 24 O. R. 227.

Repair—*Road Washed Away—Restoration.*]—Where in an action brought to compel a municipal corporation to repair a portion of a road which ran along the shore of a lake, it appeared that the road had been completely submerged by the water, so that restoration would be necessary, and no ordinary reparation could suffice :—

Held, that the defendants were not required by law to do the work. *McCormick* v. *Township of Pelée*, 20 O. R. 288.

See cases under next sub-title as to LIABILITY FOR INJURIES OWING TO ACCIDENTS ON HIGHWAYS.

XIII. LIABILITY FOR NEGLIGENCE.

1. *Non-repair of Building.*

License—*Knowledge.*]—A municipal corporation, owner of a public park and building therein, is not liable to a mere licensee for personal injuries sustained owing to want of repair of the building, at all events where knowledge of the want of repair is not shewn. *Schmidt* v. *Town of Berlin*, 26 O. R. 54.

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2. *Non-repair of Highway.*

Roadway—*Alteration—Visible Danger.*]—A municipal corporation is not responsible in damages to a person who is injured in endeavouring to cross in daylight a plainly visible shallow trench, lawfully and necessarily in the street at the time, the person injured being, moreover, familiar with the locality, and knowing that there is close at hand a safe passage way across the trench. *Krachie* v. *City of Toronto*, 22 A. R. 371.

Roadway—*Alteration of Grade—Approach—Contributory Negligence.*]—The Act of incorporation of the town of Portland, 34 Vict. ch. 11 (N.B.), which remained in force when the town was incorporated as a city by 45 Vict. ch. 61 (N.B.), empowered the corporation to open, lay out, regulate, repair, amend, and clean the roads, streets, etc.:—

Held, that the corporation had authority under this Act to alter the level of a street if the public convenience required it.

W. was owner and occupant of a house in Portland, situate several feet back from the street, with steps in front. The corporation caused the street in front of the house to be cut down, in doing which the steps were removed, and the house left some six feet above the road. To get down to the street W. placed two small planks from a platform in front of the house, and his wife, in going down these planks in the necessary course of her daily avocations, slipped and fell, receiving severe injuries. She had used the planks before, and knew that it was dangerous to walk up or down them. In an action against the city in consequence of the injuries so received :—

Held, affirming the judgment of the Court below, that the corporation having authority to do the work, and it not being shewn that it was negligently or improperly done, the city was not liable :—

Held, also, that the wife of W. was guilty of contributory negligence in using the planks as she did, knowing that such use was dangerous. *Williams* v. *City of Portland*, 19 S. C. R. 139.

Roadway—*Obstruction—Building Materials.*]—*See McDonald* v. *Dickenson*, 25 O. R. 45, 21 A. R. 485, *post* 726.

Roadway — *Obstruction — Contractor.*]—A contractor with a municipal corporation for the repair of a highway of theirs, who negligently leaves an obstacle thereon in such a position as to frighten a horse being driven on the highway, thereby causing injury to the driver, is liable in an action for the improper use of the highway, and is not relieved from liability by the fact that the corporation may have otherwise negligently allowed the highway to get out of repair.

In such a case the corporation are not liable for the accident caused by the improper use, unless their assent thereto can be shewn.

Per Rose, J.—A corporation is under such circumstances liable for non-repair of the highway. *Howarth* v. *McGugan*, 23 O. R. 396.

Roadway—*Obstruction—Damages—Remoteness.*]—*See McKelvin* v. *City of London*, 22 O. R. 70, *ante* 328.

Roadway—*Snow—Street Railway—Evidence—Finding of Jury.*]—*See Toronto Railway Co.* v. *City of Toronto*, 24 S. C. R. 589, *post*, STREET RAILWAYS.

Sidewalk—*Defect—Notice of Action.*]—*See City of St. John* v. *Christie*, 21 S. C. R. 1, *post* 725.

Sidewalk—*Defect—Remedy Over.*]—*See Stilliway* v. *City of Toronto*, 20 O. R. 98, *post* 718.

Sidewalk—*Ice.*]—At a certain point in a frequented street in the defendants' town, the sidewalk having settled through age and decay formed a depression where water lodged and ice gathered, and the plaintiff slipped upon it and was injured. The place had been in as bad condition as at the time of the mishap for a fortnight :—

Held, by the Chancery Division, Meredith, J., *dissentiente*, that the plaintiff was entitled to damages.

Per Boyd, C.—The walk was out of repair, because not safe at this point, having regard to the travel upon it and the resources of the municipality. Defect in a way or in the condition of a way may arise from superinduced causes which make it dangerous or unfit for travel.

Per Robertson, J.—This was a case of disrepair and decay of a sidewalk which it was within the power of the municipality to prevent by ordinary care and watchfulness :—

Held, by the Court of Appeal, affirming the decision of the Chancery Division, Barton, J.A., dissenting, that allowing, for a fortnight, water to collect and alternately freeze and thaw in a depression in a sidewalk in a frequented street in a town, is non-repair for which the municipality is liable :—

Held, by the Supreme Court of Canada, Gwynne, J., dissenting, that as the evidence at the trial of the action shewed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it, whereby the ice causing the accident was formed, the corporation was liable.

Held, per Taschereau, J., that allowing the ice to form and remain on the street was a breach of the statutory duty to keep the streets in repair for which the corporation was liable. *Derochie* v. *Town of Cornwall*, 23 O. R. 355, 21 A. R. 279, 24 S. C. R. 301.

Sidewalk—*Ice—Adjacent Building—Owner—Tenant—Relief Over.*]—*See Organ* v. *City of Toronto*, 24 O. R. 318, *post* 719.

Sidewalk—*Obstruction—Lighting—Independent Contractors.*]—L. was walking along the sidewalk of a street in Halifax at night, when an electric lamp went out, and in the darkness she fell over a hydrant and was injured. In an action against the city for damages it was shewn that there was a space of seven or eight feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant and accustomed to walk on said street. The statutes respecting the government of the city did not oblige the council to keep the streets lighted, but authorized them to enter into contracts for that purpose. At the time of this accident the city was lighted by electricity by a company who had contracted with the corporation therefor. Evidence was given to shew that it was not possible to prevent a single lamp or a batch of lamps going out at times :—

Held, reversing the judgment of the Court below, Strong and Taschereau, JJ., dissenting, that the city was not liable; that the corporation being under no statutory duty to light the streets, the relation between it and the contractors was not that of master and servant, or principal and agent, but that of employer and independent contractors, and the corporation was not liable for negligence in the performance of the service; that the position of the hydrant was not in itself evidence of negligence in the corporation; and that L. could have avoided the accident by the exercise of reasonable care. *City of Halifax* v. *Lordly*, 20 S. C. R. 505.

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3. *Relief Over Against Third Parties.*

Amendment—*Direct Claim—Order of Addressing Jury.*]—An action for damages for injuries resulting from a defective sidewalk was brought against a city, who under R. S. O. 1887 ch. 184, sec. 531, sub-sec. 4, obtained an order adding O. as a party defendant, and alleged in their defence that O. was responsible for the defects in the sidewalk, and asked a remedy over against him. O. delivered a defence denying the cause of action, and alleging that if any accident occurred, it was through the neglect of the city. At the trial the jury found that O. had occasioned the accident, and gave damages to the plaintiffs. The plaintiffs then applied for leave to amend their statement of claim by claiming directly against O., which leave was granted, and judgment was entered against O. for the damages awarded :—

Held, affirming the decision of MacMahon, J., that the leave to amend was properly granted, and the judgment should be affirmed.

Per Boyd, C.—Modern procedure endeavours to work out the rights and liabilities of all parties as far as possible in the same action, and, so long as no substantial injustice is done, it is permissible to conform the pleadings to the facts at the close of the case.

At the trial the Judge ruled that counsel for O should address the jury before the counsel for the city, thus giving the latter the reply as against O.:—

Held, that this ruling was correct.

Per Robertson, J.—As regards the city and O., the former stood in the relation of plaintiff, and under these circumstances, evidence having been given by O. to shew that the injury complained of was not caused by his negligence, but by the negligence of the city, the latter had the right to address the jury in reply. *Stilliway* v. *City of Toronto*, 20 O. R. 98.

Flooding Highway — *Milldam.*]—A mill-owner, having a license from a township to construct his milldam in such a way as to flood a part of the highway, constructed it so negligently that it gave way, causing damage to proprietors below:—

Held, that the license to dam water back upon the highway was (except in so far as it might be a public nuisance affecting travellers on the road) a lawful thing; and that the damage being caused by the negligence of the millowner, the township was not liable.

Such a case is not within R. S. O. 1887 ch. 184, sec. 531, sub-sec. 4, which gives to a corporation against which is brought an action to recover damages sustained by reason of any obstruction, etc., on a highway placed by any person, other than a servant or agent of the corporation, the right to claim relief over against such person. *Ward*, v. *Caledon, Alyie* v. *Caledon*, 19 A. R. 69.

Ice on Sidewalk—*Owner of Adjacent Building — Tenant.*]—In an action against a city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building, which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof were, at the instance of the municipality, made party defendants under sec. 531 of the Consolidated Municipal Act. The pipe in its condition at the time of the accident, discharging the water upon the sidewalk, had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of a building, or, if unoccupied, the owner, to remove ice from the front of a building abutting on a street, within a limited time:—

Held, that the owner was, but the tenant was not, liable over to the municipality for the damages recovered. *Organ* v. *City of Toronto*, 24 O. R. 318.

Lands Injuriously Affected—*Railway.*]—*See Baskerville* v. *City of Ottawa*, 20 A. R. 108, *ante* 689.

Non-repair of Highway—*Joint Liability.*]—Sub-section 4 of sec. 531 of R. S. O. ch. 184 provides that if an action is brought against a municipal corporation to recover damages sustained by reason of an obstruction, excavation, or opening in a public place, made, left, or maintained by another corporation or by any person other than a servant or agent of the municipal corporation, the last mentioned corporation shall have a remedy over against the other corporation or person for any damages which the plaintiff in the action may recover against them.

This applies to the case of an obstruction, excavation, or opening, directly and immediately placed on or dug in the highway by the corporation or person against whom the remedy over is given. It does not give a right to one township municipal corporation to recover from an adjoining township municipal corporation damages recovered for an accident caused by non-repair of a road lying between the townships which they were jointly liable to keep in repair. *Township of Sombra* v. *Township of Moore*, 19 A. R. 144.

Obstruction in Highway.]—The person who placed on a highway a boulder which caused injury to the plaintiff was added as a defendant under sec. 531 of the Municipal Act, R. S. O. ch. 184, and was held liable over to the corporation under sub-sec. 4. *Vespra* v. *Cook*, 26 C. P. 182, distinguished. *Baker* v. *Gosfield*, 17 O. R. 700, followed. *McKelvin* v. *City of London*, 22 O. R. 70.

Practice — *Defendant — Third Party.*]—A third party is "a party to the action" within the meaning of sec. 531, sub-sec. 5, of the Municipal Act, 55 Vict. ch. 42; and where a defendant municipal corporation, under that enactment, seeks to have another corporation or person added as a party for the purpose of enforcing a remedy over, such person or corporation should be made a third party and not a defendant, unless the plaintiff seeks some relief against such added party; and it is improper to add such party both as a defendant and a third party. *Erdman* v. *Town of Walkerton*, 15 P. R. 12.

See, also, *S. C.*, 22 O. R. 693, 20 A. R. 444, 23 S. C. R. 352.

Snow on Roadway—*Street Railway.*]—*See Toronto Railway Co.* v. *City of Toronto*, 24 S. C. R. 589, *post*, STREET RAILWAYS.

See, also, *Ferguson* v. *City of Toronto*, 14 P. R. 358, *post* 769; *Christie* v. *City of Toronto*, 15 P. R. 415, *post* 768; *Gibb* v. *Township of Camden*, 16 P. R. 316, *post* 768.

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4. *Other Cases.*

Damage to Land Adjoining Highway—*Water—Culvert.*]—*See Bryce* v. *Loutit*, 21 A. R. 100, *post* 749.

Damage to Land Adjoining Highway—*Water—Milldam—License.*]—*See Ward* v. *Caledon, Alyie* v. *Caledon*, 19 A. R. 69, *ante* 719.

Damage to Land Adjoining Highway—*Lowering Grade—Unskilful Execution.*]—*See City of New Westminster* v. *Brighouse*, 20 S. C. R. 520, *post* 724.

Evidence—*Action under Lord Campbell's Act.*]—*See Erdman* v. *Town of Walkerton*, 22 O. R. 693, 20 A. R. 444, 23 S. C. R. 352, *ante* 395.

Injury through Horses Frightened by Noise—*Proximate Cause.*]—*Connell* v. *Town of Prescott*, 20 A. R. 49, 22 S. C. R. 147, *post* 739.

XIV. LICENSING POWERS.

Auctioneers — *By-law — Sale by Agent of Assignee.*]—A by-law of a county municipality passed under sub-sec. 2 of sec. 495 of the Municipal Act, R. S. O. ch. 184, enacted that it should not be lawful for any person or persons to act as auctioneers, or to sell or put up for sale any goods, etc., "by public auction," unless duly licensed:—

Held, that the agent of an assignee of an insolvent estate selling without a license the stock-in-trade of an insolvent who had carried on business in the county, was rightly convicted of a breach of the by-law, although it was the only occasion he had so acted in the municipality. *Regina* v. *Rawson*, 22 O. R. 467.

Auctioneers—*Character of Licensee.*]—Held, by Rose, J., that sec. 495, sub-sec. 2, of the Municipal Act, R. S. O. ch. 184, which empowers any city, etc., to pass by-laws for the "licensing, regulating, and governing of auctioneers," etc., is only for the purpose of raising a revenue, and does not confer any right of prohibition so long as the applicant is willing to pay the sum fixed for the license. Where, therefore, a city refused to license the plaintiff as an auctioneer on the ground that he was a person of a notoriously bad character and ill-repute, a mandamus was granted compelling the issue of the license to him.

Held, by the Court of Appeal, affirming the judgment of Rose, J., that before the amending Act of 1894, 57 Viet. ch. 50, sec. 8 (O.), a municipal corporation could not, on the ground of the applicant's bad character, refuse to grant him an auctioneer's license. *Merritt* v. *City of Toronto*, 25 O. R. 256, 22 A. R. 205.

Express Waggons—*By-law — Rates—Agreement.*]—A by-law passed under sec. 436 of R. S. O. ch. 184, for licensing express waggons, authorized the alteration by agreement of the rates fixed thereby:—

Held, beyond the powers conferred by the statute; and a conviction under the by-law for refusal to pay charges was quashed. *Regina* v. *Latham*, 24 O. R. 616.

Hawkers—*By-law—Prohibition as to Streets.*]—Under R. S. O. ch. 184, sec. 495 (3), which provides that the council of any city may pass by-laws "for licensing, regulating, and governing" hawkers and peddlers, a city council passed a by-law to prevent hawkers and peddlers from prosecuting their trade in certain streets:—

Held, reversing the decision of the Court of Appeal, 20 A. R. 435, Fournier and Taschereau, JJ., dissenting, that the by-law was beyond the powers of the council. *In re Virgo and City of Toronto*, 22 S. C. R. 447.

Affirmed by the Judicial Committee of the Privy Council, [1896] A. C. 88.

Hawkers — *By-law — Amendment — Repugnancy.*]—A by-law of the city council provided that no license should be required from any peddler of fish, farm and garden produce, fruit and coal oil, or other small articles that could be carried in the hand or in a small basket:—

Held, affirming the decision of the Court of Appeal, 20 A. R. 435, Gwynne and Sedgewick, JJ., dissenting, that a subsequent by-law fixing the amount of a license fee for fish hawkers and peddlers was not void for repugnancy. *In re Virgo and City of Toronto*, 22 S. C. R. 447.

Livery Stable — *By-law — Restrictions.*]—A person licensed to keep a livery stable at a particular locality under a by-law made by the board of police commissioners for a city, pursuant to sec. 436 of the Municipal Act, but not having a cab license, for which under a separate by-law other and larger fees were payable, is not at liberty to stand with his cabs and solicit passengers at places, though owned by him, other than at the place mentioned in his license. *Regina* v. *Gurr*, 21 O. R. 499.

Omnibuses — *By-law — Owners—Drivers.*]—Section 456 of the Municipal Act, R. S. O. ch. 184, empowers the police commissioners of a city to regulate and license the owners of omnibuses, etc. The commissioners of a city passed a by-law enacting that no person or persons should drive or own any omnibus without being licensed to do so:—

Held, that the authority conferred on the commissioners was to license owners, and not drivers; and therefore a conviction of a driver for driving without a license was bad, and must be quashed. *The Queen* v. *Butler*, 22 O. R. 462.

Victualling Houses—*Forfeiture of License.*]—The power given to municipal corporations under sec. 285 of R. S. O. ch. 184 "to determine the time during which victualling licenses shall be in force" does not confer any power to forfeit such licenses, but merely to fix the duration of the license.

The power to create a forfeiture of property is one which must be expressly given to a corporation by the legislature, and such an extraordinary power is least of all to be inferred where the legislature has provided other means of enforcing by-laws by means of fine and amerciament, as in this case. *Bauman* v. *City of Toronto*, 22 O. R. 274.

XV. Local Improvements.

By-law — *Assessment—Notice—Variance.*]—In carrying out a local improvement the council may either ascertain and provide for the cost of the work before it is actually commenced, by imposing and confirming the assessment necessary for that purpose, or they may do the work first and make the special assessment after its completion.

A by-law imposing assessments for local improvements initiated by the city was quashed where the work done and the times of payment therefor were different from those set out in the notice of intention to do the work.

Per Osler, J. A.—The by-law was bad on the further grounds (1) that the notice given to the ratepayers was of an improvement costing the sums named therein, to be provided for by an assessment to be made and confirmed before the commencement of the work, while the by-law imposed an assessment for the cost of construction as ascertained after its execution; and (2) that a petition duly signed objecting to the performance of the work had been, within the proper time, delivered to the council. *In re Gillespie and City of Toronto*, 19 A. R. 713.

By-law — *Assessment—Sewer—Appeal—Court of Revision — Registration.*]—In constructing local improvements, a municipal corporation must either make an assessment of the probable cost, giving the ratepayers an opportunity of appealing, and then, if necessary, make a further assessment to be confirmed by the Court of Revision in the same manner as the first, or

they must defer the actual assessment until after the completion of the work, the ratepayers then having the right to appeal. They cannot proceed partly in one way and partly in another, without giving any opportunity of appealing from a definite assessment.

A municipal corporation, under the provisions of a general by-law respecting local improvements, determined to construct a sewer, and proceeded to assess the estimated cost on the property benefited. This assessment was confirmed by the Court of Revision. The council then passed a by-law authorizing the construction of the sewer to be proceeded with, and on its completion passed another by-law by which the actual cost, which was much greater than the amount of the assessment, was imposed and assessed upon the property. The council proceeded to enforce this assessment without having brought it before the Court of Revision :—

Held, that the assessment was invalid and could not be supported as a mere alteration of the estimated cost, or as a supplementary assessment.

The provisions of sec. 351 of the Municipal Act, R. S. O. ch. 184, are imperative and not merely directory, and if a local improvement by-law is not registered within two weeks after its final passing, a ratepayer may shew that it is invalid and successfully resist payment of the local improvement tax. *Re Farlinger and Morrisburg*, 16 O. R. 722, distinguished. *Sweeny* v. *Corporation of Smith's Falls*, 22 A. R. 429.

By-law — *Necessity for—General—Special.*]—The council of a city, by a resolution confirming the report of the Committee on Works, authorized the corporation to enter into an agreement with certain railway companies—who were liable to maintain and keep in repair the existing bridges over their rails on a certain street—whereby the corporation were to build as a local improvement two new bridges over said rails at an approximate cost of $75,000, $20,000 thereof to be paid by the railway companies in full of all liability, $30,000 by the corporation as their respective shares, and $25,000, the estimated damage to lands, to be assessed against the properties fronting on the street. No provision was made in the estimates for the current year for the payment by the corporation of the amount to be paid by them :—

Held, by Street, J., that before the expenditure could be brought within the local improvement clauses of the Municipal Act, a special by-law must be passed fixing the amount or proportion of the cost of the work to be assumed by the city and to be assessed on the locality, and declaring the opinion of the council to be that the work was necessary, and that it would be inequitable to charge the whole cost of it upon the locality ; and that the fact of there being a general by-law passed under sec. 612, sub-sec. 1 (*a*), for determining property to be benefited by a proposed local improvement was not sufficient ; but, even if a by-law were unnecessary, the resolution was too indefinite, as it could not be gathered with certainty therefrom what proportion of the cost was to be imposed on the property to be locally assessed.

An interim injunction was granted restraining the corporation from acting under the agreement.

Held, by the Court of Appeal, affirming the decision of Street, J., that a general by-law may be passed providing the means of ascertaining and determining what real property will be immediately benefited by any proposed work or assessment the whole cost of which is to be assessed upon that property, but such a general by-law is not sufficient in the case of local improvements or construction of bridges, the whole cost of which the council deem it inequitable to raise by local special assessment. *Fleming* v. *City of Toronto*, 20 O. R. 547, 19 A. R. 318.

Lands Injuriously Affected—*Absence of By-law — Negligence — Action.*]—The Act incorporating the city of New Westminster, 51 Vict. ch. 42 (B.C.), by sec. 190 empowers the council of the city to order by by-law the opening or extending of streets, etc., and for such purposes to acquire and use any land within the city limits, either by private contract or by complying with the formalities prescribed in sub-secs. 3 and 4 of said section, which provide for the appointment of commissioners to fix the price to be paid for such land ; sub-sec. 12 provides for the confirmation of the appointment, and 15 for the deposit in Court of said price by the council, which deposit should vest in them the title to said land. Sub-section 17 of sec. 190 enacts that sub-secs. 3 and 4 shall apply to cases of damage to real or personal estate by reason of any alteration made by order of council in the line or level of any street, and for payment of the compensation therefor without further formality. The council was authorized by by-law to raise money for improving certain streets, but no by-law was passed expressly ordering such improvements. In one of the streets named in said by-law the grade was lowered, in doing which the approach to and from an adjacent lot became very difficult, and no retaining wall having been built, the soil of said lot caved and sunk, thereby weakening the supports of the buildings thereon :—

Held, affirming the decision of the Court below, Ritchie, C.J., and Taschereau, J., dissenting, that the owner of said lot could maintain an action for the damage sustained by lowering the grade of the street, and was not obliged to seek redress under the statute ; that sub-sec. 17 of sec. 190, which dispenses with the formalities required by prior sub-sections, only applies to cases where land is injuriously affected by access thereto being interfered with, and where land is taken or used for the purposes of work on the streets, the corporation must comply with the formalities prescribed by sub-secs. 3 and 4 ; that the street having been excavated to a depth which caused a subsidence of adjoining land, the latter must be regarded as having been taken and used for the purposes of the excavation, and the council should have acquired it under the statute ; not having so acquired it, and having neglected to take steps to prevent the subsidence of the adjacent land, they were liable for the damage thereby caused :—

Held, further, that the neglect to take such precautions was in itself, however legal the making of the excavation may have been, if skilfully executed, such negligence in the manner of executing it as to entitle the owner of the adjacent land to recover damages for the injury sustained :—

Held, per Patterson, J., that, in the absence of the statutory preliminaries, a municipality has no greater right than any other owner of adjacent land to disturb the soil of a private person. *City of New Westminster* v. *Brighouse*, 20 S. C. R. 520.

Lands Injuriously Affected—*Damages—Ascertainment—Benefit—Set-off.*]—In an arbitration under the Municipal Act, R. S. O. ch. 184, sec. 483, it is proper to allow as against the amount of damages sustained by an owner of property by reason of the work in question, any enhancement in value to the property derived specifically from the work in question, notwithstanding that such enhancement in value is one common to all the property affected.

The amount assessed against the owner as his share of the cost of the work should be added to the damages or deducted from the set-off.

Judgment of Street, J., 16 O. R. 726, affirmed; Burton, J. A., dissenting. *In re Pryce and City of Toronto*, 20 A. R. 16.

Sidewalk—*Construction of—Desirable in the Public Interest — Notice.*]—Persons who will be affected by proceedings under sec. 623½ of the Consolidated Municipal Act, 1892, for the construction of sidewalks, are entitled to actual notice thereof, and to be permitted to shew, if they can, that the proposed sidewalk is not desirable in the public interest; and where such notice had not been given, except by advertisement in a newspaper, which had not come to the attention of the applicant, the by-law for the construction of the sidewalk was quashed, so far as it purported to affect his property. *In re Hodgins and City of Toronto*, 26 O. R. 480. Affirmed by the Court of Appeal, 23 A. R. 80.

See SALE OF LAND, I.

XVI. NOTICE OF ACTION.

Necessity for — *Sufficiency of — Pleading—"Immunities."*]—The Act incorporating the town of Portland, 34 Vict. ch. 11 (N. B.), gives the town council the exclusive management of and control over the streets, and power to pass by-laws for making, repairing, etc., the same. By sec. 84 the provisions of 25 Vict. ch. 16 and amending Acts relating to highways apply to said town, and the powers, authorities, rights, privileges, and immunities vested in commissioners and surveyors of roads in said town are declared to be vested in the council. By another Act no action could be brought against a commissioner of roads unless within three months after the act committed, and on one month's previous notice in writing. The town of Portland afterwards became the city of Portland, remaining subject to the said provisions, and eventually a part of the city of St. John. An action was brought against the city of Portland by C. for injuries sustained by stepping on a rotten plank on a sidewalk in said city and breaking his leg. More than a month before the action was commenced the plaintiff's solicitor wrote to the council notifying them of the injuries sustained by the plaintiff, and concluding: "As it is Mr. Christie's intention to claim damages from you for such injuries, I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to." Except this no notice of action was given, but want of notice was not pleaded. The jury on the trial found that the broken plank was within the line of the street, and that the council, by conduct, had invited the public to use said sidewalk. After Portland became a part of St. John, the latter city became defendant in the case for subsequent proceedings:—

Held, Strong, J., dissenting, that the city was liable to C. for the injuries so sustained:—

Held, per Ritchie, C.J., and Strong, J., that the letter of the solicitor was not a sufficient notice of action under the statute.

Per Ritchie, C.J.—If notice of action was necessary, the want of it could not be relied on as a defence without being pleaded.

Per Taschereau, Gwynne, and Patterson, JJ.—Notice was not necessary; the liability of the city did not depend on sec. 84 of 25 Vict. ch. 16, but on the sections making it the duty of the council to keep the streets in repair; and the only privilege or immunity possessed by the commissioners and surveyors of roads was that of exemption from the performance of statute labour.

Per Strong, J.—One of the "immunities" declared to be vested in the council was that of not being subject to an action without prior notice, and no notice having been given in this case, C. could not recover. *City of St. John* v. *Christie*, 21 S. C. R. 1.

R. S. O. ch. 73.]—A municipal corporation is not entitled to notice of action under the Act to protect justices of the peace and others from vexatious actions, R. S. O. ch. 73. *Hodgins* v. *Counties of Huron and Bruce*, 3 E. & A. 169, followed.

Defence of want of such notice struck out upon summary application. *McCarthy* v. *Township of Vespra*, 16 P. R. 416.

R. S. O. ch. 73 — *Municipal Councillors — Pathmaster.*]—Two of the defendants, members of a township council, were appointed by resolution of the council a committee to rebuild a culvert, and they personally superintended the work, and were paid for doing it, but there was no by-law authorizing their appointment or payment. The other defendants were employed by them, and did the work. The plaintiff met with an accident on the highway near the culvert, owing, as she alleged, to the negligence of the defendants in obstructing the road with their building materials, and brought this action for damages for her injuries:—

Held, that the defendants were not fulfilling a public duty, and were not entitled to notice of action under R. S. O. ch. 73:—

Held, also, that that statute is applicable only to officers and persons fulfilling a public duty for anything done by them in the performance of it, when it may be properly averred that the act was done maliciously and without reasonable and probable cause, and therefore not to actions for negligence in the doing of the act:—

Held, lastly, that one of the defendants, who was pathmaster for the beat in which the culvert was situated, did not come within the protection of the statute as pathmaster, because he was not employed as such in doing this work, but as a day labourer. *McDonald* v. *Dickenson*, 25 O. R. 45. Affirmed, 21 A. R. 485.

XVII. Nuisance.

Building on Road Allowance — *Pulling Down—Necessity for By-law.*]—Where a mill, erected with the permission of the township council, partly on an unused road allowance in the occupation of the Midland Railway Company, in lieu of which they had given another piece of land for a road, was afterwards pulled down by the orders of the council, on the ground that the terms upon which its erection had been consented to had not been complied with, no by-law for its removal being passed, the owner was held entitled to damages. The pulling down of the building would, under the circumstances, if justifiable at all, be so only if authorized by by-law. *McNab* v. *Township of Dysart*, 22 A. R. 508.

See Lewis v. *Alexander*, 21 A. R. 613, 24 S. C. R. 551, *ante* 703; *Close* v. *Town of Woodstock*, 23 O. R. 99, *post* 730; *Bryce* v. *Loulit*, 21 A. R. 100, *post* 749.

XVIII. Officers of Corporations.

Engineer — *Contract — Reference — Bias.*]—*See Farquhar* v. *City of Hamilton*, 20 A. R. 86, *ante* 31.

Examination of Officers.]—*See* Evidence, IV.

Medical Health Officer—*Liability for Acts of.*]—Held, that the medical health officer of a municipal corporation, appointed under R. S. O. ch. 205, sec. 37, is not a servant of the corporation so as to make them liable for his acts done in pursuance of his statutory duties. *Forsyth* v. *Cannif and City of Toronto*, 20 O. R. 478.

Overseer—*Inspector.*]—*See Osborne* v. *City of Kingston*, 23 O. R. 382, *ante* 715.

Pathmaster.]—*See McDonald* v. *Dickenson*, 25 O. R. 45, 21 A. R. 485, *ante* 726.

Police Officers—*Liability for Acts of—Ratification.*]—A resolution of the executive committee of a city council authorizing the city solicitor to defend actions brought against police officers for their alleged illegal acts, does not constitute a ratification thereof by the city, so as to make it liable in damages for such acts. *Kelly* v. *Barton*, *Kelly* v. *Archibald*, 26 O. R. 608.

Tenure of Office—*Chief Constable.*]—Under R. S. O. 1887 ch. 184, sec. 445, the chief constable for the municipality can only hold office during the pleasure of the council, and this although he may have been appointed for one year by a by-law passed by the council. *Vernon* v. *Corporation of Smith's Falls*, 21 O. R. 331.

Tenure of Office—*Removal of Officer.*]—The effect of sec. 279 of the Consolidated Municipal Act, 55 Vict. ch. 42 (O.), which enacts that officers appointed by a municipal council shall hold office until removed by the council, is that all such officers hold office during the pleasure of the council, and may be removed at any time without notice or cause shewn therefor, and without the council incurring any liability thereby. *Hellems* v. *City of St. Catharines*, 25 O. R. 583.

Tenure of Office—*Removal of Clerk—Detention of Seal.*]—The removal of a clerk of a municipal corporation may be by a resolution, it not being essential that a by-law should be passed for such a purpose.

Vernon v. *Corporation of Smith's Falls*, 21 O. R. 331, followed.

When the seal of a municipal corporation is wrongfully detained by the clerk of the council, a by-law removing him from office may be sealed with another seal *pro hâc vice*. *Village of London West* v. *Bartram*, 26 O. R. 161.

XIX. Parks.

Building in Public Park—*Liability for Non-repair.*]—*See Schmidt* v. *Town of Berlin*, 26 O. R. 54, *ante* 715.

Public Parks Act—*Lands Taken—Purchase Money.*]—Where a municipality adopts the Public Parks Act, R. S. O. ch. 190, and proceedings are regularly taken thereunder for the formation of the board of park management, and for the doing of the various matters authorized to be done thereby, including the purchase by the board of lands needful for park purposes, such board becomes the statutory agent of the municipality for such purchase, and the municipality, and not the board, is liable to pay for the lands. The purchase money may be raised by a special issue of debentures under sec. 17, sub-sec. 4, of the Act, or may be paid out of the general funds of the municipality, which is liable to pay, whether the debentures specially issued have been sold or not. *McVicar* v. *Town of Port Arthur*, 26 O. R. 391.

Sunday Preaching—*By-law Prohibiting.*]—*See Re Cribbin and City of Toronto*, 21 O. R. 325, *post* 728.

XX. Prohibitory Powers.

Hawkers—*Prohibition as to Streets.*]—*See In re Virgo and City of Toronto*, 20 A. R. 435, 22 S. C. R. 447, [1896] A. C. 88, *ante* 721.

Parks—*Sunday Preaching.*]—It is provided by R. S. O. ch. 184, sec. 504, sub-sec. 10, that the council of every city and town may pass by-laws for the management of the farm, park, garden, etc. :—

Held, that the municipal council of a city had power under this enactment to pass a by-law providing that no person shall on the Sabbath-day in any public park, square, garden, etc., in the city, publicly preach, lecture, or declaim :—

Held, also, that the by-law violated no constitutional right, and was not unreasonable. *Bailey* v. *Williamson*, L. R. 8 Q. B. 118, followed.

Held, also, that the by-law was not bad for uncertainty as to the day of the week intended, by reason of the use of the term "Sabbath-day." *Re Cribbin and City of Toronto*, 21 O. R. 325.

XXI. Seal.

See Bernardin v. *Municipality of North Dufferin*, 19 S. C. R. 581, *ante* 698; *Waterous Engine Works Co.* v. *Town of Palmerston*, 19 A. R. 47, 21 S. C. R. 556, *ante* 699; *Village of London West* v. *Bartram*, 26 O. R. 161, *ante* 728; *Holt* v. *Township of Medonte*, 22 O. R. 302, *post*, Public Schools, II.

XXII. Sewers.

Expropriation of Easement.]—Section 479, sub-sec. 15, of the Municipal Act, R. S. O. ch. 184, which gives power to a municipal corporation to pass by-laws ". . . . for entering upon, breaking up, taking or using any land . . . " for drainage purposes, does not authorize a by-law which, while not assuming to take land required for the purpose of a sewer, attempts to expropriate the easement for the construction thereof.

52 Vict. ch. 73, sec. 11 (O.), does not provide for the compulsory acquisition of such an easement.

The sewer in question was part of a system, but the upper end thereof, and not an outlet for any part already constructed:—

Held, that no money having been spent under the by-law, it had not been so acted upon as to prevent its being quashed. *Re Davis and City of Toronto*, 21 O. R. 243.

Extension Through Adjoining Municipality.]—The "territory" of the municipality referred to in R. S. O. ch. 184, sec. 492, sub-sec. 2, is the land comprised within the bounds and under the jurisdiction of the municipality.

One municipality cannot therefore extend a sewer through lands within the bounds of a contiguous municipality, without the consent of the latter, or without taking the statutory steps, even although the lands have been purchased by the former municipality from the private owners.

Judgment of the Court of Appeal, 17 A. R. 346, and of the Chancery Division, 18 O. R. 199, affirmed. *City of Hamilton* v. *Township of Barton*, 20 S. C. R. 173.

Liability for Damages—*Act of God.*]—Where a sewer, built and maintained by a municipal corporation, is free from structural defect and is of sufficient capacity to answer all ordinary needs, the corporation is not liable for damages caused, as a result of an extraordinary rainfall, by water backing into the cellar of a person compelled by by-law to use the sewer for drainage purposes.

An extraordinary rainfall may properly be treated as an act of God, in the technical meaning of that term, though it is not of unprecedented severity, if there is nothing in previous experience to point to a probability of recurrence. *Garfield* v. *City of Toronto*, 22 A. R. 128.

Liability for Damages—*Insufficient Fall.*]—A municipal corporation, having properly constructed a sewer in a street in the municipality according to a general plan of drainage adopted by them, are not liable to the owner of houses subsequently erected on the street, because the sewer has not been constructed sufficiently deep to allow a proper fall to the drains from the houses. *Johnston* v. *City of Toronto*, 25 O. R. 312.

Use of Drain as Sewer—*Nuisance.*]—A petition by ratepayers of a township, under sec. 570 of the Municipal Act of Ontario, asked for a drain to be constructed for draining the property described therein. The township was afterwards annexed to the adjoining city, and the drain was thereafter used as a common sewer, it being, as constructed, fit for that purpose. In an action against a householder, who had connected the sewage from his house with said drain, for a nuisance occasioned thereby at its outlet:—

Held, affirming the decision of the Court of Appeal, 21 A. R. 613, Taschereau and Gwynne, JJ., dissenting, that sec. 570, in authorizing the construction of a drain "for draining the property," empowered the township to construct a drain for draining not only surface water, but sewage generally, and the householder was not responsible for the consequences of connecting his house with such drain by permission of the city.

Where a by-law provided that no connection should be made with a sewer, except by permission of the city engineer, a resolution of the city council granting an application for such connection, on terms which were complied with and the connection made, was a sufficient compliance with said by-law. *Lewis* v. *Alexander*, 24 S. C. R. 551.

Use of Drain as Sewer—*Nuisance—Private Property — Absence of By-law — Damages — Action.*]—A municipal corporation, having constructed a drain, without a by-law for the particular portion passing through private property, whereby noxious matter was brought down and deposited thereon, was held liable for damages sustained thereby, notwithstanding that there were excavations on the land but for which the noxious matter might have passed off; the owner not being bound to leave his land in a state of nature: nor was it any answer that the drain was used for similar purposes by others as well as the corporation. In such a case the remedy is by action, and not by submission to arbitration. *Close* v. *Town of Woodstock*, 23 O. R. 99.

See Sweeny v. *Corporation of Smith's Falls*, 22 A. R. 429, *ante* 722.

XXIII. Water-works.

By-law — *Rates — Discount — Public Buildings.*]—By statute 35 Vict. ch. 79 (O.), as amended by 41 Vict. ch. 41 (O.), the corporation of the city of Toronto was empowered in regard to the city water-works, to fix the price, rate, or rent which any owner or occupant of any house, lot, etc., in, through, or past which the water-pipes should run, should pay as water-rate or rent, whether the owner or occupant should use the water or not, having due regard to the assessment and to any special benefit or advantage derived by such owner or occupant, or conferred upon him or his property by the water-works.

The corporation was also empowered to fix the rate to be paid for the use of the water by public buildings. Pursuant to these powers, a by-law of the corporation was passed providing that the half-yearly rates "paid within the first two months of the half-year for which they are due, shall be subject to a reduction of fifty per cent., save and except in the case of government or other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply;"—

Held, by Ferguson, J., that the post-office, customs-house, and other buildings vested in the Crown, all of which were exempt from city taxes, were "government institutions," within the meaning of the by-law.

2. Having regard to 35 Vict. ch. 79, sec. 12 (O.); 41 Vict. ch. 41, sec. 3 (O.); R. S. O. ch. 192, secs. 19 and 28, that the moneys charged and paid as water-rates or rent for water were not taxes, but the price or prices paid for water upon a sale thereof to the consumers.

3. That the by-law was not invalid as discriminating against the Crown.

Held, by the Court of Appeal, affirming the judgment of Ferguson, J., that "government institutions" in the by-law meant government buildings in which some public business is carried on, and were "public buildings" within the meaning of the Act:—

Held, also, that the "price, rate, or rent" paid for the water was [illegible] tax, but merely the price paid for the water supplied to the consumer, and that the corporation were not obliged to allow, for water supplied to public buildings, the discount allowed to taxpayers.

Held, by the Supreme Court of Canada, reversing the judgments below, Patterson, J.A., dissenting, that under the authority given to municipal corporations to fix the rate or rent to be paid by each owner or occupant of a building, etc., supplied by the corporation with water, the rates imposed must be uniform; and the by-law in question was invalid as regards such exception. *Attorney-General for Canada* v. *City of Toronto*, 20 O. R. 19, 18 A. R. 622, 23 S. C. R. 514.

Purchase of Land for Water-works Purposes.]—*See McLean* v. *City of St. Thomas*, 23 O. R. 114, *ante* 333.

Rate Imposed on Land — *Non-user of Water — Taxation — Exemption.*]—The defendants were the owners of vacant land in the city of Windsor, abutting on streets in which mains and hydrants of the plaintiffs had been placed. The defendants had a water-works system of their own and did not use that of the plaintiffs, though they could have done so had they wished. The commissioners imposed a water rate "for water supplied, or ready to be supplied" upon all lands in the city based upon their assessed value, irrespective of the user or non-user of water:—

Held, that this rate was, under 37 Vict. ch. 79, secs. 11, 12, validly imposed.

The lands owned by the defendants were originally part of the township of Sandwich West, and by a by-law of that township, confirmed by special legislation, were exempted from taxation for ten years from the 1st January, 1883. In 1888 the limits of the (then) town of Windsor were under the provisions of R. S. O. ch. 184, sec. 22, extended so as to embrace the lands in question:—

Held, that assuming that the water rate was a species of taxation, the effect of R. S. O. ch. 184, sec. 54, was to put an end to the exemption. *Municipality of Cornwallis* v. *Canadian Pacific R. W. Co.*, 19 S. C. R. 702, distinguished. *City of Windsor* v. *Canada Southern R. W. Co.*, 20 A. R. 388.

MUNICIPAL DEBENTURES.

See MONEY HAD AND RECEIVED.

MURDER.

See CRIMINAL LAW, II.

NAVIGABLE WATERS.

See WATER AND WATERCOURSES, III.

NAVIGATION.

See CONSTITUTIONAL LAW, III.—CROWN, III.

NEGLIGENCE.

OF LANDLORDS.—*See* LANDLORD AND TENANT, XI.

OF MASTERS AND EMPLOYERS.—*See* MASTER AND SERVANT, III.

OF MUNICIPAL CORPORATIONS.—*See* MUNICIPAL CORPORATIONS, X., XIII.

OF PERSONS IN CONTROL OF VESSELS.—*See* SHIP, I.

OF RAILWAY COMPANIES.—*See* RAILWAYS AND RAILWAY COMPANIES, IV., V., VIII., IX.

OF SERVANTS OF THE CROWN.—*See* CROWN, II.

OF SOLICITORS.—*See* SOLICITOR, VII.

OF STREET RAILWAY COMPANIES.—*See* STREET RAILWAYS, IV.

I. GENERALLY.

Bailee—*Agistment—Reasonable Care.*]—The plaintiff's mare, while in charge of the defen-

dant under a contract of summer agistment, was killed by falling through the plank covering of a well in the defendant's yard, the existence of which was known to the defendant but not to the plaintiff, and to which yard the mare, with other horses of the defendant, had access from a field in which they were at pasture:—

Held, Meredith, J., dissenting, that the plaintiff had, on proof of these facts, given sufficient *prima facie* evidence of negligence to cast the onus on the defendant of shewing that reasonable care which an agister is bound to exercise; and a nonsuit was set aside.

Per Boyd, C.—The test in such cases is not necessarily the care which the agister may exercise as to his own animals. It is, in general, not what any particular man does, but what men as a class would do with similar property as a class.

Per Meredith, J.—The agister is not an insurer. The onus of proof of neglect of his duty is on the plaintiff, and had not been satisfied in this case. *Petree* v. *Sheppard*, 24 O. R. 167.

Charterers of Tug—*Fire—Reasonable Precautions—Acts of Owner.*]—The plaintiff, owner of a scow, had, without authority, moored it permanently to the shore of a basin artificially created by the excavation of land adjacent to a navigable river, which formed the boundary at that point between Canada and the United States. The soil of the shore and basin had been patented to certain persons, the usual rights of access to the shore and of navigation being reserved. The defendants, licensees of the owners of the shore, with authority to take, and for the purpose of taking, sand from the shore by means of their own scow and a hired tug, of which the master was the owner, placed the tug and scow alongside the plaintiff's scow, by order of the foreman of the defendants' scow, to whose orders the master of the tug was bound to conform.

The plaintiff's scow caught fire from sparks emanating from the smoke-stack of the tug, and was destroyed:—

Held, affirming the decision of Street, J., 24 O. R. 509, that the defendants were bound to omit no reasonable precautions to avoid injuring the plaintiff's property; and that they were liable for the negligence of the master of the tug in so placing it as to communicate fire to the plaintiff's scow, as in so doing he was obeying the orders of the defendants' foreman, and was under his direct and personal control. *Cram* v. *Ryan*, 25 O. R. 524.

Executors.]—*See Ferrier* v. *Trépannier*, 24 S. C. R. 85, *post* 735.

Innkeeper—*Accident to Guest.*]—The plaintiff went, as a customer, into the defendant's hotel, where he had been several times before. In passing through the building to go to the urinal he fell through an open trap door, which had been left unguarded, and received injuries:—

Held, that he was entitled to damages from the defendant. *Hasson* v. *Wood*, 22 O. R. 66.

Lessees of Wharf—*Accident—Invitation.*]—A company, owning a steamboat making weekly trips between Boston and Halifax, occupied a wharf in the latter city, leased to their agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side, part way down the wharf, and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk, and instead of turning off at the end, there being no lights and the night being dark, they continued straight down the wharf, which narrowed for some distance and formed a jog, on reaching which Y.'s wife tripped, and, as her husband tried to catch her, they both fell into the water. Forty-four days afterwards Mrs. Y. died. In an action by Y. against the company to recover damages occasioned by the death of his wife it appeared that the deceased had not had regular and continual medical treatment after the accident, and the doctors who gave evidence at the trial differed as to whether or not the immersion was the proximate cause of her death. The jury, when asked whether the deceased would have recovered, notwithstanding the accident, if she had had regular and continual attendance, replied, "very doubtful." A verdict was found for the plaintiff with $1,500 damages, which the Supreme Court of Nova Scotia set aside, and ordered a new trial. On appeal from that decision:—

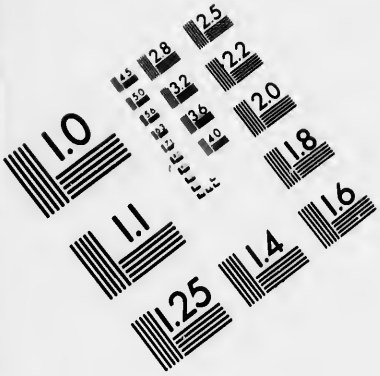
Held, that Y. and his wife were lawfully upon the wharf at the time of the accident; that, in view of the established practice, they had a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care, and the company were under an obligation to see that they were safe:—

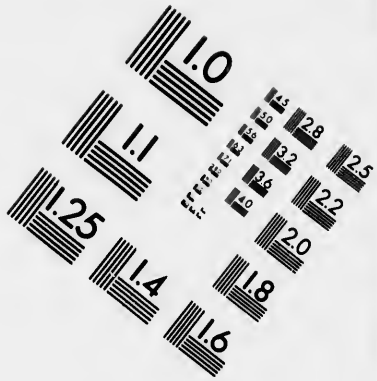
Held, further, that it having been proved that the wharf was only rented to the agent because the landlord preferred to deal with him personally, and that it was rented for the use of the company, whose officers had sole control of it, the company were in possession of it at the time of the accident:—

Held, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y.'s death, the jury having not been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed. *York* v. *Canada Atlantic S.S. Co.*, 22 S. C. R. 167.

Owner of Boom—*Overflow—Injury to Adjacent Lands.*]—In an action for damages caused by overflowage, it appeared that the defendants' boom in a river broke by reason of the heavy floods, whereupon they constructed another boom lower down near to a certain bridge, which also broke, and the logs became massed against the bridge, which the jury found, with the excess of rain, caused the injury complained of. They did not find negligence on the part of the defendants, but that they were guilty of a wrongful act in throwing the boom across the river:—

Held, that the defendants were entitled to judgment.





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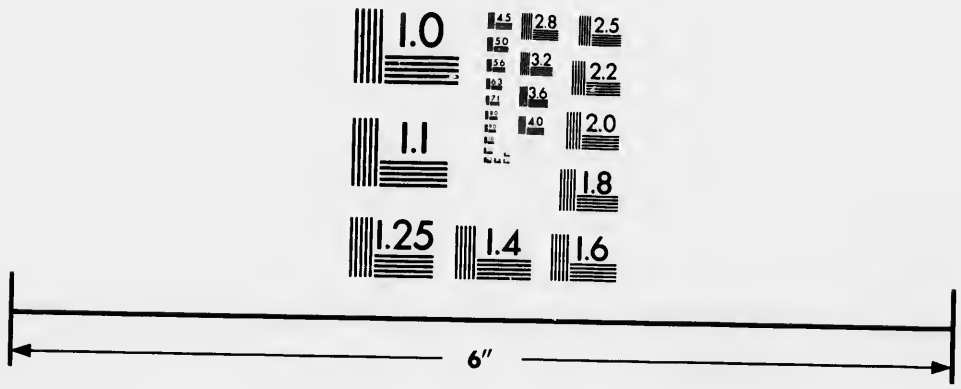

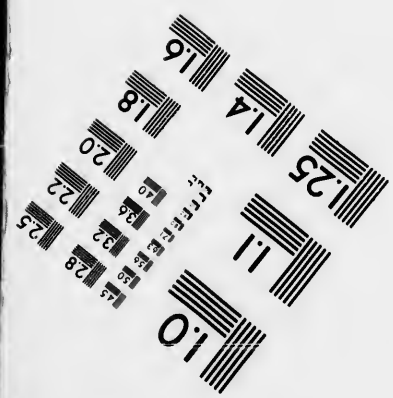

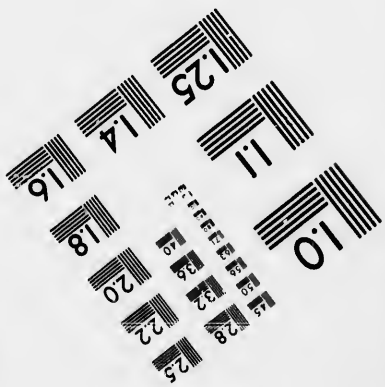

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Per Boyd, C.—The use of the boom being lawful by statute, R. S. O. ch. 121, sec. 5, and no negligence in its construction being pretended, it was impossible to say that what was thus expressly legalized, could be made the ground of an action of tort. *Langstaff* v. *McRae*, 22 O. R. 78.

Owner of Building—*Escape of Steam—Injury to Adjacent Building—Notice.*]—The pipe from a condenser attached to a steam engine used in the manufacture of electricity passed through the floor of the premises and discharged the steam into a dock below, some twenty feet from an adjoining warehouse, into which the steam entered and damaged the contents. Notice was given to the electric company, but the injury continued, and an action was brought by the owners of the warehouse for damages :—

Held, affirming the decision of the Court below, that the act causing the injury violated the rule of law which does not permit one, even on his own land, to do anything, lawful in itself, which necessarily injures another, and the persons injured were entitled to damages therefor, more especially as the injury continued after notice to the company. *Chandler Electric Co.* v. *Fuller*, 21 S. C. R. 337.

Owner of Building—*Highway—Overhanging Cornice.*]—The owner of a building, from which a cornice overhanging the sidewalk falls, because the nails fastening it to the building have become loosened by ordinary decay, and injures a passer-by, is liable in damages without proof of knowledge on his part of the dangerous condition of the cornice, the defect being one that could have been ascertained by him by reasonable inspection. *Roberts* v. *Mitchell*, 21 A. R. 433.

Owner of Building—*Highway—Window Falling—Trustees—Executors.*]—The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair, or use and management, which reasonable care can guard against.

Dame A. T. sued J. F. and M. W. F. personally as well as in their quality of testamentary executors and trustees of the will of the late J. F., claiming $4,000 damages for the death of her husband, who was killed by a window falling on him from the third storey of a building which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F., and his children, for whom the said J. F. and M. W. F. were also trustees. The judgments of the Courts below held the appellants liable in their capacity of executors of the general estate and trustees under the will :—

Held, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair as well personally as in their quality of trustees (*d'héritiers fiduciaires*) for the benefit of G. F.'s children ; but were not liable as executors of the general estate.

Where parties are before the Court *qua* executors, and the same parties should also be summoned *qua* trustees, an amendment to that effect is sufficient, and a new writ of summons is not necessary. *Ferrier* v. *Trépannier*, 24 S. C. R. 86.

Owner of Building — *Injury to Adjacent Building—Vis Major.*]—Where a fire destroyed the defendant's house, leaving one of the walls standing in a dangerous condition, and the defendant, knowing the fact, neglected to secure or support the wall or take it down, and some days after the fire it was blown down by a high wind and damaged the plaintiff's house :—

Held, affirming the judgments of the Courts below, that the defendant could not shield himself under the plea of *vis major*, and was liable for the damages caused. *Norcheimer* v. *Alexander*, 19 S. C. R. 248.

Owner of Dangerous Machine—*Injury to Child—Volunteer.*]—The plaintiff, a boy of eight, came upon the defendant's land, where the latter was mowing hay, and the defendant permitted him to get upon the mowing machine alone, and to drive the horses. By reason of one of the wheels striking into a furrow, the plaintiff was thrown out of his seat, and, falling on the knives of the machine, was injured. The trial Judge told the jury that if the defendant was not using reasonable care in allowing the plaintiff to be upon the machine, he was guilty of negligence :—

Held, a proper direction ; and a verdict for the plaintiff was allowed to stand.

The question whether the plaintiff was a trespasser or volunteer or licensee was not material. *Carroll* v. *Freeman*, 23 O. R. 283.

Owner of Engine — *Fire—Want of Spark Arrester.*]—On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of the defendants in working a steam-engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on said engine, and the learned Judge directed the jury that "if there was no spark arrester in the engine, that in itself would be negligence for which the defendants would be liable." The plaintiff obtained a verdict, which was set aside by the Court *en banc*, and a new trial ordered, for misdirection. On appeal to the Supreme Court of Canada :—

Held, Strong, J., dissenting, that the Judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence, and such direction may have influenced them in giving their verdict ; therefore the judgment ordering a new trial should not be interfered with. *Peers* v. *Elliott*, 21 S. C. R. 19.

Owner of Engine—*Noise—Highway.*]—The mere fact that a horse, while being driven along the highway, has been frightened by the whistle of a steam engine, used by the defendants for the purpose of their lawfully operated waterworks, is not sufficient to make them responsible for damages resulting from the horse having run away. Some positive evidence of negligence in the use of the whistle must be given, or at least some evidence that its use might be expected to cause such an accident, so as to cause it to be a nuisance to the highway. *Roe* v. *Village of Lucknow*, 21 A. R. 1.

Owner of Horse — *Highway.*]—It is not negligence *per se* for the driver of a horse of a quiet disposition, standing in the street, to let go the reins while he alights from the vehicle to-

ilding — *Injury : Adjacent Major.*]—Where a fire destroyed house, leaving one of the walls dangerous condition, and the ing the fact, neglected to secure all or take it down, and some re it was blown down by a high ed the plaintiff's house :—g the judgments of the Courts defendant could not shield him- ea of *vis major*, and was liable caused. *Norchemer* v. *Alex-*. 248.

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e — *Highway.*]—It is not or the driver of a horse of a anding in the street, to let he alights from the vehicle to

fasten a head-weight, there being at the time little traffic and no noise or disturbance to frighten the animal ; and the owner of the horse is not responsible for damages caused by the horse in running away when frightened by a sudden noise just after the driver has alighted. *Sullivan* v. *McWilliam*, 20 A. R. 627.

Owner of Turkey—*Highway.*]—The owner of a turkeycock, which without negligence strays upon the highway contrary to a by-law of the municipality, is not liable for damages resulting from a horse taking fright and running away at the sight of the bird acting as turkeycocks usually do. *Zumstein* v. *Shannon*, 22 A. R. 263.

Owner of Vehicle—*Highway — Obstruction.*]—Allowing a broken down waggon to remain on the highway, clear of the track of a street railway, for nearly two hours, is not in itself sufficient evidence of negligence to support an action by a person who strikes against the waggon while passing in a street car. Such a broken down waggon does not become a nuisance or obstruction to the highway, until, having regard to the difficulty of removing it, it has been allowed to remain thereon for an unreasonable time. *Howden* v. *Lake Simcoe Ice Co.*, 21 A. R. 414.

Shopkeeper — *Fall of Mirror—Injury to Child—Reasonable Care.*]—A woman went with her child, two and a-half years old, to the defendants' shop to buy clothing for both. While there a mirror fixed to the wall, and in front of which the child was, fell and injured him :—

Held, by the Queen's Bench Division, that it was a question for the jury whether the mirror fell without any active interference on the child's part ; if so, that in itself was evidence of negligence ; but if not, the question for the jury would be whether the defendants were negligent in having the mirror so insecurely placed that it could be overturned by a child ; and if that question were answered in the affirmative, the child, having come upon the defendants' premises by their invitation and for their benefit, would not be debarred from recovering by reason of his having directly brought the injury upon himself. *Hughes* v. *Macfie*, 2 H. & C. 744 ; *Mangan* v. *Atterton*, 4 H. & C. 388 ; and *Bailey* v. *Neal*, 5 Times L. R. 20, commented on and distinguished.

Semble, that the doctrine of contributory negligence is not applicable to a child of tender years. *Gardner* v. *Grace*, 1 F. & F. 359, approved of.

Semble, also, that if the mother was not taking reasonably proper care of the child at the time of the accident, her negligence in this respect would not prevent the recovery by the child.

Held, by the Court of Appeal, that the fact that a child of tender years, while in a shop with its mother, by the invitation and for the benefit of the proprietors, is injured by an unfastened mirror, standing against the wall, falling upon it, the cause of the fall being unknown, is, in itself, sufficient evidence of negligence to justify the case being submitted to a jury.

Judgment of the Queen's Bench Division affirmed. *Sangster* v. *T. Eaton Co. (Limited)*, 25 O. R. 78, 21 A. R. 624.

Affirmed by the Supreme Court of Canada, 24 S. C. R. 708.

Stevedore—*Injury to Servant of Another—Precautions.*]—When two stevedores are independently engaged in loading the same steamer, and, owing to the negligence of the employees of the one, an employee of the other is injured, the former stevedore is liable in damages for such injury. The failure to observe a precaution usually taken in and about such work is evidence of negligence ; Gwynne, J., dissenting. *Brown* v. *Ledere*, 22 S. C. R. 53.

Trustees.]—*See Ferrier* v. *Tripannier*, 24 S. C. R. 86, *ante* 735.

II. Abatement of Action.

Executor—*Revivor.*]—An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death *pendente lite*, on entering a suggestion of the death, and obtaining an order of revivor, continue the action. *Mason* v. *Town of Peterborough*, 20 A. R. 683.

III. Contributory Negligence.

Bridge—*Collision.*]—The persons in charge of a vessel are bound when approaching at night a drawbridge, lawfully erected, to keep the vessel under complete control, and are not entitled to assume that the draw of the bridge is open or will be opened in time to let the vessel through. Therefore, if a vessel is allowed to approach so close to the bridge that collision with it cannot be avoided when the draw is found to be closed, damages are not recoverable from the bridge owners ; Hagarty, C.J.O., dissenting. *Gilmour* v. *Bay of Quinte Bridge Co.*, 20 A. R. 281.

Evidence—*Onus—Jury.*]—In an action to recover damages for negligence, tried with a jury, where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant, and though the Judge may rule negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either is proved. The question of proof is for the jury. *Weir* v. *Canadian Pacific R. W. Co.*, 16 A. R. 100, was a non-jury case, and laid down no rule for the disposition of a case tried with a jury. *Morrow* v. *Canadian Pacific R. W. Co.*, 21 A. R. 149.

Infant.]—*Semble*, that the doctrine of contributory negligence is not applicable to a child of tender years. *Gardner* v. *Grace*, 1 F. & F. 359, approved of. *Sangster* v. *T. Eaton Co. (Limited)*, 25 O. R. 78.

Voluntary Incurring of Danger.]—*See Connell* v. *Town of Prescott*, 20 A. R. 49, 22 S. C. R. 147, *post* 739 ; *Hardman* v. *Canada Atlantic R. W. Co.*, 25 O. R. 269, 22 A. R. 292, *post* 849 ; *Carroll* v. *Freeman*, 23 O. R. 283, *ante* 736.

IV. Proximate Cause.

Accident—*Bodily Injury — Subsequent Neglect.*]—The plaintiff's wife died forty-four days

after falling into the water from the defendants' wharf. She had not had regular and continual medical treatment after the accident, and the physicians who gave evidence at the trial differed as to whether or not the immersion was the cause of her death. The jury, when asked whether she would have recovered if she had had regular and continual attendance, answered "very doubtful." A verdict was found for the plaintiff for $1,500 damages, which the Supreme Court of Nova Scotia set aside, and ordered a new trial:—

Held, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of the death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive, the order for a new trial should be affirmed. *York* v. *Canada Atlantic S. S. Co.*, 22 S. C. R. 167.

Danger Voluntarily Incurred.]—C., having driven his horses into a lumber yard adjoining a street on which blasting operations were being carried on, left them in charge of the owner of another team while he spoke to the proprietor of the yard. Shortly afterwards a blast went off, and stones thrown by the explosion fell on the roof of a shed in which C. was standing and frightened the horses, which began to run. C. at once ran out in front of them and endeavoured to stop them, but could not, and in trying to get away he was injured. He brought an action against the municipality conducting the blasting operations to recover damages for such injury:—

Held, by the Court of Appeal, that where a man, acting as a reasonable man would ordinarily do under the circumstances, voluntarily places himself in a position of danger in the hope of saving his property from probable injury and of preventing probable injury to the life or property of others, and sustains hurt, the person whose negligent act has brought about the dangerous situation is responsible in damages. *Anderson* v. *Northern R. W. Co.*, 25 C. P. 301, distinguished and questioned.

Held, by the Supreme Court of Canada, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the negligent manner in which the blast was set off was the proximate and first cause of the injury to C.; that such negligent act immediately produced in him the state of mind which instinctively impelled him to attempt to stop the horses; and that he did no more than any reasonable man would have done under the circumstances. *Connell* v. *Town of Prescott*, 20 A. R. 49, 22 S. C. R. 147.

See Cram v. *Ryan*, 24 O. R. 500, 25 O. R. 524, *ante* 733.

NEW TRIAL.

I. Application For.

Appeal—*Final Disposition of Action.*]—In an action for damages for negligence by a servant of a street railway company who was injured by a car striking him while he was at work upon the track, the jury assessed the plaintiff's damages at $500, but the trial Judge dismissed the action upon the ground that the plaintiff was the cause of his own misfortune. This judgment was affirmed by a Divisional Court, but reversed by the Court of Appeal, which ordered a new trial. The Supreme Court of Canada affirmed the decision of the Court of Appeal, but, on counsel for the defendants stating that a new trial was not desired, ordered judgment to be entered for the plaintiff for $500. *Hamilton Street Railway Co.* v. *Moran*, 24 S. C. R. 717.

Appeal—*Final Disposition of Action.*]—*See Hardman* v. *Putnam*, 1[illegible] C. R. 714, *post* 744.

Appeal—*Final Disposition of Action.*]—The Court of Appeal, having held one of the defendants, a sheriff, liable for the act of his officer, a co-defendant, instead of ordering a new trial to assess the damages against the sheriff, directed judgment to be entered against the sheriff for the nominal amount already assessed against his officer. *Gordon* v. *Rumble*, 19 A. R. 440.

Appeal—*Final Disposition of Action.*]—In an action brought to recover damages for the loss of certain glass delivered to the defendants for carriage, the Judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. The defendants then moved in a Divisional Court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the Court allowing them to amend the statement of claim by charging other grounds of negligence. The defendants submitted to such order, and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial, but had not been tried when the Divisional Court pronounced judgment on the motion, dismissing the plaintiffs' action. On appeal to the Court of Appeal from this judgment of the Divisional Court, it was reversed and a new trial ordered. On appeal to the Supreme Court:—

Held, affirming the judgment of the Court of Appeal, that the action having been disposed of before the issues involved in the case, whether under the original or amended pleadings, had ever been passed upon or considered by the trial Judge or the jury, a new trial should be ordered, and that this was not a case for invoking the power of the Court, under Rule 799, to finally put an end to the action :—

Held, also, that the judgment of the Court of Appeal ordering a new trial in this case was not a final judgment, nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final. *Canadian Pacific R. W. Co.* v. *Cobban Mfg. Co.*, 22 S. C. R. 132.

Appeal—*Interference.*]—Where a new trial has been ordered to try certain questions of fact arising in an action, the order should not be interfered with by an appellate Court. *Scott* v. *Bank of New Brunswick*, 21 S. C. R. 30.

Appeal—*Order for New Trial—Discretion.*]—*See Trumble* v. *Hortin*, 22 A. R. 51, *post* 741.

Forum—*Trial Judge—Persona Designata.*]—53 Viet. ch. 4, sec. 85 (*N.B.*), relating to proceedings in equity, provides that in an equity suit "either party may apply for a new trial to the Judge before whom the trial was held :"—

Held, reversing the decision of the Supreme Court of New Brunswick, Taschereau, J., dissenting, that such application need not be made before the individual before whom the trial was had, but could be made to a Judge exercising the same jurisdiction. Therefore, where the Judge in equity who had tried a case resigned his office, an application for a new trial could be made to his successor. *Footner* v. *Fyges*, 2 Sim. 319, followed. *Bradshaw* v. *Baptist Foreign Mission Board*, 24 S. C. R. 351.

II. Discovery of New Evidence.

Corroborative Evidence.]—New trial on the ground of surprise and discovery of new evidence, refused, where the evidence was merely in corroboration. *Howarth* v. *McGugan*, 25 O. R. 396.

Corroborative Evidence—*Discretion—Appeal.*]—Allowing a new trial on the ground of the discovery of new evidence is a matter of legal discretion, and where the subject-matter of the action was of a trifling nature, and a Divisional Court ordered a new trial on affidavits shewing merely the discovery of further evidence corroborative of the evidence at the trial, the order was set aside. *Murray* v. *Canada Central R. W. Co.*, 7 A. R. 646, followed. *Trumble* v. *Hortin*, 22 A. R. 51.

III. Excessive Damages.

Negligence—*Evidence.*]—*See York* v. *Canada Atlantic S. S. Co.*, 22 S. C. R. 167, *post* 743.

IV. Improper Admission and Rejection of Evidence.

Defamation—*Pleading—Justification—Rebuttal.*]—In an action for a libel contained in a newspaper article respecting certain legislation, the innuendo alleged by the plaintiff, who was the Attorney-General for the Province at the time when such legislation was enacted, was that the article charged him with personal dishonesty. The defendants pleaded "not guilty," and that the article was a fair comment on a public matter. On the trial the defendants put in evidence, the plaintiff's counsel objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by the plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject-matter of the article; the jury found generally for the defendants, and in answer to the trial Judge, who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial:—

Held, that the defendants not having pleaded the truth of the charge in justification, the evidence given to establish it should not have been received, but it having been received, evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty. For these reasons a new trial was properly granted. *Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518.

See Scammell v. *Clarke*, 23 S.C.R. 307, *post* 746.

V. Inadequacy of Damages.

Action of Negligence—*Professional Man.*]—Although it is unusual to interfere with a verdict of a jury in an action of tort on the ground of inadequacy of the damages found, still such verdicts are subject to the supervision of the Court, and if the amount awarded be so small that it is evident the jury must have overlooked some material element of damage in the plaintiff's case, a new trial will be granted.

A practising physician, who had been badly if not permanently injured through the negligence of the defendants, and whose professional business had suffered to a considerable extent, was awarded $700 by the jury :—

Held, that there must be a new trial on the ground of inadequacy of the damages. *Church* v. *City of Ottawa*, 25 O. R. 298. Affirmed, 22 A. R. 348.

VI. Jury.

Challenge—*Mistrial—Proceeding with Trial.*]—The defendants, having delivered separate defences and being separately represented at the trial, claimed to be entitled under the Jurors' Act, R. S. O. ch. 52, sec. 110, to four peremptory challenges each, which, though objected to by the plaintiff, was conceded by

the Judge, and the defendants challenged six jurors between them, and the trial proceeded, resulting in a verdict for the defendants:—

Held, upon motion by the plaintiff, that there had been mistrial, and the plaintiff was entitled to a new trial.

Under the above section the defendants were only entitled to four peremptory challenges between them, and, inasmuch as the plaintiff took the objection at the time, he had not waived his right to complain by proceeding with the trial. *Empey* v. *Carscallen*, 24 O. R. 658.

Disagreement—*See Canadian Pacific R. W. Co.* v. *Cobban Mfg. Co.*, 22 S.C.R. 132, *ante* 740.

Improperly Influencing—*Newspaper Comment—Proceeding with Trial.*]—During the trial of an action for libel the defendants published in their newspaper a sensational article with reference thereto. The plaintiffs' solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the Court, or take any action with respect to it, and proceeded with the trial to its close, when the jury brought in verdicts for the defendants.

Upon a motion for a new trial upon the ground of improper conduct towards and undue influence upon the jury:—

Held, that the objection was too late. *Tiffany* v. *McNee*, *Metcalf* v. *McNee*, 24 O. R. 551.

Improperly Influencing *Treating to Drink.*]—Where the plaintiff during the trial had conversation with members of the jury upon the subject of his case, and his brother and also his solicitor had treated some of them to "drinks" during the recess of the Court, the verdict in the plaintiff's favour was set aside, and a new trial ordered. *Stewart* v. *Woolman*, 26 O. R. 714.

Improperly Influencing—*View—Misconduct of Parties.*]—*See Simonds* v. *Chesley*, 20 S. C. R. 174, *post* 746.

Insufficient Findings.]—Held, that the evidence and the finding of the jury having left it in doubt whether the accident to the plaintiff's wife was the proximate cause of her death, and the jury not having been properly instructed as to the liability of the defendants under the circumstances, and the damages being, upon the evidence, excessive, the order of the Court below for a new trial should be affirmed. *York* v. *Canada Atlantic S. S. Co.*, 22 S. C. R. 167.

Insufficient Findings.]—*See Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518, *ante* 742; *Canadian Pacific R. W. Co.* v. *Cobban Mfg. Co.*, 22 S. C. R. 132, *ante* 740; *Stevens* v. *Grout*, 16 P. R. 210, *McDermott* v. *Grout*, *ib.* 215, *post* TRIAL, I.

VII. MISDIRECTION.

Defamation—*Refusal of Party to Answer—Inference.*]—In an action for libel it was alleged that the defendant had, as a correspondent at T. of a newspaper, furnished several items which included one reflecting on the plaintiff. In his examination for discovery the defendant, while admitting he was a correspondent at T., could not say whether he was the only one; and alleged that he did not remember sending any of the items; but might possibly have sent some of them; but he did not think he had sent the one complained of; that he had had since the publication an interview with the editor with reference thereto, but he refused to answer whether he had discussed the item complained of, for fear, as he said, of incriminating himself. At the trial he stated he had since ascertained that there were other correspondents at T., and, on being pressed as to the item complained of, after some hesitation, said he did not furnish it. No other evidence was given connecting the defendant with the publication:—

Held, that this did not constitute any evidence of publication to go to the jury.

The trial Judge in his charge, after referring to the defendant's refusal to answer on his examination for discovery, and to his reason for refusing, told the jury that they might draw the inference as to what the true answer would have been:—

Held, misdirection, and that no inference adverse to the defendant should have been drawn from his refusal to answer. *Nunn* v. *Brandon*, 24 O. R. 375.

Fraud—*Observations on Matter not in Issue.*]—In an action for winding-up a partnership in the gold-mining business, the defence pleaded was that there never was a partnership formed between the plaintiff and the defendants, or if there was, that it had been put an end to by a verbal agreement between the parties. The case was tried by a jury, and the result depended on the credibility to be attached to the respective witnesses on each side who gave evidence as to the agreement that had been entered into. No issue of fraud was raised by the defendants, but the trial Judge, in charging the jury, made strong observations in respect to fraudulent concealment of facts from the plaintiff, and submitted questions to the jury calling for findings in relation to such fraud. The plaintiff having obtained a verdict, which was sustained by the Supreme Court of Nova Scotia:—

Held, reversing the judgment of the Court below, Gwynne, J., dissenting, that there should be a new trial.

Per Gwynne, J.—Unless either party desires to give further evidence, the Court should render the judgment on the evidence as it stands which the Court below ought to have given.

Per Strong, J.—Under Rule 476 of the Judicature Act the Court can take a case which has been passed upon by a jury into its own hands and dispose of it if all the proper materials on which to decide are before it, but in this case the materials essential to the final disposition of the case are not before the Court, and there must be a new trial

Per Ritchie, C.J.—The Supreme Court, as an appellate Court for the Dominion, should not approve of such strong observations being made by a Judge as were made in this case, in effect charging upon the defendants fraud not set out in the pleadings and not legitimately in issue in the cause.

Per Strong, Fournier, Taschereau, Gwynne, and Patterson, JJ., that the case was essentially

an equity case and one in which a jury could advantageously have been dispensed with. *Hardman* v. *Putnam*, 18 S. C. R. 714.

Fraud—*Refusal to Charge—Accounts.*]—W., a trader, being in financial difficulties, assigned all his property to B., who undertook to arrange with W.'s creditors. W. subsequently assigned his property in trust for the benefit of his creditors, and the assignee and some of the creditors brought an action to have the transfer to B. set aside. On the trial, after the evidence on both sides was concluded, the plaintiffs' counsel asked the Judge to instruct the jury as to what constituted fraud under the Statute of Elizabeth, and he also urged that an account should be taken of the dealings between W. & B. The Judge refused to define fraud to the jury as requested, and the jury stated that they were unable to deal with the accounts. Judgment having been given for the defendants and affirmed by the full Court :—

Held, that the refusal of the Judge to charge the jury as requested amounted to misdirection, and there should be a new trial; that the case could not be properly decided without taking the accounts: and that it could be more properly dealt with as an equity case. *Griffiths* v. *Boscowitz*, 18 S. C. R. 718.

Negligence—*Want of Spark Arrester.*]—On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of the defendants in working a steam engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on said engine, and the learned Judge directed the jury that "if there was no spark arrester in the engine, that in itself would be negligence for which the defendants would be liable." The plaintiff obtained a verdict, which was set aside by the Court *en banc*, and a new trial ordered for misdirection. On appeal to the Supreme Court of Canada :—

Held, Strong, J., dissenting, that the Judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence, and such direction may have influenced them in giving their verdict; therefore the judgment ordering a new trial should not be interfered with. *Peers* v. *Elliott*, 21 S. C. R. 19.

Watercourse—*Definition.*]—In an action for diversion of an alleged watercourse, the defendants disputed that any water ran along the depression in question, except melted snow and rain-water flowing over the surface merely :—

Held, per Street, J., that, as the attention of the jury was not expressly called to the difference in effect between the occasional flow of surface water and the steady flow from a source, and as a passage read to the jury from the judgment in *Beer* v. *Stroud*, 19 O. R. 10, divorced from its context, might have misled the jury, there should be a new trial.

Per Armour, C.J.—That what the Judge told the jury could not be held to be a misdirection without reversing the decision in *Beer* v. *Stroud*; and the objection to the charge was too vague and indefinite. *Arthur* v. *Grand Trunk R. W. Co.*, 25 O. R. 37. Affirmed by the Court of Appeal, 22 A. R. 89.

See York v. *Canada Atlantic S. S. Co.*, 22 S. C. R. 167, *ante* 743; *Simonds* v. *Chesley*, 20 S. C. R. 174, *post* 746.

VIII. Nominal Damages.

Contract—*Breach.*]—C. brought an action against S. for the price of timber supplied, which was defended on the ground that the timber was not of the quality contracted for. The plaintiff having obtained a verdict, the defendant moved for a new trial, which was granted unless the plaintiff should consent to his verdict being reduced. Such consent being filed, judgment was entered for the plaintiff for a reduced amount.

An action was brought by S. against C. for damages in not supplying timber up to the standard required by the contract. A verdict having been given for the defendant, the plaintiff moved for a new trial, upon the ground that he was entitled to nominal damages at least. The Supreme Court of New Brunswick held that the plaintiff was entitled to nominal damages, but refused a new trial.

S. appealed from both decisions to the Supreme Court of Canada :—

Held, affirming the decisions of the Court below, 31 N. B. Reps. 250, 265, that the objections to the verdicts for improper reception and rejection of evidence were properly overruled by the Court below, and the new trial to enable S. to recover nominal damages was properly refused. *Scammell* v. *Clarke*, 23 S. C. R. 307.

Trespass—*Action to Protect Title.*]—Action for trespass to land. The defendants denied the plaintiff's title. At the trial the plaintiff gave no evidence of actual damage, but urged that an action was necessary to protect his title. The Judge charged the jury strongly against the plaintiff, and a verdict for the defendants was given :—

Held, that there was no misdirection; and, as the plaintiff could at a new trial obtain no more than nominal damages, it was properly refused. *Simonds* v. *Chesley*, 20 S. C. R. 174.

IX. Non-direction.

Refusal to Submit Questions.]—It is no ground for a new trial that the Judge refused to submit any particular question to the jury, but if the Judge refuses to charge the jury in respect to the subject-matter of any question which counsel desire to have submitted, it may be made the subject of a motion for a new trial for non-direction. *Turner* v. *Bacus*, 24 O. R. 28.

Omission from Charge—*General Verdict.*]—In an action under the Workmen's Compensation Act and at common law for damages for injuries sustained by the plaintiff while engaged in digging a drain upon the defendant's farm, it did not appear that the plaintiff engaged with the defendant to do any particular work, but that he was first put by the defendant at mason work and then at digging the drain :—

Held, that it was a question for the jury whether the hiring of the plaintiff was as a

servant in husbandry within the meaning of 56 Vict. ch. 26 (O.), and whether the work he was engaged in was in the usual course of his employment as such, and also whether the danger was known to the defendant and unknown to the plaintiff or the converse.

The jury were asked certain questions, one being whether the hiring was as a servant in husbandry, but they were told that they might give a general verdict, and they gave one for the plaintiff, answering none of the questions. The trial Judge in his charge gave them no instruction on this point and no direction as to what the law was:—

Held, that they were not competent to find a general verdict, and there should be a new trial. *Reid* v. *Barnes*, 25 O. R. 223.

X. Stay of New Trial Pending Appeal.

See Trial, V.

XI. Verdict Against Evidence.

See Esson v. *McGregor*, 20 S. C. R. 176.

NEW TRIAL IN DIVISION COURTS.

See Division Court, I., IV.

NEXT FRIEND.

See Costs, IV.—Infant, V.—Lunatic.

NIAGARA FALLS PARK COMMISSIONERS.

See Crown, II.

NON-DIRECTION.

See New Trial, IX.

NOTARY.

Discipline—*Board of Notaries—Jurisdiction.*]—When a charge derogatory to the honour of his profession is made against a notary under the provisions of the Notarial Code, R. S. Q. Art. 3871, which amounts to a crime or felony, the Board of Notaries has jurisdiction to investigate without waiting for the sentence of a Court of criminal jurisdiction. *Tremblay* v. *Bernier*, 21 S. C. R. 409.

Services—*Charges—Taxation.*]—A solicitor, who is also a notary, and, acting in the latter capacity, obtains for a client the allowance of a pension from the United States Government, is entitled to charge for his services such sum as may be agreed upon, and is not bound by the statutory regulations affecting solicitors' charges, or liable to have his charges taxed.

The right to tax a solicitor's bill of charges for conveyancing, in the absence of a special agreement, considered. *Ostrom* v. *Benjamin*, 20 A. R. 336.

Signature—*Contract—Statute of Frauds.*]—An ante-nuptial contract, entered into in the Province of Quebec, was not signed by the parties themselves, but by the notaries in their own names, they having full authority from the parties to so sign:—

Held, that this was a sufficient signature within the Statute of Frauds to bind the parties. *Taillifer* v. *Taillifer*, 21 O. R. 337.

NOTICE.

Notice of Action—*See* Action, III.—Crown IV.—Defamation, IV., VI., VII.—Malicious Arrest and Prosecution—Municipal Corporations, XVI.

Notice of Appeal—*See* Supreme Court of Canada, XVII.

Notice of Assignment—*See* Chose in Action.

Notice of Assignment of Lease—*See* Landlord and Tenant, II.

Notice of Dishonour—*See* Banks, III.—Bills and Notes, IV.

Notice of Forfeiture of Lease—*See* Landlord and Tenant, VIII.

Notice of Hypothec—*See* Limitation of Actions, II.

Notice of Transfer—*See* Chose in Action.

Notice of Trial—*See* Trial, III.

Notice of Trusts—*See* Trusts and Trustees, VIII.

Purchaser for Value—*Charge—Priorities.*]—In the case of a charge upon equitable property where the legal estate is outstanding, the defence of purchase for valuable consideration without notice is, in general, inapplicable, the rule being that all such charges take rank according to priority in point of time. *Utterson Lumber Co.* v. *Rennie*, 21 S. C. R. 218.

Purchaser for Value—*Constructive Notice.*]—An unpatented and undeveloped mining property, the value of which was purely speculative and the Government dues on which were unpaid, was conveyed to the plaintiff, the consideration mentioned in the deed being $100, and he, for the expressed, but not actual, consideration of $750, conveyed the property for the purpose of selling it for his own benefit to one of the defendants, who, after holding it for a year, conveyed it to his co-defendant, who had no actual notice of the circumstances, in consideration of the release of a debt of $25:—

Held, that the release of the debt was a sufficient consideration for the deed :—

Held, also, that, taking the circumstances and character of the property into account, the last grantee, who had made no inquiry, was not, by reason of the consideration expressed in the deeds to and from the plaintiff, put upon inquiry so as to affect him with constructive notice of the plaintiff's rights. *Moore* v. *Kane*, 24 O. R. 541.

NOVATION.

See CONTRACT, VII. — PARTNERSHIP, III.— PRINCIPAL AND SURETY, I.

NOVELTY.

See PATENT FOR INVENTION.

NUISANCE.

Abatement — *Sessions—Jurisdiction.*]— The defendant was convicted at the General Sessions on an indictment for a nuisance in obstructing the highway by the erection of a wall thereon, and directed to abate the nuisance, which not having been done, the Sessions made an order directing the sheriff to abate the same at the defendant's costs and charges, and to pay the County Crown Attorney forthwith after taxation the costs of the application and order, and the sheriff's fees and costs and incidental expenses arising out of the execution of the order :—

Held, that the Sessions had no authority to make the order to the sheriff, the proper mode in such case being by a writ *de novamento amovendo:* that the order being a judicial act was properly removed by *certiorari*, and must be quashed, but without costs.

Remarks as to the jurisdiction of the Sessions as to the costs. *Regina* v. *Grover*, 23 O. R. 92.

Damages—*Action—Water.*]—The defendants the corporations of two townships, without being bound to do so, built a culvert under the highway between the townships, to which the other defendant, the owner of lands adjoining one side of the highway, in order to carry off the surface water of his lands, built a drain, and subsequently a "gang-way" of stones for the convenience of access to the highway, which had the effect of damming the water on his land. He afterwards made an opening in the "gang-way," and the water, suddenly rushing through the culvert, flooded the plaintiff's land on the other side of the highway, which was also connected with the culvert by a receiving drain, through which he had theretofore permitted the water in its ordinary course to flow :—

Held, that the defendants the corporations were not, but that the other defendant was, liable for the damage sustained by the plaintiff. *Bryce* v. *Loutit*, 21 A. R. 100.

Restraining—*Action—Privy Pits—Adjacent Land—Occupation.*]—The owner of houses occupied by tenants can maintain an action in his own name for damages and to restrain the continuance of a nuisance arising from privy pits on the land of an adjoining owner, if the nuisance is of such a nature as to be practically continuous and permanent.

The owner of the adjoining land, although also occupied by tenants, is liable for the nuisance caused by them if the pits are so constructed that the constant use of them will necessarily result in the creation of a nuisance, or if allowed by the owner to remain in an unsanitary condition where there is power to remedy the grievance. *Park* v. *White*, 23 O. R. 611.

See MUNICIPAL CORPORATIONS, XVII.—STREET RAILWAYS, III.

OBSTRUCTION.

See WAY, VII.

OFFICIAL ARBITRATORS.

See CROWN, II.

OFFICIAL GUARDIAN.

See DEVOLUTION OF ESTATES ACT.

ORDER-IN-COUNCIL.

See CROWN, II.

ORDNANCE LANDS.

Lease—*Power of Minister of Interior.*]— The Minister of the Interior cannot lease or authorize the use of Ordnance lands without the authority of the Governor in Council. *Quebec Skating Club* v. *The Queen*, 3 Ex. C. R. 387.

Sale—*Cancellation.*]—In the year 1876 the suppliant purchased a number of lots at an auction sale of Ordnance lands in the city of Quebec. He paid certain instalments and interest thereon amounting in all to a sum of $2,447.92. Being unable to complete the payments for which he was liable, he applied to the Crown, in 1885, to appropriate the money paid by him to the purchase of three particular lots—Nos. 19, 38, and 39. This the Crown consented to do, and upon an adjustment of the account there was found to be a sum of $73.92 due to the suppliant, which, by mutual arrangement, was appropriated to the purchase of another lot (No. 100), leaving a balance then due to the Crown of $126.08. When, however, the suppliant came to pay this balance and get his patents for the four lots, he was informed that lot 19 would probably be required for certain military purposes. He then tendered the balance due to the proper officer of the Crown in that behalf, but it was declined. Patents for lots 38, 39, and 100 were subsequently issued to the suppliant, and nothing further was done until 1886, when the Crown resumed possession of

lot 19, which was followed up by an attempted cancellation of the sale of the lot under 23 Viet. (C.) ch. 2, on the ground that, as the balance due on the purchase had not been paid, the terms and conditions of the sale had not been complied with:—

Held, that the sale was not duly cancelled; that the suppliant had forfeited none of his rights under the sale, and was entitled to damages equal to the value of the lot at the time the Crown resumed possession thereof.

Quære:—Has the Deputy Minister of the Interior the right to exercise the powers of cancellation vested in the Commissioner of Crown Lands by sec. 20 of the Act of the Province of Canada 23 Viet. ch. 2. *Murphy* v. *The Queen*, 3 Ex. C. R. 75.

See CROWN LANDS, IV.

OVERFLOW.

See WATER AND WATERCOURSES, IV.

OWNER.

See LIEN, III.—SHIP, IV.

PARDONING POWER.

See CONSTITUTIONAL LAW, II.

PARENT AND CHILD.

Gift of Board and Lodging—*Charge—Right of Occupation—Duration.*]—A father conveyed to one of his sons certain farm lands, subject to his own life estate therein, and subject also to the use by another son, the plaintiff, of a bed, bed-room, and bedding, in the dwelling-house on the farm, and to his board, so long as the plaintiff should remain a resident on the farm:—

Held, that the plaintiff took no estate under the deed, but merely the use, after the termination of the father's life estate, and while resident on the land, of the bed-room and board, which was a charge thereon; that no period was fixed for such occupation, which might be either permanent or temporary; and therefore no forfeiture was created by non-occupation. *Wilkinson* v. *Wilson*, 26 O. R. 213.

Husband and Wife—*Removal and Harbouring of Wife by Parent.*]—*See Metcalf* v. *Roberts*, 23 O. R. 130, *ante* 489.

See INFANT, I.—WILL.

PARISH.

Creation—*Quebec Law.*]—Held, that under R. S. Q., tit. ix., ch. 1, every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is a sufficient foundation for proceedings with the view of obtaining the civil recognition of that parish. No objection thereto can be taken on the ground of antecedent irregularity of procedure.

Proceedings before the commissioners of the diocese with a view to such civil recognition are not subject to the review or control of a court of justice.

An objection to the formation of a new parish, on the ground that one of the old parishes dismembered for that purpose was in debt, is valid under sec. 3380, R. S. Q.; but where the debt relied on was contracted by the Fabrique, it must be proved that the Fabrique was unable to pay it, and that a levy on the Roman Catholic freeholders of the parish has been duly authorized. *Alexandre* v. *Brassard*, [1895] A. C. 301.

PARLIAMENTARY ELECTIONS.

I. BRIBERY AND CORRUPT PRACTICES.

Betting.]—*See Trebilcock* v. *Walsh*, 21 A. R. 55, *Walsh* v. *Trebilcock*, 23 S. C. R. 695, *ante* 470.

Corrupt Acts—*Judgment—Finding.*]—In this case the judgment appealed from did not contain any special findings of fact or any statement that any of the charges mentioned in the particulars were found proved, but stated generally that corrupt acts had been committed by the respondent's agents without his knowledge, and declared that he had not been duly elected, and that the election was void. On an appeal to the Supreme Court on the ground that the judgment was too general and vague:—

Held, that the general finding that corrupt acts had been proved was a sufficient compliance with the terms of the statute R. S. C. ch. 9, sec. 43. *Pontiac Election Case*, 20 S. C. R. 626.

Promise by Candidate to Procure Employment for Voter—*Finding of Trial Judges.*]—On a charge by the petitioner that the appellant had been guilty personally of a corrupt practice by promising to a voter, W., to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial Judges held on the

evidence that the charge had been proved. The promise was charged as having been made in the township of Thorold on the 28th February, 1891. At the trial it was proved that W. some time before the trial made a declaration upon which the charge was based, at the instance of the solicitor for the petitioner, and had got for such declaration employment in Montreal from the C. P. R. Co. until the trial took place, and W. swore that the promise had been made on the 17th February. G., the appellant, although denying the charge, admitted in his examination that he intimated to W. that he would assist him, and there was evidence that after the election G. wrote to W. and did endeavour to procure him the situation, but the letters were not put in evidence, having been destroyed by W. at the request of the appellant:—

Held, affirming the judgment of the Court below, that as the evidence of W. was in part corroborated by the evidence of the appellant, the conclusion arrived at by the trial Judges was not wrong, still less so entirely erroneous as to justify the Court as an appellate tribunal in reversing it on the questions of fact involved. *Welland Election Case*, 20 S. C. R. 376.

Travelling Expenses—*Loan—Free Railway Tickets—Appeal—Evidence—Reversal.*]—G., a voter and a supporter of the respondent holding a free railway ticket to go to Listowel to vote, and wanting $2 for his expenses while away from home, asked for the loan of the money from W., a bar tender and friend. W., not having the money at the time, applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G. to enable him to go to Listowel to vote. S., the agent, lent the money to W., who handed it over to G. The day before the trial W. returned the $2 to S. The trial Judges held that it was a *bona fide* loan by S. to W. On appeal to the Supreme Court of Canada:—

Held, reversing the decision of the Court below, that as that decision depended on the inference drawn from the evidence, it could be reversed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G., within the provisions of sec. 88 of the Dominion Elections Act, and a corrupt practice sufficient to avoid the election under sec. 91.

Strong, J., dissenting, was of opinion that there was no evidence that the loan of the $2 was made to G. with the corrupt intent of inducing him to vote for the respondent.

Patterson, J., also dissenting, held that, as the decision of the Court below depended on the credibility of the witnesses, it ought not to be interfered with.

Per Strong and Patterson, JJ., affirming the judgment of the Court below, that upon the evidence, the Grand Trunk Railway tickets issued at Toronto and Stratford for the transportation of voters by rail to the polls in this case were free tickets, and that as the free tickets had been given to voters who were well known supporters of the respondent prepared to vote for him and for him alone, if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of sec. 88 of the Dominion Elections Act. *Berthier Election Case*, 9 S. C. R. 102, followed. *North Perth Election Case*, 20 S. C. R. 331.

II. Petition.

1. *Appeal.*

Consent to Reversal of Judgment.]—The trial of two controverted Dominion election petitions was commenced more than six months after the filing of the petitions, no order having been made enlarging the time for the commencement of the trial. Upon the consent of the respondents, subject to the objection that the Court had no jurisdiction, judgments were given voiding the elections for corrupt practices by agents. Upon the respondents' appeal to the Supreme Court of Canada, the petitioners filed a consent to the reversal of the judgments appealed from without costs, admitting that the objection was well taken. Upon the filing of an affidavit as to the facts stated in the consent, the appeal was allowed and the petitions dismissed without costs. *Bagot Election Case, Rouville Election Case*, 21 S. C. R. 28.

Discontinuance—*Certificate of Registrar.*]—Upon the trial of a controverted Dominion election petition the respondent was unseated by the judgment of the Superior Court, by reason of corrupt practices by agents, and appealed to the Supreme Court of Canada. When the case was called, no one appearing for the appellant, counsel for the petitioner stated that he had been served with a notice of discontinuance. The Court ordered that the appeal be struck off the list. The notice of discontinuance having been filed, the registrar of the Court certified to the Speaker of the House of Commons that by reason of such discontinuance, the decision and report of the trial Judges were left unaffected by the proceedings taken in the Supreme Court; and the Speaker subsequently issued a writ for a new election. *L'Assomption Election Case*, 21 S. C. R. 29.

Dissolution of Parliament—*Certificate of Registrar—Deposit—Costs.*]—In the interval between taking an appeal from a decision delivered on the 8th November, 1890, in a controverted election petition and the February sittings (1891) of the Supreme Court of Canada, Parliament was dissolved, and by the effect of the dissolution the petition dropped. The respondent subsequently, in order to have the costs that were awarded to him at the trial taxed and paid out of the money deposited in the Court below by the petitioner as security for costs, moved before a Judge of the Supreme Court in Chambers (the full Court having referred the motion to a Judge in Chambers) to have the appeal dismissed for want of prosecution, or to have the record remitted to the Court below. The petitioner asserted his right to have his deposit returned to him:—

Held, per Patterson, J., that the final determination of the right to costs being kept in suspense by the appeal, the motion should be refused:—

Held, also, that inasmuch as the money deposited in the Court below ought to be disposed of by an order of that Court, the registrar of this

Court should certify to the Court below that the appeal was not heard, and that the petition dropped by reason of the dissolution of Parliament on the 2nd February, 1891. *Hutton Election Case*, 19 S. C. R. 557.

Reversal — *Questions of Fact.*]—*See North Perth Election Case*, 20 S. C. R. 331, *ante* 753; *Welland Election Case*, *ib.* 376, *ante* 752.

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2. *Copy.*

Preliminary Objections—*Rules of Court.*] —Held, affirming the judgment of the Court below, that the Judges of the Court in Manitoba not having made Rules for the practice and procedure in controverted elections, the English rules of Michaelmas Term, 1868, were in force, (R. S. C. ch. 9, sec. 63,) and that under Rule 1 of the said English Rules the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the Court to be sent to the returning officer, and that his failure to do so is the subject of a substantial preliminary objection and fatal to the petition; Strong and Gwynne, JJ., dissenting. *Lisgar Election Case*, 20 S. C. R. 1.

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3. *Petitioner.*

Preliminary Objections — *Description — Amendment.*]—Held, reversing the judgment of the Court below, that the omission to set out in the petition the residence, address, and occupation of the petitioner, is a mere objection to the form, which can be remedied by amendment, and is therefore not fatal. *Lisgar Election Case*, 20 S. C. R. 1.

Preliminary Objections — *Description — Occupation.*]—The petition in this case simply stated that it was the petition of Angus Chisholm, of the township of Lochiel, in the county of Glengarry, without describing his occupation, and it was shewn by affidavit that there were two or three other persons of that name on the voters' list for that township:—

Held, affirming the judgment of the Court below, that the petition should not be dismissed for the want of a more particular description of the petitioner. *Glengarry Election Case*, 20 S. C. R. 38.

Preliminary Objections—*Status—Onus.*]—By preliminary objections to an election petition the respondent claimed that the petition should be dismissed because the petitioner had no right to vote at the election. On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof, and the respondent declared that he had no evidence, and the preliminary objections were dismissed:—

Held, per Ritchie, C.J., and Taschereau and Patterson, JJ., that the *onus probandi* was upon the petitioner to establish his status, and that the appeal should be allowed and the election petition dismissed.

Per Strong, J., that the *onus probandi* was upon the petitioner, but, in view of the established jurisprudence, the appeal should be allowed without costs.

Fournier and Gwynne, JJ., *contra*, were of the opinion that the *onus probandi* was on the respondent. *Megantic Election Case*, 8 S. C. R. 169, discussed. *Stanstead Election Case*, 20 S. C. R. 12.

Preliminary Objections—*Status—Onus.*] The petition was served upon the appellant on the 12th May, 1891, and on the 16th May the appellant filed preliminary objections, the first being as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of the petitioners, and the Court dismissed the objections. On appeal to the Supreme Court:—

Held, reversing the judgment of the Court below, Gwynne, J., dissenting, that the onus was on the petitioners to prove their status as voters. *Stanstead Case*, 20 S. C. R. 12, followed. *Bellechasse Election Case*, 20 S. C. R. 181.

Preliminary Objections — *Status — Onus — Determination — Renewal of Objections at Trial.*] —In this case the respondent, by preliminary objection, objected to the status of the petitioner, and, the case being at issue, copies of the voters' lists for the electoral district were filed, but no other evidence offered, and the Court set aside the preliminary objection "without prejudice to the right of the respondent, if so advised, to raise the same objection at the trial of the petition." No appeal was taken from this decision, and the case went to trial, where the objection was renewed, but was overruled by the trial Judges, who held that they had no right to entertain it, and on the merits they allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court of Canada, on the ground that the onus was on the respondents to prove their status, and that their status had not been proved:—

Held, affirming the judgment of the Court below, that the objection raising the question of the qualification of the petitioner was properly raised by preliminary objection and disposed of, and the Judges at the trial had no jurisdiction to entertain such objection: R. S. C. ch. 9, secs. 12 and 13. *Prescott Election Case*, 20 S. C. R. 196.

Preliminary Objections — *Status — Voters' List—Evidence.*]—Held, affirming the decision of Gill, J., that where the petitioner's status in an election petition is objected to by preliminary objection, such status should be established by the production of the voters' list actually used at the election, or a copy thereof certified by the clerk of the Crown in Chancery, R. S. C. ch. 8, secs. 41, 57, and 65; R. S. C. ch. 5, sec. 32: and the production at the *enquête* of a copy, certified by the revising officer, of the list of voters upon which his name appears, but which has not been compared with the voters' list actually used at said election, is insufficient proof; Gwynne and Patterson, JJ., dissenting. *Richelieu Election Case*, 21 S. C. R. 168.

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4. *Security.*

Preliminary Objections—*Deposit—Receipt—Deputy Prothonotary.*] — In Prince Edward

Island two members are returned for the electoral district of Queen's County. With an election petition against the return of the two sitting members, the petitioner deposited the sum of $2,000 with the deputy prothonotary of the Court, and in the notice of presentation of petition and deposit of security he stated that he had given security to the amount of one thousand dollars for each respondent, "in all, two thousand dollars," duly deposited with the prothonotary, as required by statute. The receipt was signed by W. A. Weeks, the deputy prothonotary appointed by the Judges, and acknowledged the receipt of $2,000, without stating that $1,000 was deposited as security for each respondent:—

Held, that, there being at the time of the presentation of the petition security to the amount of $1,000 for the costs for each respondent, the security given was sufficient: secs. 8 and 9 (*c*), ch. 9, R. S. C.

Held, also, that the payment of the money to the deputy prothonotary of the Court at Charlottetown was a valid payment: sec. 9 (*g*), ch. 9, R. S. C. *Queen's County and Prince County (P.E.I.) Election Cases*, 20 S. C. R. 26.

Preliminary Objections—*Deposit—Receipt—Acting Prothonotary.*]—Upon appeals from decisions of the Supreme Court of Nova Scotia dismissing preliminary objections to Dominion election petitions:—

Held, that payment of the security required by sec. 9 (*c*) of R. S. C. ch. 9 into the hands of a person who was acting for the prothonotary at Halifax, and a receipt signed by such person in the name of the prothonotary, under sec. 9 (*g*), were valid. *Shelburne, Annapolis, Lunenburg, Antigonish, Pictou, and Inverness Election Cases*, 20 S. C. R. 169.

Preliminary Objections—*Deposit—Receipt—Prothonotary.*]—The preliminary objection in the case was that the security and deposit receipt were illegal, null, and void, the written receipt signed by the prothonotary of the Court being as follows:—"That the security required by law had been given on behalf of the petitioners by a sum of $1,000 in a Dominion note, to wit, a bank note of $1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute of the Dominion of Canada now in force." The deposit was, in fact, a Dominion note of $1,000:—

Held, affirming the judgment of the Court below, that the deposit and receipt complied sufficiently with sec. 9 (*f*) of the Dominion Controverted Elections Act. *Argenteuil Election Case*, 20 S. C. R. 194.

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5. *Service.*

Preliminary Objections—*Service at Domicil.*]—Held, that leaving a copy of an election petition and accompanying documents at the residence of the respondent with an adult member of his household, during the five days after the presentation of the same, is a sufficient service under sec. 10 of the Dominion Controverted Elections Act, even though the papers served do not come into the possession or within the knowledge of the respondent. *See* now 54 & 55 Vict. ch. 20, sec. 8. *King's (N.S.) Election Case*, 19 S. C. R. 526.

Preliminary Objections—*Personal Service.*]—Upon appeals from decisions of the Supreme Court of Nova Scotia dismissing preliminary objections to Dominion election petitions:

Held, that personal service on the respondents at Ottawa, with or without an order of the Court at Halifax, or at the domicil of the respondents, was good service. *Shelburne, Annapolis, Lunenburg, Antigonish, Pictou,* and *Inverness Election Cases*, 20 S. C. R. 169.

Preliminary Objections—*Personal Service.*]—Election petitions against the return of members for electoral districts in Prince Edward Island were served personally on the respondents at Ottawa:—

Held, that such service, without an order of the Court, was a good service under sec. 10 of the Dominion Controverted Elections Act. *Queen's County and Prince County Election Cases*, 20 S. C. R. 26.

Preliminary Objections—*Time for Service—Extension of—Order—Re-service.*] On the 15th April, 1891, the petitioner omitted to serve on the appellant, with the election petition in this case, a copy of the deposit receipt, but on the 20th April applied to a Judge to extend the time for service that he might cure the omission. An order extending the time, subsequently affirmed on appeal by the Court of Appeal for Ontario, was made, and the petition was re-served accordingly with all the papers prescribed by the statute. Before the order extending the time had been drawn up, the respondent had filed preliminary objections, and, by leave contained in the order, he filed further preliminary objections after the re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction of the Court of Appeal, or a Judge thereof, to extend the time for service of the petition beyond the five days prescribed by the Act:—

Held, that the order was a perfectly valid and good order, and that the re-service made thereunder was a proper and regular service: R. S. C. ch. 9, sec. 10. *Glengarry Election Case*, 20 S. C. R. 38.

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6. *Trial.*

Time—*Enlargement—Session—Order.*]—On the 23rd April, 1891, after the petition in this case was at issue, the petitioners moved to have the respondent examined prior to the trial, so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that, being attorney in his own case, it would not "be possible for him to appear, answer the interrogatories, and attend to the case, in which his presence was necessary, before the closing of the session." This motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in Court to attend to the present election trial," and that it was not possible "for him to

attend to the present case, for which his presence is necessary, before the closing of the session;" and the Court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over, on the 1st October, 1891, an application was made to fix a day for the trial, and it was fixed for the 10th December, 1891, and the respondent was examined in the interval. On the 10th December the respondent objected to the jurisdiction of the Court on the ground that the trial had not commenced within six months following the filing of the petition, and the objection was maintained:—

Held, reversing the judgment of the Court below, that the order was in effect an enlargement of the time for the commencement of the trial until after the session of Parliament, and, therefore, in the computation of time for the commencement of the trial, the time occupied by the session of Parliament should not be included: R. S. C. ch. 9, sec. 32. *Laprairie Election Case*, 20 S. C. R. 185.

Time — *Enlargement — Orders — Notice of Trial—Appeal—Notes of Evidence.*]—On the 10th October, 1891, the Judge in this case, within six months after the filing of the election petition, by order enlarged the time for the commencement of the trial to the 4th November, the six months expiring on the 18th October. On the 19th October another order was made by the Judge fixing the date of the trial for the 4th November, 1891, and 14 clear days' notice of trial was given. The respondent objected to the jurisdiction of the Court:—

Held, that the orders made were valid: secs. 31, 33, ch. 9, R. S. C.:—

Held, also, 1st, that the objection to the sufficiency of the notice of trial given in the case under sec. 31 of ch. 9, R. S. C., was not an objection which could be relied on in an appeal under sec. 50 (*b*) of ch. 9, R. S. C.; 2nd., that evidence taken by a shorthand writer, not an official stenographer of the Court, but who has been sworn and appointed by the Judge, need not be read over to witnesses when extended. *Pontiac Election Case*, 20 S. C. R. 626.

Two Petitions—*Separate Trials—Bracketing—Prothonotary.*]—Two election petitions were filed against the appellant, one by A. C., filed on the 4th April, 1892, and the other by A. V., the respondent, filed on the 6th April, 1892. The trial of the A. V. petition was, by an order of a Judge in Chambers, dated the 22nd September, 1892, fixed for the 26th October, 1892. On the 24th October the appellant petitioned the Judge in Chambers to join the two petitions and have another date fixed for the trial of both petitions. This motion was referred to the trial Judges, who, on the 26th October, before proceeding with the trial, dismissed the motion to have both petitions joined, and proceeded to try the A. V. petition. Thereupon the appellant objected to the petition being tried then, as no notice had been given that the A. C. petition had been fixed for trial, and, subject to such objection, filed an admission that sufficient bribery by the appellant's agent without his knowledge had been committed to avoid the election. The trial Judges then delivered judgment setting aside the election. On an appeal to the Supreme Court:—

Held, 1st, that under sec. 30 of ch. 9, R. S. C., the trial Judge had a perfect right to try the A. V. petition separately; 2nd, that the ruling of the Court below on the objection relied on in the present appeal, viz., that the trial Judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary, as directed by sec. 30 of ch. 9, R. S. C., was not an appealable judgment or decision: R. S. C. ch. 9 sec. 50; Sedgewick, J., doubting. *Vaudreuil Election Case*, 22 S. C. R. 1.

III. Returning Officers.

Claim Against Crown—*Services of Subordinates.*]—A person duly appointed and acting during an election as returning officer under the provisions of the North-West Territories Representation Act, R. S. C. ch. 7, cannot recover from the Crown for the services of several enumerators, deputy returning officers, or other persons employed in connection with such election. *Lucas v. The Queen*, 3 Ex. C. R. 238.

Deputy—*Refusal of Vote—Penalty—Wilful Misfeasance.*]—In an action against a deputy returning officer by a "person aggrieved," to recover a penalty under sec. 186 of the Ontario Election Act, 55 Viet. ch. 3, for an alleged wilful refusal to allow the plaintiff to vote:—

Held, that the word "wilful" in the section means "perverse" or "malicious;" and, although the plaintiff was deprived of his vote by the refusal of the defendant to allow him to deposit a "straight" ballot, and there was thereby a contravention of the Act, yet, as the defendant honestly believed the plaintiff was not qualified, and believed in his own power to withhold the ballot, the action failed. *Lewis v. Great Western R. W. Co.*, 3 Q. B. D. 195, followed. *Walton v. Apjohn*, 5 O. R. 65, distinguished. *Johnson v. Allen*, 26 O. R. 550.

IV. Revising Officers.

Mandamus—*Voters' List—Notice of Objection—Grounds—Appeal.*]—Held, by the Queen's Bench Division, that a notice under sec. 19 of the Electoral Franchise Act, R. S. C. ch. 5, as amended by 52 Vict. ch. 9, sec. 4, to a person whose name was objected to, for the purpose of having the name taken off the voters' list at the final revision, which simply gave "not qualified" as the ground of objection, was sufficient.

The revising officer (who was not a Judge) having ruled that the notice was valid, the person whose name was objected to appealed from that ruling to the County Judge, who held that the notice was invalid, and the revising officer thereupon refused to go on and hear the complaint:—

Held, that no appeal was given by sec. 33 of the Act from the revising officer's ruling; and therefore the proceedings before the County Judge were *coram non judice*.

A mandamus was granted.

Held, by the Court of Appeal, that the Queen's Bench Division having ordered a mandamus to issue directing a revising officer to consider the

at under sec. 30 of ch. 9, R. S. C., had a perfect right to try the separately ; 2nd, that the ruling low on the objection relied on in peal, viz., that the trial Judges ed with the petition in this case, o petitions filed had not been he prothonotary, as directed by R. S. C., was not an appealable cision : R. S. C. ch. 9 sec. 50; doubting. *Vaudreuil Election* . I.

RETURNING OFFICERS.

st Crown—*Services of Subordi-* on duly appointed and acting on as returning officer under the North-West Territories Repre- S. C. ch. 7, cannot recover from he services of several enumera- rning officers, or other persons nnection with such election. *cen*, 3 Ex. C. R. 238.

sal of Vote—Penalty—Wilful n an action against a deputy by a "person aggrieved," to y under sec. 186 of the Ontario Vict. ch. 3, for an alleged wilful he plaintiff to vote :— word "wilful" in the section or "malicious;" and, although deprived of his vote by the ndant to allow him to deposit lot, and there was thereby a he Act, yet, as the defendant the plaintiff was not qualified. s own power to withhold the failed. *Lewis* v. *Great Wes-* Q. B. D. 195, followed. *Wal-* . R. 65, distinguished. *John-* R. 550.

EVISING OFFICERS.

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peal was given by sec. 33 of evising officer's ruling; and eedings before the County *on judice*. granted. t of Appeal, that the Queen's ring ordered a mandamus to vising officer to consider the

objections to the qualification of certain persons whose names appeared on the preliminary voters' lists, and the revising officer having obeyed the mandamus, this Court should not consider the question of the right to grant the mandamus.

A notice of application to have a name removed from the voters' lists, giving as the ground of objection only the statement "not qualified," is sufficient : per Hagarty, C.J.O., Burton and Maclennan, JJ.A. *In re Lilley and Allin*, 21 O. R. 424, 19 A. R. 101.

Prohibition—*Jurisdiction of High Court of Justice.*]—There is no jurisdiction in the High Court of Justice to issue a writ of prohibition to a revising officer to compel him to abstain from "performing any duty under the Electoral Franchise Act."

The legislation in regard to such matters does not trench upon nor is the question one of "property and civil rights in the Province." *Re Simmons and Dalton*, 12 O. R. 505, not followed. *Re North Perth—Hessin* v. *Lloyd*, 21 O. R. 538.

V. STATUTES GOVERNING ELECTIONS.

Dominion Elections Act—*Crown.*] — The Crown is not bound by secs. 100 and 122 of the Dominion Elections Act, 1874.

The 46th clause of the 7th section of the Interpretation Act, R. S. C. ch. 1, whereby it is provided that no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not limited or qualified by any exception such as that mentioned in *The Magdalen College Case*, 11 Rep. 70*b*, "that the King is impliedly bound by statutes passed for the general good . . . or to prevent fraud, injury, or wrong." *The Queen* v. *Pouliot*, 2 Ex. C. R. 49.

Ontario Election Act — *Penalty.*] — *See Johnson* v. *Allen*, 26 O. R. 550, *ante* 760 ; *Malcolm* v. *Race*, 16 P. R. 330, *ante* 403.

Quebec Elections Act—*Promissory Note—Illegality.*]—In an action on a promissory note the evidence shewed that its proceeds were given to an election agent to be used as a portion of an election fund controlled by the maker :—

Held, that the transaction was illegal under 38 Vict. ch. 7, sec. 266 (Q.), now R. S. Q. Art. 425, which makes void any contract, promise, or understanding in any way relating to an election under that Act, and the plaintiff could not recover. *Dansereau* v. *St. Louis*, 18 S. C. R. 587.

PARTICULARS.

See EVIDENCE, VII.

PARTIES.

I. GENERALLY.

Assignee for Benefit of Creditors.] — An insolvent trader having made an assignment of all his estate for the benefit of his creditors, under R. S. O. ch. 124, his stock-in-trade was purchased by his wife from the assignee, the defendants, who were creditors of his, becoming responsible to the assignee for payment of the purchase money, and, by a secret arrangement made beforehand, receiving security from the wife for the goods purchased by her, not only for the amount for which they had become responsible, but also for the full amount of their claims as creditors of the husband :—

Held, that the assignee was a necessary party to an action by another creditor for an account. *Segsworth* v. *Anderson*, 23 O. R. 573.

Assignor of Chose in Action—*Demurrer—Res Judicata.*]—C., by instrument under seal, assigned to the defendant, as security for moneys due, his interest in certain policies of insurance, on which he had actions pending. C. afterwards gave to B. & Co. an order on the defendant for the balance of the insurance money that would remain after paying his debt to the defendant. B. & Co. indorsed the order and delivered it to the plaintiff, by whom it was presented to the defendant, who wrote his name across its face. B. & C. afterwards delivered to the plaintiff a document signed by them stating that, having been informed that the indorsed order was not negotiable by indorsement, to perfect the plaintiff's title and enable him to obtain the money in the defendant's hands, they assigned and transferred their interest therein and appointed the plaintiff their attorney, in their name, but for his own use and benefit, to collect the same. The defendant, having received the amounts due C. on the insurance policies, informed the plaintiff, on his demanding an account, that there were prior claims that would absorb it all. The plaintiff then filed a bill in equity for an account and payment of the amount found due him, to which the defendant demurred for want of parties, alleging that the order, though absolute on its face, was, in fact, only given as security, and that, an account between B. & Co. and C. being necessary to protect C.'s rights, C. was a necessary party to the suit. The demurrer was overruled and the judgment overruling it not appealed from, and the same defence of want of parties was set up in the answer to the bill :—

Held, affirming the judgment of the Court below, Strong and Patterson, JJ., dissenting, that the question of want of parties was *res judicata* by the judgment on the demurrer, and could not be raised again by the answer. Even if it could, the judgment was right, as C. was not a necessary party. As between the plaintiff and the defendant the order was an absolute transfer of the fund to be received by the defen-

dant, and was treated by all the parties as a negotiable instrument. The defendant had nothing to do with the equities between C. and B. & Co., or between B. & Co. and the plaintiff, but was bound to account to the plaintiff in accordance with his undertaking as indicated by the acceptance of the order. *McKean* v. *Jones*, 19 S. C. R. 489.

Company — *Action Against Shareholders — Dispensing with Service.*]—In an action by an execution creditor of a company against shareholders to make them liable upon their shares for the amount unpaid thereon, the plaintiff sought also to recover from the defendants moneys shewn to be in their hands which were really the property of the company:—

Held, that the plaintiff was entitled to judgment against the defendants for payment to him of such moneys; but the company were necessary parties to the action; and their consent to being added as plaintiffs not having been filed as required by Rule 324 (*b*), they should be added as defendants:—

Held, also, a proper case, under Rules 324 (*c*) and 326, for dispensing with service upon the company, as the defendants already before the Court were directors and the principal shareholders in the company. *Jones* v. *Miller*, 24 O. R. 268.

Creditors — *New Cause of Action.*] — An action was brought by one of the next of kin to set aside, as having been obtained by undue influence, a transfer to the defendant of policies on the life of a person who had died intestate; and subsequently his administrator was, on his own consent, added as a party plaintiff. After the action was entered for trial, the plaintiffs' solicitors, also acting as solicitors for certain creditors of the deceased, obtained an order under Rule 445 from the Master in Chambers to amend the statement of claim and record by making such creditors parties, suing on behalf of themselves and all other creditors to set aside the transfer of the policies as fraudulent and void against them:—

Held, that the addition of the new plaintiffs was not necessary to determine the real matter in dispute in the "action commenced," as required by the Rule, but was the introduction of a new action altogether distinct from the action commenced, and one which the plaintiffs in that action could not maintain; and the order of the Master was set aside. *Tinning* v. *Bingham*, 16 P. R. 110.

Heirs-at-Law.]—*See Carter* v. *Clarkson*, 15 P. R. 379, *post* 767.

Husband and Wife—*Tort.*]—Action against a husband and wife alleged to have been married before 1884, for a tort committed by the wife:—

Held, on demurrer, that the husband was properly joined as a party. *Amer* v. *Rogers*, 31 C. P. 195, and *Seroka* v. *Kattenburg*, 17 Q. B. D. 177, considered. *Lee* v. *Hopkins*, 20 O. R. 666.

Insurance Company — *Fire — Action for Negligence — Joining as Co-plaintiffs.*] — *See Wealleans* v. *Canada Southern R. W. Co.*, 21 A. R. 297, *post* 857.

Issue — *Claimant.*]—*See Henderson* v. *Rogers* 15 P. R. 241, *post* 765.

Mortgagee — *Right of Way.*] — Where an action is brought to establish a right of way over lands adjoining those of which the plaintiff is the owner, subject to a mortgage, and, having regard to the value of the property, the amount of the mortgage, and other circumstances, the lands may be said to be really the mortgagee's, and the action substantially his, the defendant is entitled to security for costs, if the plaintiff be without substance:—

Held, per MacMahon, J., in Chambers, that the mortgagee was not a necessary party to the action.

But *semble*, per Meredith, J., in the Divisional Court, that he was a proper party, and should have been added. *Gordon* v. *Armstrong*, 16 P. R. 432.

Mortgagor and Mortgagee — *Trespass.*]—*See Brookfield* v. *Brown*, 22 S. C. R. 398, *ante* 683.

Next of Kin—*Action to Establish Will.*]—The plaintiffs propounded a will in a Surrogate Court, under which they took the whole estate, and were named as executors. The defendant, who was one of several next of kin, all having an equal interest if the will was invalid, contested its validity, and the case was removed into the High Court. The other next of kin also disputed the will, but were not acting in concert with the defendant.

Upon an objection taken by the defendant at the trial:—

Held, that the other next of kin should be made parties; and the trial was adjourned for that purpose, it appearing that they could conveniently be added. *Cornell* v. *Smith*, 14 P. R. 275.

Partners—*Corporators.*] — In the case of a nominal corporation, which has no legal status as such, the ostensible corporators are partners; and their liability as partners, on the contracts of the company, is a joint, and not a joint and several, liability.

Where some, but not all, of the contractors are sued in an action, they are entitled of right to have all the others within the jurisdiction added as defendants; and, the plea of abatement having been abolished, the method of exception is by prompt application to the Court under Rule 324.

As to the representatives of the deceased or insolvent partners, there is a discretion to add or not. *Gildersleeve* v. *Balfour*, 15 P. R. 293.

Relators — *Counterclaim.*] — In an action brought in the name of the Attorney-General upon the relation of certain persons to restrain the defendants from collecting tolls or keeping their toll-gates closed upon their roads, the defendants alleged by way of defence certain wrongful acts of the relators, and by way of counterclaim asked damages against them:—

Held, by Winchester, official referee, that the relators were not in any sense plaintiffs; and the allegations against them must be struck out.

An appeal to Galt, C. J., was dismissed. *Attorney-General* v. *Vaughan Road Co.*, 14 P. R. 516.

Unauthorized Parties—*Striking out Name.*]—By a resolution of the council of a municipal corporation the mayor and clerk were instructed to grant a certificate under the corporate seal to the solicitors for the other plaintiffs authorizing them to join the corporation as plaintiffs in this action upon receiving a bond, to the satisfaction of the mayor, indemnifying the corporation against all costs. A bond was accordingly handed to the mayor, who retained it, but the action was brought by the solicitors, and the corporation joined therein as plaintiffs, without the granting of any certificate under the corporate seal. After the action had been begun the mayor informed the defendants' solicitors that no certificate had been issued, and stated that he would not sign one until he had been properly advised by counsel:—

Held, that the action was brought in the name of the corporation without authority; and that the defendants had the right to move to have such name struck out.

Semble, that the corporation should have been parties to the motion.

Held, also, that as the solicitors for the plaintiffs other than the corporation were not guilty of any intentional wrong-doing in joining the corporation as plaintiffs, they should not be made liable for the defendants' costs. *Town of Barrie* v. *Weaymouth*, 15 P. R. 95.

Will—*Action to Annul—Necessary Parties.*]—*See Currie* v. *Currie*, 24 S. C. R. 712.

Will—*Persons Interested Under—Account.*]—*See Dorion* v. *Dorion*, 20 S. C. R. 430.

II. Appeal.

County Court Appeal—*Claimant.*]—Under sec. 42 of the County Courts Act, R. S. O. ch. 47, an appeal lies to the Court of Appeal from the order or judgment of a County Court disposing of an issue directed by an order made in an action in such County Court upon a garnishing application; and the claimant, the plaintiff in the issue, though not a party to the original action, is a "party" within the meaning of sec. 42, and may be an appellant. *Sato* v. *Hubbard*, 6 A. R. 546, distinguished.

The Court will not ordinarily quash or dismiss an appeal because the order or judgment appealed from has not been drawn up. *Henderson* v. *Rogers*, 15 P. R. 241.

Cross-appeal—*Third Parties.*]—An order was made by a local Judge, upon the *ex parte* application of the defendant, allowing him to serve a third party notice, but, upon the application of the third parties so called upon, this order was set aside by an order of the Master in Chambers, which was affirmed by a Judge at Chambers and by a Divisional Court upon the appeal of the defendant. That Court, however, at the same time made an order staying the proceedings until the plaintiff should add the third parties as defendants, and from this order the plaintiffs appealed to the Court of Appeal, not making the third parties respondents. The defendant, however, served notice of cross-appeal upon the plaintiffs and the third parties, by which he asked that the order made by the local Judge might be restored; and the third parties moved to strike out this notice:—

Held, that the word "parties" in Rule 821 means persons who are parties to the action or proceeding in question on the appeal; and that what the defendant sought by the cross appeal was not a variation of the order appealed from, which is what Rule 821 speaks of, but the substitution of one of an entirely different character; and the notice was struck out. *Begg* v. *Ellison*, 14 P. R. 267.

III. Counterclaim.

Striking Out.]—A person brought into an action as defendant to a counterclaim delivered by the original defendant cannot deliver a counterclaim against such defendant.

Such a pleading, not being authorized by the Rules or the practice, was struck out on summary application.

Construction of Rules 371-383.

Street v. *Gover*, 2 Q. B. D. 498, followed.

Green v. *Thornton*, 9 C. L. T. Occ. N. 139, distinguished.

Semble, if the company brought in here as defendants by counterclaim had been proper parties, cross-relief might have been given them under Rule 374, by staying execution upon any judgment recovered against them until they should establish their set-off in an independent action.

The action was upon a promissory note. The counterclaim of the original defendants alleged that the plaintiffs took the note under circumstances which disentitled them to recover:—

Held, a defence and not a counterclaim.

It further asked that the plaintiffs might be ordered to deliver up the note to be cancelled:—

Held, that if that was a proper subject of counterclaim, it was one arising between the plaintiffs and the defendants as the result of the establishment of the defence, and did not render the introduction of new parties necessary.

It further asked that if the plaintiffs should be found entitled to recover upon the note, the new defendants by counterclaim should be ordered to pay it:—

Held, not a matter in which the plaintiffs were concerned, and therefore, under Rule 376, other persons could not be brought in as defendants by counterclaim.

It further alleged that the plaintiffs and the new defendants by counterclaim conspired together with the fraudulent intention of keeping certain insurance moneys without applying them upon the note sued on; but there was no assertion that the plaintiffs received the insurance moneys, or any part of them, beyond the amount of the note; and the prayer was that the new defendants by counterclaim, and not the plaintiffs, should account for the insurance money over and above the amount of the note:—

Held, that there was no excuse for joining the plaintiffs as parties liable to account with the added parties, and therefore no excuse for adding the latter.

And the counterclaim of the original defendants, as far as it added new parties, was struck out. *General Electric Co.* v. *Victoria Electric Light Co. of Lindsay*, 16 P. R. 476, 529.

IV. Demurrer for Misjoinder or Nonjoinder.

Judicature Act—*Remedy.*]—Since the Judicature Act the proceeding by demurrer for misjoinder of parties is no longer available.

Werderman v. *Société Générale D'Electricité*, 19 Ch. D. 246, followed.

In an action upon a mortgage for foreclosure, immediate payment, and immediate possession, the plaintiff joined as defendants the heirs-at-law of the deceased mortgagor (who had died after the Devolution of Estates Act) with the administrator of the real and personal estate. One of the heirs-at-law demurred to the statement of claim, on the ground that the administrator represented the estate in all regards, that the heirs-at-law were not bound by any covenants of the deceased, and that no relief was claimed or could be granted against them:—

Held, that the demurrer was in effect one for misjoinder of parties, and that the proper remedy was a motion under Rule 324 (*a*) to strike out the name of the demurring defendant. *Carter* v. *Clarkson*, 15 P. R. 379.

See McKean v. *Jones*, 19 S. C. R. 489, *ante* 762; *Lee* v. *Hopkins*, 20 O. R. 666, *ante* 763.

V. Particular Proceedings.

Interpleader Issue.—*See* Interpleader.

Mechanics' Liens.—*See* Lien, III.

Mortgage Actions.—*See* Mortgage.

VI. Third Parties.

Determining Question in Action—*Replevin.*]—J. stored certain goods with the defendant, and the plaintiff brought this action for possession of the goods and damages for their detention, and replevied them:—

Held, not a case in which J. should be added as a defendant, under Rule 324, and not a case for the application of Rule 328; but rather a case in which a notice should be served on him under Rule 330, in order to have him bound by the judgment to be given. *Peterson* v. *Fredericks*, 15 P. R. 361.

Determining Question in Action—*Specific Performance.*]—In an action for specific performance by a vendor against a purchaser, the question raised by the defence, whether a third person has a title to the whole or part of the land, is not one which, under Con. Rule 328, should be determined between the parties to the action, or either of them, and the third person, and an order cannot properly be made under that Rule and Con. Rule 330, adding such third person as a defendant.

Neither do Con. Rules 329, 331, or 332 apply in such a case.

The Consolidated Rules as to third parties discussed.

Decision of the Queen's Bench Division reversed. *Begg* v. *Ellison*, 14 P. R. 384.

See, also, *S. C.*, 14 P. R. 267, *ante* 765.

Indemnity—*Appearance*—*Costs.*]—Where, in an action for negligence, the defendants served a third party, under Rule 329, with notice of a claim for indemnity, but he did not appear thereto, and no order was made or applied for under Rule 332:—

Held, that he was under no obligation to take any proceeding, and was not bound by the result of the action; and his subsequently appearing at the trial, and asking to be made a defendant, was gratuitous, and he was not entitled to costs against the defendants. *Gibb* v. *Township of Camden*, 16 P. R. 316.

Indemnity—*Appearance*—*Pleading*—*Trial*—*Costs.*]—Where a third party was called upon by the defendants for indemnity and appeared; and, upon a motion by the defendants under Rule 332, an order was made, against the plaintiff's objection, directing that the third party might deliver a defence to the plaintiff's claim against the defendants, and a defence to the defendants' claim for indemnity; that the question of indemnity between the defendants should be tried after the trial of the plaintiffs' action, as the trial Judge might direct; and that all costs should be reserved:—

Held, that the order was within the powers conferred by Rules 328-332, and was a proper order to make under the circumstances of the case. *Christie* v. *City of Toronto*, 15 P. R. 415.

Indemnity—*Co-defendant.*]—*See Walker* v. *Dickson*, 14 P. R. 343, *post*, Trial, III.

Indemnity—*Landlord.*]—The plaintiff and defendant occupied adjoining shops under leases from the same landlord, the plaintiff having the prior lease. The plaintiff brought this action to restrain the defendant from obstructing his light and view, and the defendant served a third party notice upon the landlord, claiming, under a covenant for quiet enjoyment, to be protected against the plaintiff's claim:—

Held, that the defendant could not call upon his landlord to defend him against an unfounded claim; but if the plaintiff's claim was well founded, it was by reason of an easement expressly or impliedly granted by his lease, and the defendant took subject to such easement, and could not claim that the landlord covenanted with him for quiet enjoyment of that which did not pass under his lease; and, therefore, whether the plaintiff's claim was well or ill founded, the landlord was not a proper party to be called on for indemnity under Rule 329. *Thomas* v. *Owen*, 20 Q. B. D. 225, followed.

Held, also, that upon a motion by the defendant, under Rule 332, for directions as to the mode of trial, where a third party had been notified under Rule 329, it was proper to make an order dismissing the third party from the action, without any motion on his part. *Schneider* v. *Batt*, 8 Q. B. D. 701, followed. *Scripture* v. *Reilly*, 14 P. R. 249.

Indemnity—*Mortgage*—*Counterclaim.*]—In an action by the assignee of a mortgage against the mortgagor and the purchasers from him of the equity of redemption, the latter alleged that they had been induced by the mortgagee to purchase the lands by his promise to discharge the mortgage and accept in its place an assignment of another mortgage, which agreement he

—*Appearance—Costs.*]—Where, for negligence, the defendants d party, under Rule 329, with im for indemnity, but he did not o, and no order was made or der Rule 332:—

he was under no obligation to ceeding, and was not bound by he action; and his subsequently he trial, and asking to be made a is gratuitous, and he was not sts against the defendants. *Gibb Camden*, 16 P. R. 316.

—*Appearance—Pleading—Trial* ere a third party was called upon nts for indemnity and appeared; notion by the defendants under rder was made, against the plain-, directing that the third party a defence to the plaintiff's claim efendants, and a defence to the im for indemnity; that the ques- ity between the defendants should the trial of the plaintiffs' action, dge might direct; and that all e reserved:—

the order was within the powers Rules 328-332, and was a proper under the circumstances of the v. *City of Toronto*, 15 P. R. 415.

—*Co-defendant.*]—*See Walker* v. R. 343, *post*, TRIAL, III.

—*Landlord.*]—The plaintiff and pied adjoining shops under leases landlord, the plaintiff having the The plaintiff brought this action defendant from obstructing his , and the defendant served a ice upon the landlord, claiming nt for quiet enjoyment, to be st the plaintiff's claim:—

e defendant could not call upon defend him against an unfoun- t if the plaintiff's claim was t was by reason of an easement bliedly granted by his lease, and took subject to such easement, im that the landlord covenanted uiet enjoyment of that which der his lease; and, therefore, aintiff's claim was well or ill ndlord was not a proper party for indemnity under Rule 329. , 20 Q. B. D. 225, followed. at upon a motion by the defen- le 332, for directions as to the here a third party had been noti- 329, it was proper to make an the third party from the action, tion on his part. *Schneider* v. . 701, followed. *Scripture* v. 249.

Mortgage—Counterclaim.]—In assignee of a mortgage against d the purchasers from him of emption, the latter alleged that induced by the mortgagee to ds by his promise to discharge l accept in its place an assign- mortgage, which agreement he

had failed to carry out and had afterwards assigned the mortgage to the plaintiff, his wife:—

Held, that the purchasers of the equity were not entitled to claim "indemnity" against the mortgagee, within the meaning of that word as used in Rule 328, as amended by Rule 1313; and a third party notice served upon him was set aside.

Semble, a proper case for counterclaim against the plaintiff and the third party jointly to enforce the alleged agreement or for damages. *Moore* v. *Death*, 16 P. R. 296.

Indemnity — *Negligence — Insurance Company.*]—The plaintiff sued for a personal injury, which by his statement of claim he alleged he had received, when acting as a conductor of a street railway car operated by the defendants, by reason of the negligence of a servant of the defendants, who was driving a scavenger waggon used by the defendants. The company who had operated the railway before the defendants assumed it, were insured against all sums for which they should become liable to any employee in their service, while engaged in their work. The insurance policy was assigned to the defendants when they assumed the railway. The defendants served on the insurance company a third party notice claiming indemnity:—

Held, that the policy did not cover injuries accruing by reason of the negligence of the defendants or their servants in other branches of their service; and that the insurance company should not be kept before the Court on the chance of a different state of facts being developed at the trial from that which the plaintiff alleged.

An order was therefore made in Chambers setting aside the third party notice. *Ferguson* v. *City of Toronto*, 14 P. R. 358.

Intervention of Third Party—*Quebec Law.*] —*See Price* v. *Mercier*, 18 S. C. R. 303, *ante* 620; *Ball* v. *McCaffrey*, 20 S. C. R. 319, *ante* 19.

Remedy Over—*Municipal Corporations.*]—A third party is "a party to the action" within the meaning of sec. 531, sub-sec. 5, of the Municipal Act, 55 Vict. ch. 42; and where a defendant municipal corporation, under that enactment, seeks to have another corporation or person added as a party for the purpose of enforcing a remedy over, such person or corporation should be made a third party and not a defendant, unless the plaintiff seeks some relief against such added party; and it is improper to add such party both as a defendant and a third party. *Erdman* v. *Town of Walkerton*, 15 P. R. 12.

See, also, *S. C.*, 22 O. R. 693, 20 A. R. 444, 23 S. C. R. 352.

See GUARANTY AND INDEMNITY—MUNICIPAL CORPORATIONS, XIII.

PARTITION.

Improvements by Tenant in Common.]—*See Lasby* v. *Crawson*, 21 O. R. 255, *ante* 499.

Mistake—*Family Arrangements.*]—*See Baldwin* v. *Kingstone*, 18 A. R. 63, *ante* 630.

Retrait Successoral—*Sale by Co-heir—Prescription.*]—When a co-heir has assigned his share in a succession before partition, any other co-heir may claim such share upon reimbursing the purchaser thereof the price of such assignment, and such claim is imprescriptible so long as the partition has not taken place: Art. 710, C. C.

A sale by a curator of the assets of an insolvent, even though authorized by a Judge, which includes an undivided share of a succession of which there has been no partition, does not deprive the other co-heirs of their right to exercise by direct action against the purchaser thereof the *retrait successoral* of such undivided hereditary rights.

The heir exercising the *retrait successoral* is only bound to reimburse the price paid by the original purchaser, and not bound in his action to tender the moneys paid by the purchaser. *Baxter* v. *Phillips*, 23 S. C. R. 317.

See LIMITATION OF ACTIONS, II.

PARTNERSHIP.

I. ACTIONS AND PROCEEDINGS BY AND AGAINST.

Appearance—*Subsequent Proceedings.*]—In an action against two partners sued as a firm in the firm name, though after dissolution, one of the partners appeared in his individual name, and afterwards delivered a statement of defence and counterclaim, also in his individual name. The other partner did not appear.

By Rule 288, "Where partners are sued in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm:"—

Held, that the words "subsequent proceedings" should be confined to proceedings by the plaintiff; and a motion to set aside the pleading was dismissed. *Langman* v. *Hudson and Ramsey*, 14 P. R. 215.

Appearance—*Want of Authority—Judgment—Execution—Creditors' Relief Act—Sheriff.*]—After service of the writ of summons upon one of the partners in an action against a partnership in the firm name, an appearance was entered by a solicitor in the names of both partners individually, but upon the instructions of one partner only and without the authority of the

other. Upon motion by the latter to set aside the appearance and subsequent proceedings:—

Held, that the appearance and the plaintiffs' judgment founded thereon were irregular.

After the judgment had been set aside, several creditors of the defendants obtained judgments against them and placed writs of *fi. fa.* in the sheriff's hands, under which he sold the defendants' goods. Upon a motion by the plaintiffs, made in their own action and also in the several actions in which judgments had been obtained, for an order directing the sheriff to pay the proceeds of the sale into Court, instead of making the usual entries under the Creditors' Relief Act, in order to preserve the priority of the plaintiff's judgment, in case it should be restored upon appeal:—

Held, that there was no power, upon the plaintiffs' application, to interfere with the sheriff's proceedings upon writs of *fi. fa.* regularly in his hands. *Mason* v. *Cooper and Smith*, 15 P. R. 418.

Discovery — *Quasi-Plaintiff.*]—*See Frothingham* v. *Ishister*, 14 P. R. 112, *ante* 401.

Judgment—*Execution.*] — Where an application is made under Rule 876 for leave to issue execution, upon a judgment against a firm, against an alleged member of the firm, who has not admitted that he was and has not been adjudged to be a partner, and who was not served as a partner with the writ of summons, and who disputes his liability, there is no power in a Court or a Judge, under Rule 756 or otherwise, to summarily determine the question of his liability; but an issue must be directed.

Tennant v. *Manhard*, 12 P. R. 619, overruled. *Standard Bank of Canada* v. *Frind & Co.*, 14 P. R. 355.

Judgment—*Execution—Issue—Amendment.*]—The latter part of Rule 876, providing for an application for leave to issue, upon a judgment against a firm, execution against some person as a member of the firm other than those mentioned in sub-secs. (*b*) and (*c*) of the Rule, applies only where there is in truth a partnership which is bound by the judgment obtained against the firm in consequence of the service of the writ of summons upon one of its members or its manager.

Where there is in fact no partnership, no one can be bound by a judgment against an abstraction called "a firm," except the person who has been served under the provisions of Rule 266, and who has appeared or pleaded in the action.

And where the wife of the manager of the business of a so-called firm, who was shewn by the subsequent proceedings to have been merely a trustee for him of the profits, was personally served as a defendant with process in an action against the firm upon a bill of exchange, and defended:—

Held, that, as there was in fact no partnership, an issue directed to determine whether the husband was liable to have execution issued against him as a member of the firm, upon a judgment recovered in the action against the firm, must be found in favour of the husband; and no amendment could be made which would enable the Court to determine otherwise; Hagarty, C.J.O., dissenting.

Per Hagarty, C.J.O.—The husband was in fact the firm itself; his liability for the debts of the firm was established; and it was not clearly wrong to find that he was a member of the firm. But, at any rate, it was a case in which the power to make all necessary amendments could and should be exercised. *Standard Bank of Canada* v. *Frind*, 15 P. R. 438.

Judgment—*Execution—Judgment Summons—Division Court.*]—A member of a partnership, against which a judgment has been recovered in a Division Court in the firm name, who has not been personally served with the summons, and has not admitted himself to be or been adjudged a partner, cannot be proceeded against by an order for committal for non-attendance on a judgment summons.

Decision of Boyd, C., 25 O. R. 573, reversed. *In re Reid* v. *Graham Brothers*, 26 O. R. 126.

Judgment Against Firm — *Proceeding Against Alleged Partner.*]—*See Ray* v. *Ishister*, 24 O. R. 497, 22 A. R. 12, 26 S. C. R. 79, *post* 774 5.

Nominal Corporation—*Status of Corporators—Parties—Application to Add Co-partners.*]—In the case of a nominal corporation which has no legal status as such, the ostensible corporators are partners; and their liability as partners on the contracts of the company is a joint, and not a joint and several, liability.

Where some but not all of the co-contractors are sued in an action, they are entitled of right to have all the others within the jurisdiction added as defendants; and, the plea of abatement having been abolished, the method of exception is by prompt application to the Court under Rule 324.

As to the representatives of deceased or insolvent partners, there is a discretion to add or not. *Gildersleeve* v. *Balfour*, 15 P. R. 293.

Partnership Name—*Action by One Plaintiff—Amendment.*]—A person carrying on business alone, in a name denoting a partnership, cannot bring an action in that name. Where, however, such name consisted of his surname, prefaced by the initials of his Christian names, and followed by the words "and Co.;"—

Held, that these words in the style of cause in an action were mere surplusage, or, if not, they should be struck out; and, as the mistake was trifling, and no one was misled or affected by it, an amendment at the trial should have been granted as of course. *Mason* v. *Mogridge*, 8 Times L. R. 805, distinguished. *Lang* v. *Thompson*, 16 P. R. 516.

Pleading — *Sufficiency of Traverse.*]—*See Mylius* v. *Jackson*, 23 S. C. R. 485, *post* 795.

Slander of Firm — *Right of Action.*]—*See Brieker* v. *Campbell*, 21 O. R. 204, *ante* 353.

II. Dissolution.

Assignment of Interest of Partner—*Possession of Partnership Premises—Tavern License.*]—A partnership for a definite term, which has not expired, can be put an end to by the voluntary assignment by one of the partners of his

ty, C.J.O.—The husband was in itself; his liability for the debts was established; and it was not to find that he was a member of it, at any rate, it was a case in ver to make all necessary amend- nd should be exercised. *Standard ada* v. *Fried*, 15 P. R. 438.

—*Execution—Judgment Summons art.*]—A member of a partnership, a judgment has been recovered in rt in the firm name, who has not y served with the summons, and ted himself to be or been adjudged not be proceeded against by an ittal for non-attendance on a judg- s.

Boyd, C., 25 O. R. 573, reversed. *Graham Brothers*, 26 O. R. 126.

Against Firm — *Proceeding ed Partner.*]—*See Ray* v. *Ashster*, 2 A. R. 12, 26 S. C. R. 79, *post* 774-5.

orporation—*Status of Corporator pplication to Add Co-partners.*]— a nominal corporation which has as such, the ostensible corpora- ers; and their liability as partners ts of the company is a joint, and several, liability.

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Sufficiency of Traverse.]—*See son*, 23 S. C. R. 485, *post* 795.

Firm — *Right of Action.*]—*See pbell*, 21 O. R. 204, *ante* 353.

II. Dissolution.

of Interest of Partner—*Pe- rship Premises—Tavern License.*] o for a definite term, which has n be put an end to by the volun- by one of the partners of his

interest in the business, at his own instance or at the instance of his assignee, against the will of the other partner.

And where a partnership was so put an end to, the assignor being the lessee of the premises on which the business was carried on, and assigning the term to the assignee, the latter was held entitled to recover possession of the premises against the other partner without notice to quit or demand of possession.

Where the holder of a tavern license enters into partnership with another person, to whom he assigns an interest in his tavern business, such assignment is not an assignment of his business within the meaning of sec. 37 of the Liquor License Act, R. S. O. ch. 194, and does not require a transfer of the license.

Under the construction of the partnership agreement in this case, the new partner did not take an undivided one-half interest in the license. *Westbrook* v. *Wheeler*, *Wheeler* v. *Westbrook*, 25 O. R. 559.

Pending Contract.]—*See McCraney* v. *McCool*, 18 A. R. 217, affirming decision reported 19 O. R. 470.

Registered Declaration—*Evidence Contradicting.*]—*See Caldwell* v. *Accident Ins. Co. of North America*, 24 S. C. R. 263, *ante* 418.

Simulated Dissolution—*Husband and Wife —Creditors.*]—In April, 1886, J. S. McL. retired from the firm of McL. Bros., composed of himself and W. McL., and agreed to leave his capital, for which he was to be paid interest, in a new firm to be constituted by W. McL. and another. It was arranged that such capital should rank after the creditors of the old firm had been paid in full. The new firm undertook to carry on business under the same firm name up to 31st December, 1889. J. S. McL. died on 15th November, 1886. His wife, who was separate as to property, had an account in the books of both firms. On 16th April, 1890, an agreement was entered into between the new firm of McL. Bros. and the estate of J. S. McL. and Mrs. J. S. McL., whereby a large balance was admitted to be due by the firm to each. The new firm was declared insolvent in January, 1891. Claims having been filed by the estate of J. S. McL. and by Mrs. J. S. McL., they were contested by the Merchants' Bank, on the following grounds among others:—1, that the bank had been creditors of the firm, and continued to make advances to the new firm on the faith of the agreement of April, 1886; 2, that Mrs. J. S. McL.'s money was part of her husband's capital; 3, that the dissolution was simulated:—

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, Q. R. 2 Q. B. 431, Fournier and King, JJ., dissenting, that the dissolution of the partnership was simulated; that the moneys which appeared to be owing to Mrs. J. S. McL., after crediting her with her own separate moneys, were in reality moneys deposited by her husband in order to confer upon her, during marriage, benefits contrary to law; and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors. *Merchants' Bank of Canada* v. *McLachlan*, *Merchants' Bank of Canada* v. *McLaren*, 23 S. C. R. 143.

See Mitchell v. *Lister*, 21 O. R. 22, 318, *post* 777-8; *Allison* v. *McDonald*, 23 S. C. R. 635, *post* 776.

III. Liability of Partners to Third Persons.

Authority of Partner—*Promissory Note—Fraud—Notice to Holder.*]—E. was a member of the firm of S. C. & Co., and also a member of the firm of E. & Co., and in order to raise money for the use of E. & Co. he made a promissory note which he signed with the name of the other firm, and indorsing it in the name of E. & Co. had it discounted. The officers of the bank which discounted the note knew the handwriting of E., with whom the bank had had frequent dealings. In an action against the makers of the note C. pleaded that it was made by E. in fraud of his partners, and the jury found that S. C. & Co. had not authorized the making of the note, but did not answer questions submitted as to the knowledge of the bank of want of authority:—

Held, reversing the judgment of the Court below, that the note was made by E. in fraud of his partners, and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry, the bank could not recover against C. *Creighton* v. *Halifax Banking Co.*, 18 S. C. R. 140.

Election to Look to One Partner.]—Where goods had been sold and delivered by the plaintiffs to a partnership consisting of the two defendants prior to the dissolution of the firm, the retiring partner set up in an action for the price of the goods that the plaintiffs had agreed to discharge him and look to the remaining partner alone. The only evidence of this was the fact that the plaintiffs had rendered an account for these goods, along with others for which the remaining partner alone was liable, to the remaining partner, and afterwards had accepted promissory notes for the amount, signed in the firm name, with the knowledge that the firm was then composed of the remaining partner only:—

Held, insufficient to shew an agreement such as was set up; for the facts were quite consistent with an intention on the plaintiffs' part to look to both defendants in case the notes should not be paid at maturity. *Bresse* v. *Griffith*, 24 O. R. 492.

Election to Look to One Partner.]—The defendant set up that the plaintiffs had elected to treat the other member of the firm as their sole debtor, by reason of their having proved their claim with and having purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm; and that the defendant had relied and acted upon their conduct and election, and they were therefore estopped from suing him as a partner:—

Held, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiffs' action, no estoppel arose, because the plaintiffs did nothing shewing an

election not to look to him, and he had no right to assume an election from what they did, nor to act as if such an election had been made. *Ray* v. *Isbister*, 24 O. R. 497, 22 A. R. at p. 17. Affirmed, 26 S. C. R. 79.

Incoming Partner—*Assumption of Liabilities — Rights of Creditor — Trust — Novation.*]—A firm consisting of two persons dissolved partnership, the retiring partner receiving a number of promissory notes in payment of his share in the business, which notes he indorsed to the plaintiff H. The continuing partner of the firm afterwards entered into a partnership with O., the defendant, and transferred to the new firm all the assets of his business, his liabilities, including the above mentioned promissory notes, being assumed by the co-partnership and charged against him. The new firm paid two of the notes and interest on others, and made a proposal for an extension of time to pay the whole, which was not entertained :—

Held, reversing the decision of the Court of Appeal, 17 A. R. 456, *sub nom. Henderson* v. *Killey*, and of the Queen's Bench Division, 14 O. R. 137, Fournier, J., dissenting, that the agreement between the continuing partner and the defendant did not make the defendant a trustee of the former's property for the payment of his liabilities, and the act of the defendant in paying some of the notes did not amount to a novation, as it was proved that the plaintiff had obtained and still held a judgment against the maker and indorser of the notes in an action thereon, and there was no consideration for such novation. *Osborne* v. *Henderson*, 18 S. C. R. 698.

Incoming Partner—*Covenant of Indemnity —Assignment of.*]—Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts, and agreements of the firm, no cause of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought against the firm. *Meadburn* v. *Mackelcan*, 19 A. R. 729, and *Leith* v. *Freeland*, 24 U. C. R. 132, distinguished.

Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible. *Sutherland* v. *Webster*, 21 A. R. 228.

Judgment Against Firm—*Action thereon against Alleged Partner—Res Judicata—Partnership by Estoppel.*]—An action was brought against a firm in the firm name as makers, and an individual as indorser, of a note, and was dismissed as against the indorser on the ground that he had indorsed at the request of the holders for their accommodation, judgment being given against the firm :—

Held, reversing the judgment of Street, J., 24 O. R. 497, that the dismissal of this action was an answer to an action on the judgment, in which it was sought to prove that the indorser was, as regards the plaintiffs, a partner by estoppel, and therefore bound by the judgment against the firm :—

Held, however, affirming the judgment of Street, J., that the plaintiffs had the right to proceed by action on the judgment and to try therein the question whether the defendant was a member of the firm so as to be bound by the judgment. *Clark* v. *Cullen*, 9 Q. B. D. 355, followed. *Ray* v. *Isbister*, 22 A. R. 12. Affirmed 26 S. C. R. 79.

Partnership by Estoppel.]—When a person not in fact a partner, authorizes his name to be used in the firm name of a partnership, there is a holding out of himself as a partner to any one who knows or has reason to believe that the represents the name of the person so authorizing its use; but a partnership by estoppel by holding out will not be created if the real position of affairs is known to the creditor.

Judgment of the Common Pleas Division, 20 O. R. 683, reversed in part. *McLean* v. *Carr*, 20 A. R. 660.

Partnership by Estoppel.]—Action against the defendant S. W., as a member of the firm of S. W. & Son, on promissory notes made by the firm in favour of the plaintiff. The defence was that the defendant had retired from the firm long before the notes were made, and, though his son had carried on the business under the same firm name, he, S. W., had no interest in it; also that at the most he could be liable only in respect to the business of a general country store, which was the business of the firm before he withdrew, and not for that of buying and selling real estate and investing in securities, which business his son alone had carried on, and in respect of which the notes in question were given.

The trial Judge gave judgment for the plaintiff, and the Court of Appeal affirmed it, holding that public notice of the dissolution of the partnership between the defendant and his son had not been given; that the defendant was aware that his name still appeared as a member of the firm on the bill-heads and in other ways; that he was aware of the general nature of the new business carried on by his son in the firm name; and that the defendant was therefore liable on the notes.

The Supreme Court of Canada affirmed the judgment of the Court of Appeal. *Wiper* v. *Williams*, 24 S. C. R. 713.

Promissory Note of Partnership—*Dissolution—Discharge of Collateral Security—Release of Retiring Partner.*]—A. and B., partners in business, borrowed money from C., giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved, A. assumed all the liabilities of the firm and continued to carry on the business alone. After the dissolution, C. gave A. a discharge of the mortgage, but without receiving payment of the debt, and afterwards brought an action against B. on the promissory note :—

Held, affirming the decision of the Court of Appeal, 20 A. R. 695, that the note having been given for the mortgage debt, C. could not recover without being prepared, upon payment, to convey to B. the mortgaged lands, which he had incapacitated himself from doing :—

Held, also, that, by the terms of the dissolution of the partnership, the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change, B.

release of the principal, A., discharged B., the surety, from the liability for the debt. *Allison v. McDonald*, 23 S. C. R. 635.

IV. Partnership and Separate Estate.

Assignment by Firm for Benefit of Creditors *General Property of Partners.*]—Held, by the Queen's Bench Division, that an assignment under R. S. O. ch. 124, for the general benefit of creditors, made by the members of a trading partnership, in the words mentioned in sec. 4, vests in the assignee all the properties of each of the partners, several as well as joint. But, by the Court of Appeal, that the benefit of a covenant by a third person to indemnify one of the partners against a mortgage does not pass to the assignee. *Ball v. Tennant*, 25 O. R. 50, 21 A. R. 602.

Assignment by Partner for Benefit of Creditors—*Rights of Partnership Creditors.*]—Where an assignment for the benefit of creditors is made by an assignor carrying on business by himself, creditors having claims against him for goods sold to a firm in which he was formerly a partner are entitled to rank against his estate ratably with creditors having claims for goods sold to the assignor alone.

Section 5 of R. S. O. ch. 124 does not apply to such a case, but only to the case of an assignor who has both separate estate and joint estate. *Macdonald v. Balfour*, 20 A. R. 404.

Execution against Partner —*Seizure of Partnership Property.*]—Under an execution against an individual partner the sheriff can seize the partnership goods and sell the execution debtor's share, whatever may be the difficulties which arise thereafter; and the Judicature Act has made no difference in this respect. *Harrison v. Harrison*, 14 P. R. 436.

Partner as Surety — *Cross-examination — Liabilities of Firm.*]—A surety on a bond, who is a member of a mercantile partnership, but justifies on his own individual property, not on his share in the partnership, is not compellable, upon cross-examination on his affidavit of justification, to disclose the liabilities of the partnership. *Douglas v. Blackey*, 14 P. R. 504.

V. Partnership Lands.

Sale by One Partner—*Refusal of Other to Consent—Rights of Purchaser.*]—*See Crain v. Ripple*, 22 O. R. 519, 20 A. R. 291, *post*, Specific Performance, III.

See Bury v. Murphy, 22 S. C. R. 137, *post* 778.

VI. Rights and Liabilities of Partners Between Themselves.

Account —*Jurisdiction of County Court.*]—*See Allen v. Fairfax Cheese Co.*, 21 O. R. 598, *ante* 247.

Breach of Articles — *Business Done by Partner—Remedy.*]—Where articles of partnership bound the parties to be just and true to each other, and to devote their time diligently to the concerns of the firm, and not to engage in any other business; and it appeared that after notice of dissolution had been given, one of the partners had taken orders on his own account to be filled by him after the termination of the partnership:—

Held, that his co-partner had no equity to compel him to account for the profits of the business thus done by him. The remedies in such a case are by injunction, or by action for damages. *Dean v. MacDowell*, 8 Ch. D. 345, followed. *Mitchell v. Lister*, 21 O. R. 318.

Costs in Partnership Actions.] —*See* Costs, VI.

Discovery—*Action for Account.*]—*See Mack v. Dobie*, 14 P. R. 465, *ante* 401.

Distribution of Assets.] — In partnership actions, in the absence of special circumstances such as misconduct or negligence, the assets will be applied, first, in payment of creditors, next, in payment of the sum found due to the successful party, and lastly, in payment of the costs of all parties. *Hamer v. Giles*, 11 Ch. D. 942, followed. *Chapman v. Newell*, 14 P. R. 208.

Mandate — *Termination — Action — Account —Partnership Moneys—Sequestration.*]—In November, 1886, G. B. by means of a *contre-lettre* became interested in certain real estate transactions in the city of Montreal, effected by one P. S. M. In December, 1886, G. B. brought an action against P. S. M. to have a sale made by the latter to one Barsalou declared fraudulent, and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. A plea of compensation was filed, and pending the action a sequestrator was appointed, to whom Barsalou paid over the money. In September, 1887, another action was instituted by G. B. against P. S. M. asking for an account of the different real estate transactions they had conformably to the terms of the *contre-lettre*. To this action a plea of compensation was also filed. The Superior Court dismissed the first action on the ground that G. B. had no right of action, but maintained the second action, ordering an account to be taken. The Court of Queen's Bench affirmed the judgment of the Superior Court dismissing the first action, and P. S. M. acquiesced in the judgment of the Superior Court in the second action. On appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench dismissing the first action:—

Held, reversing the judgment of the Court below, that the plea of compensation was unfounded, G. B. having the right to put an end to P. S. M's. mandate by a direct action, and therefore, until the account which had been ordered in the second action had been rendered, the moneys should remain in the hands of the sequestrator appointed with the consent of the parties. *Rees v. Murphy*, 22 S. C. R. 137.

Receiver —*Appointment.*]—Where partnership articles provide that on dissolution the partners shall appoint a person to collect the accounts and settle the partnership affairs, the Court will, on failure of the parties to agree on

some person, appoint a receiver. *Mitchell* v. *Lister*, 21 O. R. 22.

Receiver—*Interim Sale of Assets.*]—Under special circumstances an order may be made, in an action for the dissolution and winding-up of an insolvent partnership, for the sale of assets by the receiver before the trial. *McLaren* v. *Whiting*, 16 P. R. 552.

Services—*Remuneration.*]—If the business of winding up a partnership concern is apportioned between the partners, and each undertakes to perform the share allotted to him, one of them cannot afterwards claim to be paid salary or other remuneration merely for the reason that his share of the work has been more laborious or difficult than that performed by his co-partner, in the absence of any express agreement to that effect, or one to be implied from the conduct of the parties. *Liggett* v. *Hamilton*, 24 S. C. R. 665.

See Creighton v. *Halifax Banking Co.*, 18 S. C. R. 140, *ante* 774; *Osborne* v. *Henderson*, 18 S. C. R. 698, *ante* 775; *Allison* v. *McDonald*, 23 S. C. R. 635, *ante* 776; *Sutherland* v. *Webster*, 21 A. R. 228, *ante* 775; *Westbrook* v. *Wheeler*, 25 O. R. 559, *ante* 772.

PATENT FOR INVENTION.

Forfeiture—*Improper Importation.*]—Where the subject of a patent is a new combination of old devices, the patentee cannot import such devices in a manufactured state, and simply apply his combination to them in Canada, without violating the prohibition against importation contained in sec. 28 of the Patent Act, 1872. *Mitchell* v. *Hancock Inspirator Co.*, 2 Ex. C. R. 539.

Forfeiture — *Improper Importation.*] — To bring an importation by the patentee within the prohibition of sec. 37 of the Patent Act, R. S. C. ch. 61, it is necessary that it consist of, or affect, the particular invention in respect of which the patent has been granted. *Wright* v. *Bell Telephone Co.*, 2 Ex. C. R. 552.

Forfeiture—*Non-manufacture.*]—Section 37 of the Patent Act, R. S. C. ch. 61, does not require the patentee, or his legal representatives, to personally manufacture his invention in Canada. So long as he puts it within the power of persons to obtain the invention at a reasonable price in Canada, he fulfils the requirement of the statute. *Brook* v. *Broadhead*, 2 Ex. C. R. 562.

Forfeiture — *Non-manufacture* — *Improper Importation.*]—Although a patentee may not have commenced to manufacture the patented article within the period limited in sec. 28 of 35 Vict. ch. 26, as amended by 38 Vict. ch. 14, sec. 2, yet so long as he is in a position either to furnish it, or to license its use, at a reasonable price to any person desiring to use it, his patent ought not to be declared forfeited.

(2.) It is not incumbent upon a patentee to shew that he has made active efforts to create a market for his patented invention in Canada. It rests upon those who seek to defeat the patent to shew that he neglected or refused to sell the invention for a reasonable price when proper application was made to him therefor.

(3.) The intention of the legislature in enacting the provisions of sec. 28 of 35 Vict. ch. 26, which prohibit the patentee from importing his invention in a manufactured state after the expiry of a given time from the granting of his patent, was to protect the industrial interests of Canada, and the prohibition should not be extended to operate a forfeiture in cases where the character and circumstances of the importation tend to promote rather than prejudice such interests.

(4.) If, after the time has expired wherein the patentee may have imported the invention without prejudice to his rights, he consents to its importation by others, such consent brings him within the prohibition of the statute and avoids his patent. *Barter* v. *Smith*, 2 Ex. C. R. 455.

Forfeiture — *Non-manufacture* — *Improper Importation.*]—Where the owner of several patents illegally imports elements common to the composition of all his inventions, but uses the same in the construction of one of them only, such importation operates a forfeiture in respect of the particular invention so constructed, but does not affect the other patents.

A patentee is within the meaning of the law in regard to his obligation to manufacture, when he has kept himself ready either to furnish the patented article or to sell the right of using, although not one single specimen of the article may have been produced, and he may have avoided his patent by refusal to sell, although his patent is in general use. *Toronto Telephone Mfg. Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 524.

Forfeiture—*Non-manufacture* — *Refusal to sell* — *Improper Importation.*]—If an article imported by a patentee and used by him in the construction of his invention is a common commercial article employed for many purposes, and is not specified in the patentee's claim as an essential part of his invention, such importation does not operate a forfeiture of the patent.

(2.) A fair test of the patentee's ability to freely import any article required in the construction of his invention is to ascertain if it is open to every person in Canada to manufacture, import, sell, and use the same without thereby infringing the patent in question. If the article is thus part of the public domain, the patentee is at liberty either to import it or purchase it in Canada for the purposes of such construction.

(3.) Where the subject of a patent is a combination of elements, and one of them is a novelty invented by the patentee, such novelty is in the same position as the other elements with respect to importation by him unless its production or manufacture is covered by the patent in question.

(4.) There is no express provision in the statute imposing the penalty of forfeiture for importing into Canada the various parts of the invention in respect of which the patent was granted, much less for importing one of its parts. The words of the statute are "the invention for which the patent is granted," and they ought not to be extended beyond their plain meaning. In administering the statute, the Minister can only apply the penalty to the offence which the statute forbids. He cannot apply it to an attempt to evade the statute.

(5.) In imposing penalties Parliament must take its own measures to prevent evasion, and it would be most unsafe to impose, in the case of an evasion, the heavy penalty which the law has levelled at the principal offence, on the theory, which may or may not be correct, that Parliament intended by an equal penalty to forbid the doing of that which would be almost or quite an equivalent of the principal offence.

(6.) Where the article patented is of delicate and skilful manufacture, and one from which the patentee can only reap the reward of his labour and expenditure through its being esteemed successful by the public, it is reasonable for him, at a time when public opinion with respect to it is in suspense, to decline to sell his invention unconditionally to those who, by unsuitable use, would fail to derive benefit from it themselves, and would create an impression in the public mind that the invention was a failure. If, upon application made to him for the purchase of his invention, he imposes a limitation in respect of its use, he ought not to be held to have thereby forfeited his patent, unless it appear that such limitation is imposed for the purpose of evading compliance with the provisions of the statute which require him to sell the patented invention at a reasonable price.

(7.) In relation to the provisions of sec. 37 of the Patent Act touching the price of the patented invention to purchasers, it would appear that the evil the statute was principally intended to prevent is the exaction of exorbitant prices under the monopoly secured by the patent. *Royal Electric Company of Canada* v. *Edison Electric Light Co.*, 2 Ex. C. R. 576.

Forfeiture—*Non-manufacture — Refusal to Sell—Improper Importation—Connivance.*]—The importation of the component parts of a telephone, in such a state of manufacture as to simply require putting together in Canada to make the completed instrument, falls within the prohibition of sec. 28 of 35 Vict. ch. 26, as amended by 38 Vict. ch. 14, sec. 2.

Upon application being made to the respondents to purchase a number of their telephones for private purposes, they refused to sell the same, accompanying such refusal by the statement: "We do not sell telephones, but we rent them:"—

Held, that the respondents had thereby afforded a good ground for forfeiture of their patent.

Connivance by the patentee in an improper importation is equal to importing or causing to be imported within the meaning of the statute. *Toronto Telephone Manufacturing Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 495.

Interpretation of Grant.]—The granting of letters patent to inventors is not the creation of an unjust monopoly, nor the concession of a privilege by mere gratuitous favour, but it is a contract between the state and the discoverer, which, in favour of the latter, ought to receive a liberal interpretation. *Barter* v. *Smith*, 2 Ex. C. R. 455.

Jurisdiction of Minister of Agriculture.]—The jurisdiction in respect to the avoidance of patents conferred upon the Minister of Agriculture by sec. 28 of the Patent Act of 1872 is exclusive of that possessed by any other tribunal in the Dominion. *Toronto Telephone Manufacturing Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 524.

Licence to Manufacture—*Right of Licensee to Terminate.*]—The defendants were licensees of a patent under an agreement whereby they had to pay certain royalties to the patentee, and in consideration thereof were empowered to manufacture the patented machine in question, to the end of the term of the letters patent. Subsequently the defendants became possessed of an undivided one-fourth interest in the patent, and they thereupon gave notice to the plaintiff, who was the holder of the patent and entitled to the benefit of the above agreement, that they would, after a day named, terminate the agreement and make no further payments for royalties, but would manufacture the machine in question as owners of an undivided one-fourth interest in the patent:—

Held, that the defendants were entitled so to do.

If an interest is transferred in a patent, then it requires the consent of both parties to put an end to the transfer; but if the transaction is merely permission on certain terms to invade the monopoly, then the licensee may, at his option, renounce the license and make the machine patented at his peril. *Noxon* v. *Noxon*, 24 O. R. 401.

Novelty—*Combination.*]—An invention consisting of a new and useful combination of well known materials or devices, which produces a result not theretofore so obtained, is a proper subject for a patent. *Toronto Telephone Manufacturing Co.* v. *Bell Telephone Co.*, 2 Ex. C. R. 495.

—Novelty—*Combination.*]—A new combination of known elements is an invention, and as such is patentable. The person who has devised such new combination has all the rights and privileges of an inventor, even if the novelty consists in a trifling mechanical change, provided, in the latter case, some economic or other result is produced in some way different from what was obtained before. *Mitchell* v. *Hancock Inspirator Co.*, 2 Ex. C. R. 539.

Novelty—*Combination.*]—In an application for a patent the object of the invention was stated to be the connection of a spring tooth with the drag-bar of a seeding machine, and the invention claimed was "in a seeding machine in which independent drag-bars are used, a curved spring tooth, detachably connected to the drag-bar, in combination with a locking device arranged to lock the head block to which the spring tooth is attached, substantially as and for the purpose specified." In an action for infringement of the patent it was admitted that all the elements were old, but it was claimed that the substitution of a curved spring tooth for a rigid tooth was a new combination, and patentable as such:—

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the alleged invention, being the mere insertion of one known article in place of another known article, was not patentable. *Smith* v. *Goldie*, 9 S. C. R. 46, and *Hunter* v. *Carrick*, 11 S. C. R. 300, referred to. *Wisner* v. *Coulthard*, 22 S. C. R. 178.

Novelty—*Combination—Milk-aerator.*]—*See Fowell* v. *Chown*, 25 O. R. 71, 22 A. R. 268.

Novelty — *Infringement.*]—C. & Co. were assignees of a patent for a check book used by shopkeepers in making out duplicate accounts of sales. The alleged invention consisted of double leaves, half being bound together and the other half folded in as fly leaves, with a carbonized leaf bound in next the cover, and provided with a tape across the end. What was claimed as new in this invention was the device, by means of the tape, for turning over the carbonized leaf without soiling the fingers or causing it to curl up. H. made and sold a similar check book with a like device, but, instead of the tape, the end of the carbonized leaf, for about half an inch, was left without carbon, and the leaf was turned over by means of this margin. In an action by C. & Co. against H. for infringement of their patent:—

Held, affirming the decision of the Exchequer Court, 3 Ex. C. R. 351, that the evidence at the trial shewed the device for turning over the blank leaf without soiling the fingers to have been used before the patent of C. & Co. was issued, and it was therefore not new; that the only novelty in the patent was in the use of the tape; and that using the margin of the paper instead of the tape was not an infringement. *Carter & Co.* v. *Hamilton*, 23 S. C. R. 172.

Novelty —*Specification—Ambiguity.*]—There is no inventive merit in making in one piece the cap-bar and protector of a washing machine, the cap-bar and protector having been previously made in two separate pieces.

A specification providing merely that such a protector is to be arranged "at an angle" is void for uncertainty. *Taylor* v. *Brandon Manufacturing Co.*, 21 A. R. 361.

Particulars —*Defence—Action for Infringement.*]—In making an order for particulars of the defence in a patent action, the better practice is to provide merely for exclusion of evidence in case of no particulars or insufficient particulars being delivered, and not to order the excision of the defence, if good *per se*.

And where both excision of the pleading and exclusion of evidence were provided for in an order:—

Held, that the discretion of a Judge in Chambers in striking out the provision for excision was rightly exercised. *Noxon Brothers Manufacturing Co.* v. *Patterson and Brother Co.*, 16 P. R. 40.

Prior Manufacturer — *Rights of.*]—Section 46 of the Patent Act, R. S. C. ch. 61, does not authorize one who has, with the full consent of the patentee, manufactured and sold a patented article for less than a year before the issue of the patent to continue the manufacture after the issue of the patent, but merely permits him to use and sell the articles manufactured by him prior thereto. *Fawcett* v. *Crown*, 25 O. R. 71.

Promissory Note—"*Given for a Patent Right.*"]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, I.

PATENT FOR LAND.

See CROWN LANDS, V., VI.

PAYMENT.

See LIEN, III.—MORTGAGE, XI., XVII.

I. PAYMENT OF MONEY INTO COURT.

Insurance Moneys — *Trustees — Conflicting Claims.*]—On an application by a benevolent society for leave to pay insurance money into Court, claimed by different parties:—

Held, that sub-sec. 5 of sec. 53 of the Judicature Act extends the benefit of the Act for the relief of trustees to such cases, and that the society was entitled to pay the money in. *Re Bajus*, 24 O. R. 397.

Judgment—*Indemnity.*]—Where judgments were recovered against the plaintiff, and he sued the defendants upon a bond of indemnity to recover the amounts of the judgments, although he had not himself paid them:—

Held, that the defendants should be ordered to pay the amounts into Court. *Boyd* v. *Robinson*, 20 O. R. 404.

Mechanics' Liens — *Discharge of Owner—Costs.*]—In a mechanics' lien action a certain sum was found due from the owner to the contractor, and the latter was found indebted to other lienholders. Payment of the former sum into Court was ordered and made, the amount, however, being insufficient to pay the claims of lienholders against the contractor. The latter then appealed unsuccessfully, and was ordered to pay the costs of appeal to the owner, who claimed that these costs should be paid out of the moneys paid by her into Court:—

Held, that by the payment into Court for distribution she was discharged from her liability and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in. *Patton* v. *Laidlaw*, 26 O. R. 589.

Payment in with Defence.]—*See Henderson* v. *Bank of Hamilton*, 25 O. R. 641, 22 A. R. 414, *post* 786; *Davis* v. *National Assurance Co. of Ireland*, 16 P. R. 116, *post* 796.

Protection against Incumbrances.]—*See Armstrong* v. *Anger*, 21 O. R. 98, *post*, SALE OF LAND, I.

II. PAYMENT OF MONEY OUT OF COURT.

Infant—*Administrator.*]—The administratrix of a deceased party who had died before the Devolution of Estates Act came into force was allowed to take out of Court a sum of $210, which was part of the personal estate of the deceased, notwithstanding that two infants were among the next of kin who would be entitled to

share in the estate after the payment of debts, etc. *Hanrahan* v. *Hanrahan*, 19 O. R. 396, followed. *Re Parsons—Jones* v. *Kelland*, 14 P. R. 144.

Infant — *Administrator.*]—Money in Court belonging at the time of her death to an intestate was paid out to her administrator, notwithstanding that infants might be or might become entitled to it or a share of it.

Semble, if the money belonged specifically to infants, the disposition might be otherwise. *Stewart* v. *Whitney*, 14 P. R. 147.

Infant—*Marriage—Foreign Law.*]—Where a female was entitled at majority to payment out of Court of a sum of money, and it appeared that, although only nineteen years of age, she was married and domiciled in a foreign country, by the laws of which a female is entitled upon marriage to receive money due her, an order was made for immediate payment out. *Kavanagh* v. *Lennon*, 16 P. R. 229.

Legacy—*Vested Interest—Assignment—Distribution.*]—Two devisees of full age having a vested interest absolute in a definite fund in Court, although not divisible by the terms of the will until a third devisee attained twenty-one, having assigned their interest in the fund to a purchaser, the Court, the estate having been otherwise wound up, made an order for payment out to the assignee, without waiting for the period of distribution. *Re Wartman*, 22 O. R. 691.

Lunatic—*Maintenance—Inspector.*]—Sections 48 and 49 of the Act respecting lunatic asylums and the custody of insane persons, R. S. O. ch. 245, providing that the inspector of prisons and public charities may take possession of the property of lunatics to pay for maintenance, do not apply to money in Court.

Where the property of the lunatic is money in Court, the inspector must apply for payment out under sec. 61, and must shew clearly that the person to whom the money in Court belongs is a lunatic, and that the purpose for which the money is sought is to pay charges for maintenance of the lunatic in a public asylum; but it is not necessary, having regard to sec. 1, sub-sec. 2, that the person shall have been, or shall be, declared a lunatic. *Re McKenzie, Re Lind, Re Campbell*, 14 P. R. 421.

Result of Proceedings—*Appeal.*]—By the terms of a consent order, a sum of money was to be retained in Court to abide the result of such proceedings as the plaintiffs might be advised to take to assert and enforce their rights and remedies with respect to a claim made by them, and such proceedings were to be commenced within four months. Substantially the sum of money was to represent that which the plaintiffs claimed, and they were to have it if their claim proved a valid one. The plaintiffs brought this action to enforce their claim, and carried it to the Court of Appeal, where it was dismissed. They then commenced an appeal to the Supreme Court of Canada:—

Held, that this appeal was one of the proceedings, or part of such proceedings, as the plaintiffs were at liberty to take under the order, and, until its determination, the money should not be paid out. *City of Toronto* v. *Toronto Street R. W. Co.*, 15 P. R. 358.

See Agricultural Ins. Co. v. *Sargent*, 16 P. R. 397, *ante* 137.

III. PAYMENT TO CREDITORS.

Appropriation of Payments.]—Appropriation of payments is a question of intention; and where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold, and crediting him with moneys received, and crediting and charging notes on account in such a way as to render the original indebtedness undistinguishable, there is no irrebutable presumption that the payments are to be applied upon the original indebtedness. *Griffith* v. *Crocker*, 18 A. R. 370.

Appropriation of Payments.]—*See Verdon* v. *Town of Thorold*, 22 S. C. R. 390, *ante* 143.

Bank—*Special Deposit—Refusal to Pay—Damages—Costs.*]—The damages recoverable by a non-trading depositor in the savings bank department of a bank who has made his deposit subject to special terms, on the wrongful refusal of the bank to pay it to him personally, are limited to the interest on the money.

Marzetti v. *Williams*, 1 B. & Ad. 415, and *Rolin* v. *Steward*, 14 C. B. 594, distinguished.

A bank having received a deposit subject to certain notice of withdrawal, if required, cannot set up as a defence to an action for the deposit the absence of such notice, unless the refusal to pay was based on that ground.

The defendants having paid into Court twenty cents less than the correct amount due by them, the plaintiff was held entitled to full costs. *Henderson* v. *Bank of Hamilton*, 25 O. R. 641.

See, upon appeal, 22 A. R. 414.

Cheque of Third Person — *Presentment—Notice of Dishonour — Delay.*]—Where the cheque of a third person is received from a debtor as conditional payment of an antecedent debt, the creditor must without undue delay present the cheque for payment, and, if it is dishonoured, notify the debtor of the fact and claim recourse against him on the original indebtedness. Unless this is done, the creditor will be taken to have accepted the cheque in payment of the debt, and the debtor is discharged. *Saucer* v. *Thomas*, 18 A. R. 129.

Cheque of Third Person—*Transfer.*]—The handing by a debtor to his creditor of the cheque of a third person upon a bank in the place where the creditor lives, the maker of the cheque having funds there to meet it, is a "payment of money to a creditor" within the meaning of R. S. O. ch. 124, sec. 3, sub-sec. 1. *Armstrong* v. *Henstreet*, 22 O. R. 336. Overruled by the Court of Appeal in *Davidson* v. *Fraser*, 23 A. R.

See Rogers v. *Devitt*, 25 O. R. 84, *post*, SALE OF GOODS.

PENAL ACTIONS AND PENALTIES.

Arbitrators' Fees—*Penalty for Overcharge.*]—*See Jones* v. *Godson*, 25 O. R. 444, 23 A. R. 34, *ante* 34.

Contract—*Penalty for Delay—Damages.*]—*See Kerr Engine Co.* v. *French River Tug Co.*, 21 A. R. 160, 24 S. C. R. 703, *ante* 323.

Foreign Judgment—*Penalty.*]—The Courts of this Province will not indirectly enforce the penal laws of a foreign country by entertaining an action founded on a judgment obtained in that foreign country in a penal action. The Court being divided in opinion, both as to the penal nature of the judgment sued on and as to whether the law applicable to such question was that of the foreign country or of this Province, the appeal was dismissed, and the judgment of Street, J., 17 O. R. 245, was affirmed. *Huntington* v. *Attrill*, 18 A. R. 136. *See* the next case.

Foreign Judgment—*Penalty*]—To an action by the appellant in an Ontario Court upon a judgment of a New York Court against the respondent under sec. 21 of New York State Laws of 1875, ch. 611, which imposes liability in respect of false representations, the latter pleaded that the judgment was for a penalty inflicted by the municipal law of New York, and that the action, being of a penal character, ought not to be entertained by a foreign Court :—

Held, that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights, was remedial, and not penal in the sense pleaded. It was not within the rule of international law which prohibits the Courts of one country from executing the penal laws of another or enforcing penalties recoverable in favour of the State :—

Held, further, that it was the duty of the Ontario Court to decide whether the statute in question was penal within the meaning of the international rule so as to oust its jurisdiction ; and that such Court was not bound by the interpretation thereof adopted by the Courts of New York. *Huntington* v. *Attrill*, [1893] A. C. 150.

Fraudulent Transfer—*13 Eliz. ch. 5—Action—Evidence—Privilege—Appeal.*]—An action by the party aggrieved to recover the moiety of the penalty imposed by sec. 3 of 13 Eliz. ch. 5 may be joined with an action to set aside a fraudulent transfer under that Act, in this case the transfer of certain promissory notes.

Bills and notes are, by virtue of the legislation passed since 13 Eliz., goods and chattels within that Act.

Section 28 of the R. S. C. ch. 173 only applies to the concluding part of said sec. 3, namely, that relating to imprisonment on conviction, etc.

Where a defendant at the trial raises no claim of privilege, if any such exists, to his being examined in support of a claim for the recovery of the penalty under the statute of Elizabeth, such claim cannot afterwards be set up on appeal to the Divisional Court. *Millar* v. *McTaggart*, 20 O. R. 617.

Parliamentary Elections—*Action for Penalty—Discovery—Examination of Defendant.*]—*See Malcolm* v. *Race*, 16 P. R. 330, *ante* 403.

Parliamentary Elections—*Penalty for Refusal of Vote.*]—*See Johnson* v. *Allen*, 26 O. R. 550, *ante* 760.

See DAMAGES, IV.

PENSION.

Retiring Pension—*Surrender—Cancellation—Rights of Wife.*]—D., a retired employee of the Government of Quebec, in receipt of a pension under Arts. 676 and 677, R. S. Q., surrendered said pension for a lump sum to the Government, and subsequently he and his wife brought an action to have it revived and the surrender cancelled. By Art. 690 of R. S. P. Q. the pension or half-pension is neither transferable nor subject to seizure, and by Art. 683 the wife of D. on his death would have been entitled to an allowance equal to one-half of his pension :—

Held, reversing the decision of the Court of Review, Strong, C J., and Sedgewick, J., dissenting, that D. after his retirement was not a permanent official of the Government of Quebec, and the transaction was not, therefore, a resignation by him of office and a return by the Government, under Art. 688, of the amount contributed by him to the pension fund ; that the policy of the legislation in Arts. 685 and 690 is to make the right of a retired official to his pension inalienable, even to the Government ; that D.'s wife had a vested interest jointly with him during his life in the pension, and could maintain proceedings to conserve it ; and therefore that the surrender of the pension should be cancelled. *Dionne* v. *The Queen*, 24 S. C. R. 451.

See Ostrom v. *Benjamin*, 20 A. R. 336, *ante* 747.

PERFORMANCE.

See CONTRACT, IV.

PETITION OF RIGHT.

See CROWN—CROWN LANDS, V.

PHYSICAL EXAMINATION.

See EVIDENCE, IV.

PLACE OF TRIAL.

See TRIAL, VII.

PLANS AND SURVEYS

Amendment of Plan — *Closing Street — "Party Concerned"—Land Titles Act.*]—All persons who buy lots according to a registered plan do not *ipso facto* become "parties concerned" within the meaning of sec. 7 of the Land Titles Act, 52 Vict. ch. 20 (O.), in every street shewn upon it. Whether they are "concerned" or not in having a particular street kept open, is a question of fact ; and in this case, in the absence of any representation at the time of the sale, by the vendor, that the street would be kept open, it was held that a person owning a lot several hundred yards away, and on the other side of a highway from the street in question, could not object to its being closed. *In re Mellmurray and Jenkins*, 22 A. R. 398.

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n—*Surrender—Cancellation* D., a retired employee of uebec, in receipt of a pen- and 677, R. S. Q., surren- for a lump sum to the sequently he and his wife have it revived and the By Art. 690 of R. S. P. Q. ension is neither transfer- eizure, and by Art. 683 the h would have been entitled al to one-half of his pen-

e decision of the Court of J., and Sedgewick, J., dis- r his retirement was not a the Government of Quebec, was not, therefore, a resig- ffice and a return by the Art. 688, of the amount to the pension fund; that islation in Arts. 685 and 690 of a retired official to his even to the Government; vested interest jointly with in the pension, and could s to conserve it; and there- ler of the pension should be v. *The Queen*, 24 S. C. R.

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AND SURVEYS

f Plan — *Closing Street* — —*Land Titles Act.*]—All per- ecording to a registered plan ceome "parties concerned" of sec. 7 of the Land Titles O (O.), in every street shewn they are "concerned" or not ar street kept open, is a ques- n this case, in the absence of at the time of the sale, by e street would be kept open, person owning a lot several y, and on the other side of a street in question, could not closed. *In re McMurray* R. 398.

Boundary—*Ascertainment.*]—Where there is a dispute as to the boundary line between two lots granted by patents from the Crown, and it has been found impossible to identify the original line, but two certain points have been recorded in the Crown Lands Department, the proper course is to run a straight line between the two certain points: R. S. Q. Art. 4155. *Bell's Asbestos Co.* v. *Johnson's Co.*, 23 S. C. R. 225.

Description—*Evidence.*]—The description of a lot prepared for and used by the Crown Lands Department in framing the patent, which grants the lot by number or letter only, is admissible evidence to explain the metes and bounds of that lot.

The plan of survey of record in and adopted by the Crown Lands Department governs on a question of location of a road, when the surveyor's field notes do not conflict with the plan, and no road has been laid out on the ground. *Kenny* v. *Caldwell*, 21 A. R. 110, 24 S. C. R. 699.

Monuments—*Evidence—Road Allowance.*]—Monuments placed in compliance with the provisions of secs. 34, 35, 36, and 37 of R. S. O. 1877 ch. 146 must be placed at the true corners, governing points, or off-sets, or at the true ends of concession lines, and there is nothing in these sections making a survey thereunder or the placing of the monuments conclusive, whether right or wrong, and evidence may be received in contradiction. So held on a case reserved from General Sessions on an indictment for obstruction of a highway, being the town line between two counties. *Tanner* v. *Bissell*, 21 U. C. R. 553; *Regina* v. *McGregor*, 19 C. P. 69; *Re Fairbairn and Sandwich East*, 32 U. C. R. 573; and *Boley* v. *McLean*, 41 U. C. R. 260, distinguished. *Regina* v. *Cosby*, 21 O. R. 591.

Registered Plan—*Sale of Lots—Way.*]—Under the Municipal and Surveyors' Acts, by the filing of a plan, and the sale of lots according to it, abutting on a street, the property in the street becomes vested in the municipality, although they may have done no corporate act by which they have become liable to repair. *Roche* v. *Ryan*, 22 O. R. 107.

Registered Plan—*Sale of Lots—Way.*]—A street or road laid out upon a registered plan of a township lot, where, although houses are clustered, there is not an incorporated village, continues to be a private street or road, although the owner should sell a lot fronting on it, until the township council adopts it as a public highway, or until the public by travelling upon it has accepted the dedication offered by the proprietor.

R. S. O. ch. 152, sec. 62, only applies to cities, towns, or incorporated villages.

A person who purchases lots according to such a plan, abutting upon streets laid out thereon, acquires, as against the person who laid out the plot and sold him the land, a private right to use those streets, subject to the right of the public to make them highways, in which case the private right becomes extinguished.

The right so to use a private road does not necessarily mean a right over every part of the roadway, but only to such a width as may be necessary for the reasonable enjoyment of it. *Sklitzsky* v. *Cranston*, 22 O. R. 590.

See CROWN, I.

PLEADING.

I. AMENDMENT OF PLEADINGS.

Bills of Sale Act.]—Under Rule 444 an amendment should be allowed at any stage of the proceedings, if it can be made without injustice to the other side; and there is no injustice if the other side can be compensated by costs. *Steward* v. *North Metropolitan Tramways Co.*, 16 Q. B. D. 556, applied and followed, notwithstanding the difference in the English Rule.

And *semble*, a matter of mere hardship should not govern the question of granting or refusing an amendment.

And where, in an action to recover possession of a chattel, the defendants, who were subsequent *bonâ fide* purchasers for value without notice of the plaintiff's purchase, were at the trial refused liberty to amend their defence by setting up the provisions of the Bills of Sale Act, which amendment would have called for no additional evidence, a Divisional Court allowed it upon appeal. *Williams* v. *Leonard*, 16 P. R. 544. Affirmed by the Court of Appeal, 17 P. R. 73, and by the Supreme Court.

Possession—*Limitation of Actions.*]—In an action *en déclaration d'hypothèque* for the balance due on the purchase price of land, secured by a *bailleurs de fonds* privilege, the defendants pleaded that they had acquired the property in good faith by a translatory title, and had become freed of the hypothec by ten years' possession. In their declaration the plaintiffs alleged that the defendants had been in possession of the property since 9th May, 1876, but after the *enquête* they moved the Court to amend the declaration by substituting for 9th May, 1876, the words "1st December, 1886:"—

Held, reversing the judgment of the Court below, that the motion should have been allowed, so as to make the allegation of possession conform with the facts as disclosed by the evidence; Fournier, J., dissenting. *Baker* v. *Société de Construction Métropolitaine*, 22 S. C. R. 364.

See Patterson v. *Smith*, 14 P. R. 558, *post* 795; *Thompson* v. *Howson*, 16 P. R. 378, *post* 791; *Cole* v. *Hubble*, 26 O. R. 279, *post*, SEDUCTION; *Stilliway* v. *City of Toronto*, 20 O. R. 98, *ante* 718.

II. Close of Pleadings.

Issue.]—A defendant by simply taking issue upon the statement of claim closes the pleadings, and may then serve notice of trial. *Hare* v. *Cawthrope*, 11 P. R. 353, followed. *Malcolm* v. *Race*, 16 P. R. 330.

Issue—*Counterclaim.*]—A pleading delivered by the defendant to a counterclaim, in answer thereto, whether by the original plaintiff or by added defendants, which denies the allegations in the counterclaim, puts the plaintiff to the proof thereof, and submits that the counterclaim should be dismissed, is not a joinder of issue, but a statement of defence to the counterclaim: the plaintiff by counterclaim has by the Rules three weeks to reply thereto; and the pleadings, at least *quoad* the counterclaim, are not closed until after the lapse of three weeks, or until the plaintiff by counterclaim has joined issue.

Notice of trial set aside where given by the original plaintiffs after the lapse of four days from the delivery of such a pleading, no subsequent pleading having been delivered.

Construction of Rules 379-383. *Hare* v. *Cawthrope*, 11 P. R. 353, distinguished. *Irwin* v. *Brown*, 12 P. R. 639, overruled.

Quære, whether "plaintiff" in Rule 381 does not include a plaintiff by counterclaim. *Irwin* v. *Turner*, 16 P. R. 349.

Issue—*Order—Amendment.*]—Where a pleading is amended under an order giving leave to amend, Rule 427 does not apply: and, under Rule 392, when the amendments allowed by the order have been made or the time thereby limited for making them has elapsed, the pleadings are in the same position as to their being closed as they were in when the order was made. *Thompson* v. *Howson*, 16 P. R. 378.

III. Counterclaim and Set-off.

Cross-counterclaim—*Striking Out—Cross-relief—Original Counterclaim — Parties.*]—A person brought into an action as defendant to a counterclaim delivered by the original defendant cannot deliver a counterclaim against such defendant.

Such a pleading, not being authorized by the Rules or the practice, was struck out on summary application.

Construction of Rules 371-383. *Street* v. *Gover*, 2 Q. B. D. 498, followed. *Green* v. *Thornton*, 9 C. L. T. Occ. N. 139, distinguished.

Semble, if the company brought in here as defendants by counterclaim had been proper parties, cross-relief might have been given them, under Rule 374, by staying execution upon any judgment recovered against them until they should establish their set-off in an independent action.

The action was upon a promissory note. The counterclaim of the original defendants alleged that the plaintiffs took the note under circumstances which disentitled them to recover:—

Held, a defence and not a counterclaim.

It further asked that the plaintiffs might be ordered to deliver up the note to be cancelled:—

Held, that if that was a proper subject of counterclaim, it was one arising between the plaintiffs and the defendants as the result of the establishment of the defence, and did not render the introduction of new parties necessary.

It further asked that if the plaintiffs should be found entitled to recover upon the note, the new defendants by counterclaim should be ordered to pay it:—

Held, not a matter in which the plaintiffs were concerned, and therefore, under Rule 376, other persons could not be brought in as defendants by counterclaim.

It further alleged that the plaintiffs and the new defendants by counterclaim conspired together with the fraudulent intention of keeping certain insurance moneys without applying them upon the note sued on; but there was no assertion that the plaintiffs received the insurance moneys, or any part of them, beyond the amount of the note; and the prayer was that the new defendants by counterclaim, and not the plaintiffs, should account for the insurance money over and above the amount of the note:—

Held, that there was no excuse for joining the plaintiffs as parties liable to account with the added parties, and therefore no excuse for adding the latter.

And the counterclaim of the original defendants, so far as it added new parties, was struck out. *General Electric Co.* v. *Victoria Electric Light Co. of Lindsay*, 16 P. R. 476, 529.

Exclusion of—*Damages—Relators.*]—In an action brought in the name of the Attorney-General upon the relation of certain persons to restrain the defendants from collecting tolls or keeping their toll-gates closed upon their roads, the defendants alleged by way of defence certain wrongful acts of the relators, and by way of counterclaim asked damages against them:—

Held, that the relators were not in any sense plaintiffs: and the allegations against them must be struck out. *Attorney-General* v. *Vaughan Road Co.*, 14 P. R. 516.

Liquidated Damages.]—If a claim to liquidated damages by a defendant is pleaded by way of counterclaim, the plaintiff may reply matters arising subsequent to action brought. The plaintiff was allowed to reply that the final payment under the contract had accrued due after action brought. *Aliter*, if pleaded by way of a set-off. *Toke* v. *Andrews*, 8 Q. B. D. 428, followed. *McNamara* v. *Skain*, 23 O. R. 103.

Mortgagee—*Agreement—Indemnity.*]—In an action by the assignee of a mortgage against the mortgagor and the purchasers from him of the equity of redemption, the latter alleged that they had been induced by the mortgagee to purchase the lands by his promise to discharge the mortgage and accept in its place an assignment of another mortgage, which agreement he had failed to carry out, and had afterwards assigned the mortgage to the plaintiff, his wife:—

Held, that the purchasers of the equity were not entitled to claim "indemnity" against the mortgagee within the meaning of that word as used in Rule 328, as amended by Rule 1313; and a third party notice served upon him was set aside.

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Semble, a proper case for a counterclaim against the plaintiff and the third party jointly to enforce the alleged agreement or for damages. *Moore* v. *Death*, 16 P. R. 296.

See Irwin v. *Turner*, 16 P. R. 349, *ante* 791.

IV. Delivery of Pleadings.

Default — *Dismissal.*] — *See Armstrong* v. *Toronto and Richmond Hill Street R. W. Co.*, 15 P. R. 449, *post* 794.

Vacation.]—A party to an action has the right, notwithstanding the insertion in Rule 484, by Rule 1331, of the words "or of the Christmas vacation," to deliver a pleading during such vacation; and a notice of trial given therein is regular. *Thompson* v. *Howson*, 16 P. R. 378.

V. Demurrer.

Costs of Demurrer—*Power Over.*]—*See Jones* v. *Miller*, 16 P. R. 92, *ante* 237.

Frivolous Demurrer—*Pleading and Demurring.*]—Where a statement of claim sets up in different paragraphs more than one cause of action, the defendant may under Rule 384 plead to one and demur to another without filing the affidavit mentioned in Rule 388 or obtaining leave under Rule 389.

A demurrer to a claim for wrongful dismissal, which does not allege a hiring by the day, or week, or month, or otherwise, cannot be said to be frivolous. *Ross* v. *Bucke*, 14 P. R. 63.

Relief Prayed.]—A demurrer to the relief prayed in respect of the cause of action, and not to the cause of action itself, will not be allowed. Rule 384 referred to. *Oliver* v. *McLaughlin*, 24 O. R. 41.

What Constitutes—*Reply — Admission.*]—To an action on a foreign judgment the defendants pleaded that the order for such judgment was obtained upon a false affidavit, and that the plaintiffs obtained the judgment by fraudulently concealing from the Court the true nature of the transactions between them and the defendant:—

Held, a good defence.

The plaintiffs, after the coming into force of Rule 1322, replied that the defendant was precluded by law from raising any question as to the validity of the foreign judgment which might have been raised by way of appeal in the foreign forum:—

Held, that this replication was equivalent to a demurrer under the former practice, and was an admission of the truth of the facts stated in the defence; and to such a replication Rule 403 had no application. *Hollender* v. *Fjoulkes*, 26 O. R. 61.

What Constitutes—*Striking Out—Irregularity.*]—To an action for wrongfully taking out of possession of the plaintiff goods seized by him as a bailiff under process against the goods of an absconding debtor, the defendants set up a number of defences of fact, and also alleged that the statement of claim disclosed no cause of action, since it contained no allegation that the goods seized by the plaintiff were the property of the absconding debtor, and stated that the defendants set up the same rights as if they had demurred:—

Held, that this was a demurrer, and as it was pleaded along with defences, without an affidavit under Rule 388, or an order under Rule 389, it should be struck out as irregular.

Vandusen v. *Malcolm*, 4 C. L. T. 211, and *Snider* v. *Snider*, 11 P. R. 140, referred to.

The proper procedure for the plaintiff was to move to strike out the pleading, not to set it down as a demurrer. *Mackey* v. *Bierel*, 16 P. R. 148.

VI. Reply.

Inconsistency—*Refusal to Try Action.*]—By their statement of claim the plaintiffs alleged themselves to be creditors for wages of two of the defendants, and they sought relief against the third defendant only as having obtained certain assets from the other two, either fraudulently or upon a trust to pay the plaintiffs' claims. In their reply they set up that they were creditors of the third defendant himself, upon the ground that he was really the person who hired them. There was no subsequent pleading:—

Held, that the reply was a direct violation of Rule 419; and that the trial Judge was within his right in refusing, in his discretion, to try the action until the issues were properly presented upon the pleadings, and in directing that the costs of the postponement should be borne by the plaintiffs.

No opinion expressed as to whether a Divisional Court had power to review such a ruling. *Hurd* v. *Bostwick*, 16 P. R. 121.

See McNamara v. *Skain*, 23 O. R. 103, *ante* 792; *Hollender* v. *Fjoulkes*, 26 O. R. 61, *ante* 793.

VII. Statement of Claim.

Delivery—*Abridgement of Time—Default—Dismissal.*]—Under Rule 485 the Court or a Judge may, in a proper case, order a plaintiff to deliver his statement of claim within a limited time shorter than that allowed by Rule 369; but an order dismissing the action for failure to deliver the statement within the time so limited is not, having regard to Rule 646, to be made until after default.

And an order directing that the action should be dismissed for want of prosecution if the statement of claim was not delivered within eight days, was amended so as to make it direct only that the plaintiff should deliver the statement within eight days. *Armstrong* v. *Toronto and Richmond Hill Street R. W. Co.*, 15 P. R. 449.

Embarrassment—*Nonconformity with Writ.*] —*See McNab* v. *Macdonnell*, 15 P. R. 14, *post* 813.

VIII. Statement of Defence.

Defence Arising After Action—*Confession—Judgment—"Otherwise Order."*]—In an action against a judgment debtor and his brother to set aside a conveyance by the former to the latter as fraudulent, both defendants pleaded several defences. Afterwards the judgment debtor applied for leave to amend by adding as a defence, without abandoning his other defences, that since action the judgment had become extinguished by reason of a set-off ordered in another action :—

Held, a case in which the plaintiff should not be allowed to confess the new defence and sign judgment for his costs under Rule 440, but one in which the Court should "otherwise order" under the last clause of the Rule.

Construction and history of Rule 440. *Harrison* v. *Marquis of Abergavenny*, 57 L. T. N. S. 360, discussed. *Patterson* v. *Smith*, 14 P. R. 558.

Defense au fonds en fait.]—The want of signification of a transfer or sale of a debt as a bar to an action by the transferee is put in issue by a *défense au fonds en fait*. *Murphy* v. *Bury*, 24 S. C. R. 668.

Defense en fait—*Status of Plaintiff.*]—The quality assumed by the plaintiff in the writ and declaration is considered admitted unless it be specially denied by the defendant. A *défense en fait* is not a special denial within the meaning of Art. 144, C. C. P. *Martindale* v. *Powers*, 23 S. C. R. 597.

Denial—*Sufficiency of Traverse—Appeal.*]—The plaintiff by his statement of claim alleged a partnership between two defendants, one being married, whose name on a rearrangement of the partnership was substituted for that of her husband without her knowledge or authority :—

Held, reversing the judgment of the Court below, that a denial by the married woman that "on the date alleged or at any other time she entered into partnership with the other defendant," was a sufficient traverse of the plaintiff's allegation to put the party to proof of that fact :—

Held, also, that an objection to the sufficiency of the traverse would not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient. *Mylius* v. *Jackson*, 23 S. C. R. 485.

See Mackey v. *Bierel*, 16 P. R. 148, *ante* 793; *Welbourne* v. *Canadian Pacific R. W. Co.*, 16 P. R. 343, *post* 796; *Davis* v. *National Assurance Co. of Ireland*, 16 P. R. 116, *post* 796; *Stratford Gas Co.* v. *Gordon*, 14 P. R. 407, *post* 796; *McCarthy* v. *Township of Vespra*, 16 P. R. 416, *post* 797; *Bank of Hamilton* v. *George*, 16 P. R. 418, *post* 797; *Daley* v. *Byrne*, 15 P. R. 4, *post* 797.

IX. Striking Out Pleadings.

Counterclaim.]—*See General Electric Co.* v. *Victoria Electric Light Co. of Lindsay*, 16 P. R. 176, 529, *ante* 791; *Attorney-General* v. *Vaughan Road Co.*, 14 P. R. 516, *ante* 792.

Defence—*Champerty.*]—To an action under Lord Campbell's Act the defendants pleaded that it was brought and maintained under a champertous agreement which disentitled the plaintiff to sue :—

Held, that this defence should not be struck out; if proved, it was for the Court to say what effect should follow. *Welbourne* v. *Canadian Pacific R. W. Co.*, 16 P. R. 343.

Defence—*Denial of Liability—Tender and Payment into Court—Prejudice—Costs—Rules 632-640.*]—In an action upon an insurance policy the defendants pleaded denying their liability, and also tender before action and payment into Court. The plaintiff replied that there was due to him a larger sum than that paid in.

Upon a motion to strike out the defences in denial :—

Held, that they did not tend to prejudice, embarrass, or delay the fair trial of the action, within the meaning of Rule 423.

Discussion as to the effect of the defences of tender and payment into Court upon the question of costs and otherwise. Rules 632-640 considered. *Davis* v. *National Assurance Co. of Ireland*, 16 P. R. 116.

Defence—*Embarrassment—Prolixity.*]—The plaintiffs were a gas company, doing business in and distributing gas by their mains throughout a city; the defendant was also the owner of gasworks in the same place, from which he supplied certain buildings in the city. The statement of claim charged that the defendant laid or caused to be laid a pipe to communicate with the pipe belonging to the plaintiffs, or in some way obtained or used the plaintiffs' gas, without their consent; and claimed the penalty given by sec. 3 of the Gas and Water Companies' Act, R. S. O. ch. 164, and also the value of the gas alleged to have been taken.

The defendant, in thirteen paragraphs of his statement of defence, set out at great length various facts and circumstances, the gist of which was that the pipe mentioned in the statement of claim was so laid or caused to be laid by the plaintiffs, or by some one on their behalf, and not by the defendant; and also made therein allegations of a malicious course of conduct by the plaintiffs towards the defendant, affording reasons for the probability of the truth of the defence.

The thirteen paragraphs containing these allegations were moved against by the plaintiffs as embarrassing and irrelevant :—

Held, that an embarrassing pleading under Rule 423 is one which brings forward a defence which the defendant is not entitled to make use of; but here the defendant was entitled to make use of the defence set up, and there was nothing in the paragraphs tending to prejudice or delay the fair trial of the action.

It might be that evidence of the course of conduct of the plaintiffs alleged by the defendant could not be permitted to be given; but that was a question for the trial Judge, and not one to be determined upon a motion to strike out pleadings except in a plain case. Even if it was unnecessary to plead this course of conduct, that did not make the pleading embarrassing.

The Court should not hesitate to interfere with the discretion exercised in Chambers, where the defendant has been thereby deprived of his right

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rassment—Prolixity.]—The s company, doing business as by their mains through- endant was also the owner ame place, from which he ildings in the city. The charged that the defendant laid a pipe to communicate ing to the plaintiffs, or in r used the plaintiffs' gas, t; and claimed the penalty Gas and Water Companies' , and also the value of the een taken.

thirteen paragraphs of his e, set out at great length ircumstances, the gist of ipe mentioned in the state- laid or caused to be laid y some one on their behalf, unt; and also made therein ions course of conduct by the defendant, affording bility of the truth of the

aphs containing these alle- gainst by the plaintiffs as levant:—

arrassing pleading under brings forward a defence s not entitled to make use dant was entitled to make up, and there was nothing ing to prejudice or delay ion.

idence of the course of ffs alleged by the defen- mitted to be given; but r the trial Judge, and not upon a motion to strike a plain case. Even if it d this course of conduct, pleading embarrassing. hesitate to interfere with in Chambers, where the eby deprived of his right

to set up a defence which he is entitled to make use of.

Remarks on verbosity in pleading. *Glass* v. *Grant*, 12 P. R. 480, approved. *Stratford Gas Co.* v. *Gordon*, 14 P. R. 407.

Defence—*Municipal Corporation—Notice of Action.*]—A municipal corporation is not entitled to notice of action under the Act to protect justices of the peace and others from vexatious actions, R. S. O. ch. 73. *Hodgins* v. *Counties of Huron and Bruce*, 3 E. & A. 169, followed.

Defence of want of such notice struck out upon summary application. *McCarthy* v. *Township of Vespra*, 16 P. R. 416.

Defence — *Promissory Note — Payment.*]—Upon a summary application under Rule 1322 (387) to strike out defences on the ground that they disclose "no reasonable answer," the Court is not to look upon the matter with the same strictness as upon demurrer; a party should not be lightly deprived of a ground of substantial defence by the summary process of a judgment in Chambers.

And in an action upon a promissory note, alleged by the defendants to have been taken by the plaintiffs after maturity, defences of payment, estoppel by conduct, and a claim for equitable protection arising out of agreement, were allowed to remain on the record. *Bank of Hamilton* v. *George*, 16 P. R. 418.

Defence — *Seduction — Cause of Action — Pleading and Demurring.*]—A pleading will not be summarily struck out merely on the ground that it is demurrable.

Glass v. *Grant*, 12 P. R. 480, followed.

Where the statement of defence in an action of seduction alleged that the cause of action was in another than the plaintiff, but did not allege that that other sought to proceed by action:—

Held, that as there was no authority expressly holding this defence to be bad, it should not be struck out; but leave was given to reply and demur. *Daley* v. *Byrne*, 15 P. R. 4,

Demurrer.]—*See Ross* v. *Bucke*, 14 P. R. 63, *ante* 793; *Mackey* v. *Bierel*, 16 P. R. 148, *ante* 793.

Statement of Claim.]—*See McNab* v. *Macdonnell*, 15 P. R. 14, *post* 813.

PLEDGE.

Opposition a Fin de Charge—*Agreement—Effect of.*]—The respondent obtained against the Montreal and Sorel Railway Company a judgment for the sum of $675 and costs, and caused a writ of *venditioni exponas* to issue against the railway property of that company. The appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition *à fin de charge* for the sum of $35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company was entered into between the Montreal and Sorel Railway Company and the appellant company, and stated amongst other things that "the Montreal and Sorel Railway Company was burdened with debts, and had neither money nor credit to place the road in running order," etc. The amount claimed for disbursements, etc., was over $35,000. The Superior Court, whose judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition *à fin de charge*.

On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy, and was insufficient in amount to give jurisdiction to the Court. The Court, without deciding the question of jurisdiction, heard the appeal on its merits, and it was:—

Held, 1. That such an agreement must be deemed in law to have been made with intent to defraud, and was void as to the anterior creditors of the Montreal and Sorel Railway Company. 2. That as the agreement granting the lien or pledge affected immovable property, and had not been registered, it was void against the anterior creditors of the Montreal and Sorel Railway Company: Arts. 1977, 2015, and 2094, C. C. 3. That Art. 419, C. C., does not give to a pledgee of an immovable, who has not registered his deed, a right of retention as against the pledgor's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an *opposition à fin de conserver*, to be paid out of the proceeds of the judicial sale: Art. 1972, C. C. *Great Eastern Railway Co.* v. *Lambe*, 21 S. C. R. 431.

See BANKS, III. — COLLATERAL SECURITY — COMPANY, VIII.

POLICE MAGISTRATE.

Arrest of Witness—*Absence of Malice.*]—Where a police magistrate, acting within his jurisdiction under R. S. C. ch. 174, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice, liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest.

Judgment of the Common Pleas Division, 24 O. R. 576, affirmed. *Gordon* v. *Denison*, 22 A. R. 315.

Liquor License Act—*Right to Try County Offences.*]—The defendant was charged with a breach of the Liquor License Act, in the township of Barton in the county of Wentworth; and was tried and convicted at the city of Hamilton, situated in the said county, before the police magistrate thereof:—

Held, that under sec. 18 of the Police Magistrates' Act, R. S. O. ch. 72, the police magistrate had jurisdiction in the premises. *Regina* v. *Gully*, 21 O. R. 219.

Return of Convictions—*Penalty.*]—A police magistrate, acting *ex officio* as justice of the peace, is not subject to the provisions of sec. 1 of R. S. O. ch. 76, and need not make a return as therein required to the clerk of the peace.

Sec. 6 of R. S. O. ch. 77 exempts him from this duty, whether he is acting as police magistrate or *ex officio* as justice of the peace. *Hunt qui tam* v. *Sharer*, 22 A. R. 202.

Salary—*Attachment—Public Policy.*]—The salary of a police magistrate appointed by the Crown, but paid by a municipality, cannot, on grounds of public policy, be attached; Hagarty, C.J.O., expressing no opinion on this point. *Central Bank* v. *Ellis*, 20 A. R. 364.

See JUSTICE OF THE PEACE.

POUNDAGE.

See SHERIFF.

POWER OF APPOINTMENT.

See WILL, IV.

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT, III.

POWER OF SALE.

See MORTGAGE, XII.

PRACTICE.

See ABSCONDING DEBTOR—ACTION—AFFIDAVIT—AMENDMENT—APPEAL—ARBITRATION AND AWARD—ARREST—ATTACHMENT OF DEBTS.

BY-LAWS.

CERTIORARI—COMPANY, VIII.—CONTEMPT OF COURT—COSTS—COUNTY COURT—COURT OF APPEAL—CRIMINAL LAW, III.

DEFAMATION, IV., V., VIII.—DEVOLUTION OF ESTATES ACT—DIVISION COURT.

EVIDENCE—EXCHEQUER COURT, II.—EXECUTION—EXECUTORS AND ADMINISTRATORS.

GUARANTY AND INDEMNITY.

HABEAS CORPUS—HIGH COURT OF JUSTICE.

INFANT—INJUNCTION—INTERPLEADER.

JUDGMENT—JUDGMENT DEBTOR—JUSTICE OF THE PEACE.

LACHES—LAND TITLES ACT—LIEN, III.—LUNATIC.

MORTGAGE, X., XIII.—MUNICIPAL CORPORATIONS.

NEGLIGENCE—NEW TRIAL.

PARLIAMENTARY ELECTIONS, II.—PARTIES—PARTNERSHIP—PAYMENT—PLEADING—PRIVY COUNCIL—PROHIBITION—PUBLIC SCHOOLS.

RECEIVER.

SCIRE FACIAS AND REVIVOR—SHERIFF—SHIP—SOLICITOR—SPECIFIC PERFORMANCE, III.—SUPREME COURT OF CANADA—SURROGATE COURT.

TRIAL—TRUSTS AND TRUSTEES.

VACATION.

I. APPEARANCE.

Default of—*Noting Pleadings Closed.*]—*See Morse* v. *Lamb*, 15 P. R. 9, *ante* 677.

Special Appearance.]—Where there is a grave question as to jurisdiction of the Courts of this Province in an action on a contract entered into in a foreign country, a special appearance under protest or conditionally may be permitted under Con. Rule 286, and the defence of want of jurisdiction may be subsequently raised by the pleadings. *Howland* v. *Insurance Co. of North America*, 16 P. R. 514.

Time for Appearance — *Judgment.*] — *See Bank of British North America* v. *Hughes*, 16 P. R. 61, *post* 812.

Time for Appearance—*Shortening.*] — The effect of Rule 275 (*a*) is to supersede sec. 7, of 47 Vict. ch. 14 (O.), and to incorporate its provisions into the Rules, and the former practice, being inconsistent with the Rules, is superseded by the provisions of Rule 3; and therefore there is now power, under the provisions of Rule 485, to bridge the time for appearance to a writ of summons issued in the district of Algoma or Thunder Bay. *Kendell* v. *Ernst*, 16 P. R. 167.

Time for Appearance—*Shortening — Order for.*]—*See Sparks* v. *Purdy*, 15 P. R. 1, *ante* 230.

Unauthorized Appearance — *Partnership Action.*]—*See Mason* v. *Cooper and Smith*, 15 P. R. 418, *ante* 770.

Waiver of Irregularity.]—*See McNab* v. *Macdonnell*, 15 P. R. 14, *post* 813.

Waiver of Objection to Jurisdiction.]—*See Sears* v. *Meyers*, 15 P. R. 381, 456, *post* 817.

II. Consolidation of Actions.

Application of Common Defendant.]—Where the issues in several actions are not the same, there cannot be a consolidation of them.

Where several actions were brought against a municipal corporation by different plaintiffs for damages for injuries to their respective lands occasioned by the alleged negligent construction by the defendants of several drains without providing a proper outlet for the waters brought down by such drains:—

Held, that, it being necessary for each plaintiff to prove that the negligent conduct of the defendants resulted in an injury to his own particular land, the issues in the several actions were not the same; and this quite apart from the fact that, in any case, there would have to be several assessments of damages.

Quære, whether a common defendant can obtain a consolidation order against the will of the several plaintiffs. *Williams* v. *Township of Raleigh*, 14 P. R. 50.

Application of Common Defendant.]—Two separate actions, in which the defences were the same, including contributory negligence, were brought by a husband and wife against the same defendant for damages for injuries received by each of the plaintiffs owing to the alleged negligence of the defendant in permitting a pair of horses to run away, and run into a vehicle in which both plaintiffs were seated, causing them to be thrown out and trampled on:—

Held, upon an application by the defendant, that both claims should have been joined in one action; and an order was made consolidating them. *Smurthwaite* v. *Hannay*, 10 Times L. R. 649; *Westbrook* v. *Australian, etc., Navigation Co.*, 23 L. J. N. S. (C. P.) 42; *Williams* v. *Township of Raleigh*, 14 P. R. 50, distinguished. *Noyes* v. *Young*, 16 P. R. 254.

Joint Application of Different Defendants.]—Four actions were brought by the same plaintiffs against different defendants for damages for trespass in refusing to pay toll and forcing past the toll gates. The pleadings were identical, and the main issue was common to all the actions, but it was admitted that if the plaintiffs had a substantial cause of action, there must be a separate assessment of damages in each case.

Upon a motion by the defendants to consolidate the actions:—

Held, that one of the actions should be tried as a test for all, and that proceedings in the other actions should be stayed till the test action should have been determined, after which the assessments should proceed according to the result on the main question; or, if the defendants would each submit to pay the largest amount of damages that might be awarded in the test action, that all proceedings should be stayed in all actions, except that in which the plaintiffs expected to recover the largest amount, and such action should be alone litigated. *Vaughan Road Company* v. *Fisher*, 14 P. R. 340.

Joint Application of Different Plaintiffs.]—In two actions where the plaintiffs were different, the defendants different, and the relief sought entirely different, though part of the evidence in the one action might be available in the other, an application by the plaintiffs conjointly for an order consolidating the two actions was refused.

Semble, the defendants would be entitled to an order to have the actions tried together in case the plaintiffs were bringing them on at different Courts. *Ryan* v. *Cameron, Attorney-General for Canada* v. *Ontario and Western Lumber Company*, 16 P. R. 235.

III. Discontinuance.

Issue—*Action—Costs.*]—An interpleader proceeding is not an action; and Rule 641 (*c*), which enables the Court to "order the action to be discontinued," upon terms as to costs, does not apply to interpleader issues. *Hamlyn* v. *Betteley*, 6 Q. B. D. 63, and *Re Dyson*, 65 L. T. N. S. 488, followed.

Semble, that the execution creditor can abandon the seizure or the prosecution of the issue, but only on the terms of answering all costs. *Hogaboom* v. *Gillies*, 16 P. R. 402.

Notice — *Taxation of Costs.*] — Where the plaintiff serves a notice of discontinuance under Rule 641, the defendant is entitled to a reasonable time within which to apply for an appointment to tax his costs, and until after the lapse of that time an appointment will not be granted to the plaintiff, even where he is entitled upon

the final taxation to tax interlocutory costs which may exceed the defendant's general costs.

Under Rule 641 it is not necessary for the plaintiff to ascertain the amount of the defendant's cost and pay them to make the notice of discontinuance effectual. *Barry* v. *Hartley*, 15 P. R. 376.

IV. Dismissing Actions.

Default—*Security for Costs—Appeal.*]—The fact that the plaintiff has lodged an appeal against an order for security for costs is "sufficient cause," within the meaning of Rule 1246, to exempt him from having his action dismissed for failure to comply with the order, pending the appeal.

And if a motion to dismiss is made, the better practice is to enlarge it before the appellate tribunal, to be dealt with after the main question has been determined. *Bennett* v. *Empire Printing and Publishing Company*, 15 P. R. 430.

Default — *Security for Costs — Waiver.*] — Where an order for security for costs directs that unless security be given within a limited time the action shall be dismissed, and security is not given within the time limited, the action is to be regarded as dismissed, unless the defendant treats it as still alive. *Carter* v. *Stubbs*, 6 Q. B. D. 116, followed.

Rule 1251 does not give a plaintiff any further time for or relieve him from the obligation of putting in his security for costs; it only enables him to remove the stay effected by the order, for the sole purpose of making a motion for judgment under Rule 739; and if he does not succeed in that motion, he must obey the order by putting in the full security.

But where the defendant, after the time for giving security under the order had expired, opposed a motion for judgment under Rule 739, and appealed to a Judge in Chambers and afterwards to a Divisional Court from the order made upon such motion, without taking the objection that the action was at an end:—

Held, that he had waived the objection; and a bond filed after the time limited was allowed.

Upon appeal, decision varied by extending, pursuant to Rule 485, the time for giving security. *Hollender* v. *Fjoulkes*, 16 P. R. 225, 315.

Default—*Statement of Claim.*]—Under Rule 485 the Court or Judge may, in a proper case, order a plaintiff to deliver his statement of claim within a limited time shorter than that allowed by Rule 369; but an order dismissing the action for failure to deliver the statement within the time so limited is not, having regard to Rule 646, to be made until after default.

And an order directing that the action should be dismissed for want of prosecution if the statement of claim was not delivered within eight days, was amended so as to make it direct only that the plaintiff should deliver the statement within eight days. *Armstrong* v. *Toronto and Richmond Hill Street R. W. Co.*, 15 P. R. 449.

Default—*Want of Prosecution.*]—An action by solicitors to recover the amount of a bill of costs was begun and the defendant appeared in February, 1883. No further step was taken till February, 1892, when the plaintiffs delivered a statement of claim. The plaintiffs' reason for the delay was that the defendant had no means to pay during the period of delay.

Upon motion by the defendant to dismiss and cross-motion by the plaintiffs to validate the delivery of the statement of claim:—

Held, that the action should be allowed to proceed.

Terms imposed upon the plaintiffs. *Finkle* v. *Lutz*, 14 P. R. 446.

V. Intituling of Papers.

County Court — *High Court.*] — Where a motion is made to a Judge of the High Court or the Master in Chambers under Rule 1260 to change the venue in a County Court action, the papers should not be intituled in the High Court of Justice, but in the County Court. *Ferguson* v. *Golding*, 15 P. R. 43.

Divisions of High Court.]—Where an interpleader order is entitled in two actions, in different Divisions of the High Court, there being two executions in the sheriff's hands, an appeal from the order may be entertained in either Division, although one of the execution creditors has been barred by the order, from which there is no appeal on that ground. *Hogaboom* v. *Grundy*, 16 P. R. 47.

Divisions of High Court.]—*See Clarke* v. *Creighton*, 14 P. R. 34, *ante* 14.

VI. Jurisdiction of Drainage Referee.

See Municipal Corporations, X.

VII. Jurisdiction of Judge in Chambers.

Appeal—*Final Report—Mechanics' Lien Proceeding.*]—*See Wagner* v. *O'Donnell*, 14 P. R. 254, *ante* 617.

Certificate of Taxing Officer—*Motion to Set Aside.*]—*See Harding* v. *Knust*, 15 P. R. 80, *ante* 208.

Contempt of Court—*Motion for Attachment.*]—*See Southwick* v. *Hare*, 15 P. R. 239, 331, *ante* 177.

Costs — *Action* — *Settlement.*]—*See Knickerbocker* v. *Ratz*, 16 P. R. 30, 191, *ante* 233.

Costs—*Demurrer.*]—*See Jones* v. *Miller*, 16 P. R. 92, *ante* 237.

Rescission of Order.]—*See Flett* v. *Way*, 14 P. R. 123, *post* 807.

Venue—*Change of—County Court—Appeal.*]—*See McAllister* v. *Cole*, 16 P. R. 105, *post*, Trial, VII.

VIII. Jurisdiction of Local Master.

Proceedings for the Winding-up of Companies.]—*See* Company, VIII.

Summary Procedure to Enforce Mechanics' Liens.]—*See* LIEN, III.

IX. JURISDICTION OF LOCAL MASTER OF TITLES.

See LAND TITLES ACT.

X. JURISDICTION OF MASTER IN CHAMBERS.

Certificate of Taxing Officer—*Motion to Set Aside.*]—*See Harding* v. *Knust*, 15 P. R. 80, *ante* 208.

Costs — *Action* — *Settlement.*]—*See Knickerbocker* v. *Ratz*, 16 P. R. 30, 191, *ante* 233.

Costs—*Demurrer.*]—*See Jones* v. *Miller*, 16 P. R. 92, *ante* 237.

Municipal Election — *Validity of* — *Trial.*] — Held, by MacMahon, J., that the Master in Chambers had, by the combined effect of Rule 30 and 51 Vict. ch. 2, sec. 4 (O.), all the powers of a Judge to determine the validity of the election of the defendant, and that his determination was final; and it was within the competence of the provincial legislature to clothe the Master with such powers.

Held, by the Divisional Court, following the principle of the decision in *Re Wilson* v. *McGuire*, 2 O. R. 118, that the provincial legislature had power to invest the Master with authority to try controverted municipal election cases. *Regina ex rel. McGuire* v. *Birkett*, 21 O. R. 162.

Reference to District Judge —*Unorganized Territory Act.*]—In an action brought for damages to the plaintiff's house situated in a provisional judicial district, an order was made by the Master in Chambers, assuming to act under the Unorganized Territory Act, R. S. O. ch. 91, directing that issues of fact be referred to the District Judge, reserving further directions and questions of law arising at the trial for the disposal of a Judge in Court. Notice of trial was given for the District Court, and the case was heard by the District Judge, who made certain findings of fact, assessed the damages, and directed judgment to be entered for the plaintiff. The plaintiff moved for judgment on such findings before a Judge in Court, the defendant at the same time appealing from the judgment or report, whereupon the Judge disposed of both motions, directing judgment to be entered for the plaintiff for the amount found by the District Judge.

On appeal to a Divisional Court:—

Held, that, apart from the question of jurisdiction of the Master to make the order, as the parties had treated it as valid, and the subsequent order of the Judge in Court remained unreversed and not appealed from, the Court would not interfere; that if the question of the jurisdiction of the Master were involved, the appeal should have been to the Court of Appeal. *Fraser* v. *Buchannan*, 25 O. R. 1.

Rescission of Order.]—*See Flett* v. *Way*, 14 P. R. 123, *post* 807.

Stay of Proceedings — *Motion for, after Judgment.*]—*See Lee* v. *Mimico Real Estate Co.*, 15 P. R. 288, *post* 811.

Venue — *Change of* — *County Court.*]—*See McAllister* v. *Cole*, 16 P. R. 105, *post*, TRIAL.

XI. JURISDICTION OF MASTER IN ORDINARY.

Proceedings for the Winding-up of Companies.]—*See* COMPANY, VIII.

XII. JURISDICTION OF REFEREE.

Foreign Commission.]—*See Brooks* v. *Georgian Bay Saw-Log Salvage Co.*, 16 P. R. 511, *post* 808.

Solicitor's Lien.]—*See Bell* v. *Wright*, 24 S.C. R. 656, *post* 808.

XIII. ORDERS.

Consent Order — *Initialling.*]—Held, that after an order has been pronounced, the initialling of it, as drawn up, by the solicitor for the party opposed to the party having the carriage of it, does not make it a consent order, but merely assents to it as being the understanding of the party of what was ordered by the Judge. *McMaster* v. *Radford*, 16 P. R. 20.

Correction—*Mistake*—*Time.*]—A Judge may always correct anything in an order which has been inserted by mistake or inadvertence; and an order will be corrected even after the lapse of a year. *Ib.*

Enforcement—*Action.*]—Prohibition granted to restrain the enforcement of a judgment in a Division Court in an action brought upon an order of a Judge in an action in the High Court ordering the defendant in the Division Court action to pay certain costs arising out of his default as a witness.

Notwithstanding the broad provisions of Rule 934, an order of the Court or of a Judge is not for all purposes and to all intents a judgment; and no debt exists by virtue of such an order as was sued on here.

Rule 866 means that an order may be enforced in the action or matter in which it is, as a judgment may be enforced, and does not extend to the sustaining of an independent action upon the order. *Re Kerr* v. *Smith*, 24 O. R. 473.

Ex Parte Order.]—All *ex parte* orders are *periculo petentis*. Præcipe order for taxation of costs set aside. *Re McCarthy, Pepler, and McCarthy*, 15 P. R. 261.

Ex Parte Order—*Execution.*]—Orders should not be made *ex parte* allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator. *In re Trusts Corporation of Ontario and Boehmer*, 26 O. R. 191.

Ex Parte Order—*Rescission.*]—A Judge or the Master in Chambers has power to reconsider a matter which has been brought before him *ex parte*, on the application of an opposing party; and he can also open up a matter in respect of which an order has been made after notice and upon default to shew cause, if he is satisfied that opposition was intended and that any injustice has arisen.

Semble, that if necessary the words "*ex parte* order" in Rule 536 may be read so as to cover cases going by default, where through some slip cause has not been shewn. *Flett* v. *Way*, 14 P. R. 123.

Ex Parte Order—*Extension of Time for Service of Writ.*]—*See Gilmour* v. *Magee*, 14 P. R. 120, *post* 813; *Howland* v. *Dominion Bank*, 15 P. R. 56, 22 S. C. R. 130, *post* 814; *Cairns* v. *Airth*, 16 P. R. 100, *post* 814.

Multiplicity of Orders.]—*See Re Cosmopolitan Life Association, Re Cosmopolitan Casualty Association*, 15 P. R. 185, *ante* 244.

XIV. Reference.

Directing Reference—*Damages—Discretion—Appeal.*]—The right of the trial Judge to refer the question of damages, as a question arising in the action, under sec. 101 of the Judicature Act, is indisputable, at all events as a matter of discretion and subject to review: and it is for the party objecting to the reference to shew that the discretion has been wrongly exercised.

And where, in an action for damages for injury to the plaintiff's land on the bank of a navigable river and to his business as a boatman, by the acts of the three several defendants, who owned saw-mills higher up on the stream, in throwing refuse into it, it appeared that the plaintiff's title to relief and the liability of the defendants had been established in a former action, and the trial Judge heard the case only so far as to satisfy himself that the plaintiff had established a *primâ facie* case on the question of damages, and directed a reference to assess and apportion them among the defendants, reserving further directions and costs:—

Held, that there was no miscarriage, and the discretion of the trial Judge should not be overruled. *Ratté* v. *Booth*, 16 P. R. 185.

Directing Reference—*Damages—Injunction—Undertaking—Discretion—Appeal.*]—The jurisdiction to award an inquiry as to or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages given, is a discretionary one, to be exercised judicially and not capriciously.

Where, in an action to set aside a sale of goods as fraudulent, a claim for damages by reason of an injunction was set up in the defence, and the trial Judge was, on the evidence, of opinion that no damage was proved occasioned by the injunction as distinct from the detriment arising from the litigation, and no additional evidence having been given, the Divisional Court, under the circumstances of this case, where the defendant was given his costs, although his conduct had been such as properly to evoke legal inquiry, refused to award a reference as to damages. *Gault* v. *Murray*, 21 O. R. 458.

Directing Reference—*Special Referee—Liability—Damages.*]—Except by consent, the Court has no power to order a reference under sec. 101 of the Ontario Judicature Act, R. S. O. ch. 44, to any person other than official referee or the Judge of a County Court.

Where the question of the defendant's liability in an action is expressly raised on the pleadings, such question should be determined before a reference of all the questions of fact in controversy, including the amount of damages, is ordered. *Forester* v. *Township of Raleigh*, 14 P. R. 429.

Proceedings on Reference—*Delay—Warrant.*]—The object of Rule 51 is to protect the Court and its officers from undue delay in the prosecution of references.

Where there has been undue delay in the prosecution of a reference, the party having the conduct of it should not be refused a warrant to proceed, if he applies therefor before any action has been taken by the Master under Rule 51, and there is nothing but delay to interfere with the granting of it. *Re Cannon, Oates* v. *Cannon*, 14 P. R. 502.

Proceedings on Reference—*Evidence—Reasons for Report.*]—Held, that the Master was the final Judge of the credibility of the witnesses, and his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence.

On a reference to a Master, the latter, provided he sufficiently follows the directions of the decree, is not obliged to give his reasons for, or enter into a detailed explanation of, his report to the Court. *Booth* v. *Ratté*, 21 S. C. R. 637.

Proceedings on Reference—*Foreign Commission—Jurisdiction of Referee.*]—A referee upon a reference under sec. 102 of the Judicature Act, R. S. O. ch. 44, has jurisdiction to order the examination of foreign witnesses under a commission.

Rule 34-37, 52, 58, 59, 73, 552, considered.

Semble, the provisions of Rule 590 are embraced by inference in Rule 35 so as to enable the referee, by express terms, to grant certificates for the issue of foreign commissions.

But the mere form, whether by certificate or order, is immaterial, having regard to Rules 441, 442.

Hayward v. *Mutual Reserve Association*, [1891] 2 Q. B. 236, and *Macalpine* v. *Calder*, [1893] 1 Q. B. 545, followed. *Brooks* v. *Georgian Bay Saw-Log Salvage Co.*, 16 P. R. 511.

Proceedings on Reference—*Solicitor's Lien—Disallowance.*]—A referee before whom administration proceedings are taken has no authority to make an order depriving a solicitor of his lien for costs on a fund in Court on the ground that adverse parties have a prior claim on such fund for costs which the said solicitor's client has been personally ordered to pay, the

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damages. *Gault* v. *Murray*, 21

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14 P. R. 502.

on Reference — *Evidence —*
port.]—Held, that the Master
dge of the credibility of the
his report should not be sent
e irrelevant evidence may have
character not likely to have
gment, especially as no appeal
his ruling on the evidence.
to a Master, the latter, provided
llows the directions of the de-
ged to give his reasons for, or
uled explanation of, his report
ooth v. *Ratté*, 21 S. C. R. 637.

on Reference—*Foreign Com-*
ction of Referee.]—A referee
under sec. 102 of the Judica-
O. ch. 44, has jurisdiction to
ination of foreign witnesses
on.
58, 59, 73, 552, considered.
visions of Rule 590 are embraced
le 35 so as to enable the referee
, to grant certificates for the
ommissions.
orm, whether by certificate or
al, having regard to Rules 441.

Mutual Reserve Association,
36, and *Macalpine* v. *Calder*,
545, followed. *Brooks* v.
ne-Log Salvage Co., 16 P. R.

n Reference—*Solicitor's Lien*
— A referee before whom
oceedings are taken has no
e an order depriving a solicitor
sts on a fund in Court on the
rse parties have a prior claim
osts which the said solicitor's
personally ordered to pay, the

administration order not having so directed the referee, and there being no general Order permitting such an interference with the solicitor's *prima facie* right to the fund. *Bell* v. *Wright*, 24 S. C. R. 656.

Proceedings on Reference—*Service of Warrant—Dispensing With.*]—Upon an application in Chambers for an order dispensing with service of a warrant and all subsequent proceedings in the Master's office upon certain absent defendants, other defendants in the same interest being represented :—

Held, by Meredith, J., that Rule 467 did not apply to the case, and, as the matter was one in the Master's discretion, the order should not be made.

Leave being given to renew the application :—

Held, by Boyd, C., that, in accordance with Rule 3, the practice should be regulated by analogy to Rule 467, and the order should be made. *Smith* v. *Houston*, 15 P. R. 18.

Report — *Confirmation — Appeal.*] — The statute and Rules applicable to references should not and need not be so read as to produce the result of two distinct lines of practice in reference to reports of Masters and referees.

The well-settled procedure in the case of the ordinary report is extended to the statutory reports of referees under sec. 101 of the Ontario Judicature Act, R. S. O. ch. 44.

And a motion to vary a report upon a reference under that section, although made at the same time as a motion for judgment on the report, cannot be entertained unless made within the time limited by Rules 848 and 849. *Raymond* v. *Little*, 13 P. R. 364, not followed. *Freeborn* v. *Vandusen*, 15 P. R. 264.

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

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

Held, also, Gwynne J., dissenting, that the report having been confirmed by lapse of time and not appealed against, the Court on the motion for judgment was not at liberty to go into the whole case upon the evidence, but was bound to adopt the referee's findings and to give the judgment which those findings called for. *Freeborn* v. *Vandusen*, 15 P. R. 264, approved of and followed. *Township of Colchester South* v. *Vahal*, 24 S. C. R. 622.

Report — *Confirmation—Execution.*]—Where a reference is directed to the Master to ascertain and state the amount of alimony which the defendant should pay, execution may be issued for the amount found by his report before confirmation thereof. *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P. R. 15, approved and followed. *Boeck* v. *Boeck*, 16 P. R. 313.

Report — *Drawing — Settling — Notice.*]— A judicial officer charged with a reference should himself draw his report, and not delegate it to the solicitor for the successful party.

Any *ex parte* communication with a litigant as to the decision to be given should be avoided, and both parties should have equal facilities of knowing the result, and of being present at the drawing or settling of the report. *Knarr* v. *Bricker*, 16 P. R. 363.

XV. Second Applications.

Leave to Appeal—*Winding-up Act.*]—Where an application for leave to appeal to the Court of Appeal from a decision in a matter under the Winding-up Act, R. S. C. ch. 129, has been made under sec. 74, and refused by a Judge, a fresh application will not be entertained by another Judge.

The cases in which successive applications to successive Judges have been favoured are not pertinent to a case where the right to appeal, upon leave, is sought under a special statute. *Re Sarnia Oil Co.*, 15 P. R. 347.

See Roberts v. *Donovan*, 16 P. R. 456, *ante* 175 ; *Attorney-General for Ontario* v. *Attorney-General for Canada*, 1 Ex. C. R. 184.

XVI. Service of Papers.

Dispensing with Service.]—*See Smith* v. *Houston*, 15 P. R. 18, *ante* 809; *Jones* v. *Miller*, 24 O. R. 268, *ante* 763.

Substitutional Service.]—An order will not be made for substitutional service upon an officer of a litigant corporation of a subpœna and appointment for his examination for discovery. *Mills* v. *Mercer Co.*, 15 P. R. 281.

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

XVII. Staying Proceedings.

Action — *Abuse of Process of Court.*] — *See Ross* v. *Edwards*, 14 P. R. 523, 15 P. R. 150, *ante* 10, 11.

Action—*Costs of Former Action Unpaid.*]—The practice by which, when the defendant's costs of a former action for the same or substantially the same cause were unpaid, the defendant was entitled to have the later action stayed until they should be paid, is now superseded by the effect of Rule 3, the defendant's only remedy being to apply under Rule 1243 for security for costs in the second action. *Campbell* v. *Elgie*, 16 P. R. 440.

Execution.]—*See* EXECUTION.

Judgment—*Motion to Set Aside.*]—When a motion to a Divisional Court to set aside the judgment pronounced at the trial, but not yet entered, has been set down for hearing, there is a stay of proceedings upon such judgment *ipso facto*, unless it should be otherwise ordered. *Western Bank of Canada* v. *Courtemanche*, 16 P. R. 513.

Judgment—*Satisfaction—Motion.*]—A motion by the defendants, after judgment in an action, to stay proceedings therein, after satisfaction of the plaintiff's claims, should be made in Chambers, not in Court.

Where such a motion was made in Court, it was enlarged into Chambers, and costs were ordered against the applicants. *Lee* v. *Mimico Real Estate Co.*, 15 P. R. 288.

Judgment—*Stay of Entry—Effect of.*]—Where an interim injunction was obtained by the plaintiffs restraining the defendants from doing certain acts until the trial or other final disposition of the action or until further order, and by the judgment pronounced after the trial the action was dismissed, but the entry of the judgment was stayed until the fifth day of the next sittings of a Divisional Court:—

Held, that the effect of the stay was to leave the whole matter in *statu quo* until the defendants should become entitled to enter judgment, and by so doing to put an end to the injunction in accordance with its terms. *Carroll* v. *Provincial Natural Gas and Fuel Co. of Ontario*, 16 P. R. 518.

Trial—*Appeal from Order Directing New Trial.*]—*See* TRIAL, V.

XVIII. STYLE OF CAUSE.

Action against Crown.]—In this case the action was instituted against the Government of the Province of Quebec, but when the case came up for hearing on the appeal to the Supreme Court, the Court ordered that the name of Her Majesty the Queen be substituted for that of the Province of Quebec. *Grant* v. *The Queen*, 20 S. C. R. 297.

Firm Name—*Amendment.*]—A person carrying on business alone, in a name denoting a partnership, cannot bring an action in that name. Where, however, such name consisted of his surname, prefaced by the initials of his Christian names, and followed by the words "and Co.:"—

Held, that these words in the style of cause in an action were mere surplusage, or, if not, they should be struck out; and, as the mistake was trifling, and no one was misled or affected by it, an amendment at the trial should have been granted as of course. *Mason* v. *Mogridge*, 8 Times L. R. 805, distinguished. *Laing* v. *Thompson*, 16 P. R. 516.

See Clarke v. *Creighton*, 14 P. R. 34, *ante* 14.

XIX. WRIT OF SUMMONS.

1. *Generally.*

Copies.]—A writ of summons is a "pleading or other document" within the meaning of Rule 395, and more than four copies cannot be taxed. *Sparks* v. *Purdy*, 15 P. R. 1.

Issue of—*Provisional Judicial Districts.*]—The indorsement on a writ of summons, issued in the district of Thunder Bay after the passing of 57 Vict. ch. 32 (O.), shewed that the claim was for cancellation of a lease of a mining location in the district of Rainy River, for possession of the location, and for an injunction restraining the defendant from entering thereon:—

Held, that the action was not one of ejectment within the meaning of Rule 653, and therefore the venue was not local, and it was not necessary that the writ should be issued by the local Registrar at Rat Portage under sec. 3 of the Act. *Kendell* v. *Ernst*, 16 P.R. 167.

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2. *Amendment.*

Character of Parties.]—Where parties are before the Court *qua* executors, and the same parties should also be summoned *qua* trustees, an amendment to that effect is sufficient, and a new writ of summons is not necessary. *Ferrer* v. *Trépannier*, 24 S. C. R. 86.

Character of Parties.]—*See McNab* v. *Macdonnell*, 15 P. R. 14, *post* 813.

Shortening Time for Appearance—*Judgment.*]—A writ of summons issued for service out of the jurisdiction required an appearance thereto to be entered within eight weeks after service, inclusive of the day of service. The plaintiffs obtained an order shortening the time for appearance to ten days, not specifying whether inclusive or exclusive of the day of service, and amended the writ under order by merely substituting "ten days" for "eight weeks." The writ as amended was served, and the order with it, on the 27th January. On the 6th February following judgment was signed for default of appearance:—

Held, that the judgment was irregular; for the writ was not amended in accordance with the order, and the latter must govern; and according to its terms, having regard to Rule 474, the ten days were to be reckoned exclusively of the day of service, and the defendants had the whole of the 6th February to appear. *Bank of British North America* v. *Hughes*, 16 P. R. 61.

Time—*Judgment.*]—Under the liberal powers of amendment now given by Rules 444 and 780, the writ of summons and all subsequent proceedings may be amended after judgment. *Clarke* v. *Cooper*, 15 P. R. 54.

3. *Indorsement.*

Character of Parties—*Irregularity—Waiver—Amendment.*]—The writ of summons was indorsed only with a claim for damages for negligence and breach of trust on the part of the defendants in the investment of moneys upon mortgage. There was no indorsement of the character of parties. The defendants appeared, and the plaintiff thereupon delivered a statement of claim in which it was set forth that the plaintiff was the administrator of one who was in her lifetime entitled to the moneys invested by the defendants. It was shewn that one of the defendants was fully aware of all the facts of the case, and of the capacity in which the plaintiff sued.

Upon a motion by the defendants to strike out the statement of claim as embarrassing in that it did not follow the writ :—

Held, that the defendants by entering an appearance, instead of moving against the writ, had waived the irregularity of the plaintiff in not stating the character of the parties, as required by Rule 224 :—

Held, also, that as the statement of claim shewed the character in which the plaintiff was suing, it was not necessary to amend the writ. *McNab* v. *Macdonnell*, 15 P. R. 14.

Ship-owners—*Account—Dispute.*]—*Semble*, that in an action by the managing owner of a ship against his co-owner, the indorsement on the writ need not shew that there was any dispute as to the amount involved. *Hall* v. *The Ship "Seaward,"* 3 Ex. C. R. 268.

Special Indorsement.]—*See* JUDGMENT, IV., VIII.

4. *Renewal.*

Order—*Discretion—Service.*]—A writ of summons cannot be renewed without a Judge's order, and to satisfy the terms of Rule 238 leave to serve the writ after the lapse of a year should also be obtained.

But where an order for renewal was obtained and the writ was renewed pursuant thereto and was served without any order for leave to serve, it was dealt with under Rule 442, and the service was confirmed.

Inconsistency in Rule 238 and Forms Nos. 92 and 124 pointed out.

Where the delay in serving the writ arose from the pendency of an appeal in an action between the same parties, the decision of which would affect the plaintiff's course, and service was not made till that appeal was decided :—

Held, that a local Judge's discretion in extending the time for service should not be interfered with.

A local Judge has jurisdiction under Rule 238. *St. Louis* v. *O'Callaghan*, 13 P. R. 322, followed. *Gilmour* v. *Mayee*, 14 P. R. 120.

Rescission of Ex Parte Order—"*Good Reason*"—*Statute of Limitations.*]—Where an order has been made, on the *ex parte* application of the plaintiff, under Rule 238 (*a*), extending the time for service of the writ of summons, it is open to the defendant to move against it within the time or extended time prescribed by Rule 536, and to shew, if he can, that there was no good reason for making it, even though the result of setting it aside may be that the action will be defeated altogether by the operation of the Statute of Limitations.

The Master in Chambers, where he has made such an order, has jurisdiction under Rule 536 to reconsider and rescind it.

The reason offered by the plaintiffs for an extension of the time for service of the writ was that until they should ascertain, by the result of the reference in another pending proceeding, that there had been a fund in the hands of one of the defendants, in respect of which it would be worth while to prosecute this action, it would be advisable to delay the service of the writ, as, in the event of there being no fund, this action would be useless. There had been delay in prosecuting the reference in the other proceeding, the plaintiffs having the conduct of it. The Master in Chambers, upon the application of the defendants, set aside his own *ex parte* order extending the time for service of the writ, and his decision was affirmed by a Judge in Chambers and a Divisional Court :—

Held, that the three tribunals could not be said to have been wrong in holding that no good reason was shewn for extending the time. *Rowland* v. *Dominion Bank*, 15 P. R. 56.

Affirmed by the Supreme Court of Canada, 22 S. C. R. 130.

Rescission of Ex Parte Order—*Time—Merits—Statute of Limitations.*]—An action upon a promissory note payable on the 4th November, 1885, was begun on the 31st October 1891. The writ of summons not having been served, an order was made on the 28th October, 1892, on the *ex parte* application of the plaintiff, under Rule 238 (*a*), that service should be good if made within twelve months. The writ together with this order and an order of revivor—the original plaintiff having died in the meantime—was served on one of the defendants on the 2nd August, 1893. On the 12th September, 1893, the defendant who had been served moved before the local Judge who made the order of 28th October, 1892, to set it aside, which he refused to do :—

Held, reversing the decision of Galt, C. J., in Chambers, that the local Judge was right ; for the time for moving under Rule 536 had expired and had not been extended ; and certain correspondence relied on as shewing an agreement to extend the time, had not that effect.

The validity of the *ex parte* order did not depend solely upon whether the affidavit upon which it was made was sufficient to support it ; the motion to set it aside was a substantive motion supported by affidavits ; and the plaintiff was at liberty to answer the motion by shewing new matter in support of the original order.

And upon the material before the local Judge his refusal to set aside his order was right upon the merits. *Cairns* v. *Airth*, 16 P. R. 100.

5. Service out of Jurisdiction.

Alimony — *Domicil.*]—In an action for alimony the writ of summons was served upon the defendant out of the jurisdiction, and upon a motion to set aside the service it appeared that the plaintiff and defendant were married in Ontario in 1889, where the defendant had resided for forty years prior to 1886; that in that year he had been appointed to a permanent position in the North-West Territories, and had then sold his dwelling-house in Ontario and gone to reside in the North-West, where his daughter and her husband and children lived, and where he had ever since remained, only visiting Ontario on a few occasions. He swore that he had no intention of returning to Ontario to live. It also appeared that the plaintiff, shortly after the marriage, accompanied the defendant to his home in the North-West, and lived with him for about nine months, when she left him and proceeded to Ontario for business purposes; that she never returned to the defendant, and had since resided chiefly in the United States of America, and since the commencement of this action had stated on oath, in another cause, that she resided in the United States:—

Held, that the defendant had acquired a domicil in the North-West Territories, and that the plaintiff had not acquired a distinct domicil in Ontario since she left her husband; and, therefore, it was not a case in which service of the writ of summons was permissible under Rule 271 (*c*) or (*e*). *Allen* v. *Allen*, 15 P. R. 458.

Breach of Contract.]—The defendants in British Columbia by letter offered to sell the plaintiff in Ontario a car-load of lumber, according to a sample previously furnished, at a certain price, free on board cars at Toronto. The plaintiff accepted the offer by letter, and it was agreed between the parties that the lumber was to be shipped at Vancouver and delivered at Toronto, upon which being done the price was to be paid by means of a draft. When the lumber arrived at Toronto the plaintiff inspected it and refused to accept it or the draft on the ground that it was not up to the sample. He then brought this action for damages for breach of the contract:—

Held, that the plaintiff had the right to make inspection of the bulk at Toronto before accepting or paying; and the contract was one which, according to its terms, ought to be performed within Ontario; and therefore service out of the jurisdiction of the writ of summons ought to be allowed under Rule 271 (*c*). *Fisher* v. *Cassady*, 14 P. R. 577.

Breach of Contract.]—The defendants, resident in the Province of Quebec, there wrote and posted to the plaintiff in Ontario a letter putting an end to a contract of hiring entered into in Quebec between the parties:—

Held, in an action for wrongful dismissal, that the breach of the contract occurred in Quebec, the receipt of the letter by the plaintiff not being the breach, but only evidence of it; and service of the writ of summons on the defendants in Quebec could not be allowed under Rule 271 (*e*). *Cherry* v. *Thompson*, L. R. 7 Q. B. 573, followed. *Offord* v. *Bresse*, 16 P. R. 332.

Breach of Contract—*Undertaking.*]—Where a contract of hiring is made within the Province of Ontario, and the work thereunder is to be done there, the commission therefor will be payable there. *Hoarder* v. *Hanover, etc., Works*, 10 Times L. R. 22, and *Robey* v. *Snaefell Mining Co.*, 20 Q. B. D. 152, referred to.

If the contract is ended by letter sent from another Province, *quære* whether this indicates that the breach complained of was out of the Province.

And where, upon a motion to set aside service of a writ of summons on defendants resident out of the jurisdiction in an action for breach of such contract of hiring, there was conflicting evidence as to whether the discharge of the plaintiff from the defendants' service was by letter or by the act of an agent of the defendants within the Province, the plaintiff was allowed to proceed to trial upon his undertaking to prove at the trial a cause of action within Rule 271 (*e*). *Bell* v. *Villeneuve & Co.*, 16 P. R. 413.

Foreign Judgment—*Equitable Execution.*]—The plaintiff, a foreigner, sued the defendant, also a foreigner, upon a foreign judgment, and, alleging that the defendant was the owner of lands in Ontario, also claimed relief by way of equitable execution against such lands and an interim injunction restraining the defendant from dealing therewith:—

Held, by the Master in Chambers, not a case in which service of the writ of summons out of the jurisdiction could be allowed under any of the provisions of Rule 271. *Sears* v. *Meyers*, *Heath* v. *Meyers*, 15 P. R. 381.

Fraudulent Conveyance—*Promissory Note.*]—Action by an alleged creditor of one of the defendants to set aside a conveyance of land in Ontario by that defendant to another, as fraudulent. The plaintiff claimed to be a creditor in respect of a promissory note made and payable, and the makers of which resided, out of the jurisdiction, but he did not seek judgment upon the promissory note:—

Held, a case in which, under Rule 271 (*b*), service of the writ of summons effected out of the jurisdiction was allowable.

The different sub-rules of Rule 271 are disjunctive; and under (*b*) it is not necessary that the whole subject-matter of the action should come within its provisions.

Semble, also, that the case came within sub-rule (*g*); for, although the defendant alleged to be within the jurisdiction had not been served, it was not necessary (assuming that service within the jurisdiction is requisite to bring the case within the sub-rule) that she should be served first, but only that the service without should not be allowed until the service within had been effected, and an adjournment for the purpose might be granted. *Livingstone* v. *Sibbald*, 15 P. R. 315.

Tort — *Conspiracy — Undertaking.*]— Where the alleged cause of action was a joint conspiracy by the defendants, two of whom resided within the jurisdiction, and a third, who was a foreigner, was implicated, service on the foreigner out of the jurisdiction of a notice in lieu of the writ of summons was:—

Held, properly allowed under Rule 271 (*g*). *Massey* v. *Heynes*, 21 Q. B. D. at pp. 334, 335,

and *Indigo Co.* v. *Ogilvy*, [1891] 2 Ch. 31, specially referred to.

Such an order should not be made unless the Judge is reasonably satisfied as to the *bona fides* of the plaintiff in joining the foreign defendant; and as an evidence of such *bona fides* the plaintiff in this action was required to undertake to submit to a nonsuit if he failed to prove a joint cause of action at the trial as against the foreign defendant. *Thomas* v. *Hamilton*, 17 Q. B. D. at p. 597, specially referred to. *Simpson* v. *Hall*, 14 P. R. 310.

Tort—*Malicious Prosecution—Arrest.*]—Criminal proceedings begun in the Province of Quebec, under which the plaintiff was arrested in the Province of Ontario and taken to Montreal, where he was discharged, constitute, in effect, one entire tort; and service of a writ out of this Province in an action therein for malicious prosecution, founded thereon, will not be allowed under Rule 1309, amending Rule 271 (*e*). *Oligny* v. *Beauchemin*, 16 P. R. 508.

Tort — *Transfer of Goods—Fraudulent Preference.*]—An action by an assignee under R. S. O. ch. 124 against persons residing in the Province of Quebec to set aside a transfer of goods effected in this Province, as a fraudulent preference, which goods have afterwards been removed to Quebec, is founded on a "tort committed within the jurisdiction," within the meaning of Rule 271 (*e*), as amended by Rule 1309. *Clarkson* v. *Dupré*, 16 P. R. 521.

Waiver of Objection to Allowance—*Appearance.*]—A defendant, by entering an appearance in an action, submits himself to the jurisdiction of the Court, and waives his right to move against an order permitting service of the writ of summons to be made upon him out of the jurisdiction.

Upon a motion by the defendant for leave to appeal:—

Held, by the Court of Appeal, that the defendant, by appearing, had submitted to the jurisdiction, and the justice of the case consisted in allowing him to remain in the position in which he had placed himself; and there was no reason for giving leave to appeal. *Sears* v. *Meyers*, 15 P. R. 381, 456.

Waiver of Objection to Allowance—*Intention—Proceedings.*]—Where a defendant does not really intend to waive his objection to the jurisdiction, he does not, by obtaining an order for security for costs and opposing a motion for speedy judgment, estop himself from moving against an order permitting service of the writ of summons to be made upon him out of the jurisdiction. *Heath* v. *Meyers*, 15 P. R. 381.

See Sparks v. *Purdy*, 15 P. R. 1, *ante* 230; *Milne* v. *Moore*, 24 O. R. 456, *ante* 440.

PRACTISING MEDICINE.

See Medical Practitioner.

PREMIUM NOTE.

See Insurance, V.

PREROGATIVE OF CROWN.

See Crown, III.

PRESCRIPTION.

See Limitation of Actions—Way, II.

PRESSURE.

See Bankruptcy and Insolvency, I.

PRESUMPTION.

See Bankruptcy and Insolvency, I.

PRINCIPAL AND AGENT.

I. Appointment.

Evidence of Agency — *Fraud — Statute of Frauds.*]—Property of the plaintiff's husband having been offered for sale under mortgage, she agreed orally with the mortgagee's solicitors to purchase it, but, not having the means to make the cash payment required, she saw one of the defendants, who agreed to lend her for a year the necessary money, and to take a deed of the property as security, and he gave to the solicitors a written offer to purchase on the terms arranged by the plaintiff, which offer was by the solicitors orally accepted. The property was however in fact conveyed to the other defendant, who was the daughter of her co-defendant:—

Held, per Hagarty, C. J. O., and Maclennan, J. A., that, on the evidence, the conveyance to the daughter was the result of a fraudulent conspiracy between her father and herself to deprive the plaintiff of her bargain; that therefore the daughter stood in no better position than her father; and that he was an agent for the plaintiff whose agency might be proved by oral evidence notwithstanding the Statute of Frauds:—

Held, per Burton and Osler, JJ. A., that, on the evidence, the purchase by the daughter was not a collusive one, but was one for her own benefit, and could not be impeached.

The Court being equally divided, the judgment of Robertson, J., at the trial was affirmed.

Upon appeal to the Supreme Court of Canada, the opinions of Hagarty, C. J. O., and Maclennan, J. A., were adopted, Strong, J., dissenting. *McMillan* v. *Barton*, 19 A. R. 602, 20 S. C. R. 404.

Ratification of Agency—*False Representations.*]—Where payment is obtained from a debtor by one who falsely represents that he is agent of the creditor, upon whom a fraud is thereby committed, if the creditor ratifies and confirms the payment, he adopts the agency of the person receiving the money and makes the payment equivalent to one to an authorized agent.

The payment may be ratified and the agency adopted, even though the person receiving the money has, by his false representations, committed an indictable offence. *Scott* v. *Bank of New Brunswick*, 23 S. C. R. 277.

II. Liability of Principal to Third Party.

Executor—*Misappropriation by Agent.*]—When a testamentary executrix employs an agent as attorney, she is bound to supervise his management of the matters intrusted to him and to take all due precautions, and cannot escape liability for the misappropriation of funds committed by such agent, although he was a notary public of excellent standing prior to the misappropriation. *Low* v. *Gemley*, 18 S. C. R. 685.

III. Power and Authority of Agent.

Agent of Bank—*Discounting.*]—K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank, which he discounted as such agent, and, without indorsing them, used the proceeds, in violation of his instructions, in the business of his firm. The firm having become insolvent, the question arose whether these drafts constituted a debt due from the estate to the bank, or whether the bank could repudiate the act of its agent and claim the whole amount from the solvent acceptors:—

Held, Gwynne, J., dissenting, that the drafts were debts due and owing from the insolvents to the bank:—

Held, per Strong and Patterson, JJ., that the agent being bound to account to the bank for the funds placed at his disposal, he became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he had failed to account. *Merchants' Bank of Halifax* v. *Whidden*, 19 S. C. R. 53.

Attorney—*Borrowing.*]—An agent who is authorized by his power to make contracts of sale and purchase, charter vessels, and employ servants, and as incidental thereto to do certain specified acts, including indorsement of bills and other acts for the purposes therein aforesaid, but not including the borrowing of money, cannot borrow on behalf of his principal or bind him by contract of loan, such acts not being necessary for the declared purposes of the power. *Bryant* v. *La Banque du Peuple*, *Bryant* v. *Quebec Bank*, [1893] A. C. 170.

Attorney—*Drawing and Making Bills and Notes.*]—Where, by a document indorsed "procuration générale et spéciale," a wife being sole owner constituted her husband "son procureur général et spécial" to administer her affairs, specifying such acts as drawing bills of exchange and making promissory notes:—

Held, that the wife's liability extended to all promissory notes granted by the husband, and was not limited by Art. 181 of the Civil Code to such notes as were required for purposes of the administration. *La Banque d' Hochelaga* v. *Jodoin*, [1895] A. C. 612.

Attorney—*Indorsing Bills and Notes.*]—Where an agent accepts or indorses "per pro.," the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority; where an agent has such authority, his abuse of it does not affect a *bonâ fide* holder for value. *Bryant* v. *La Banque du Peuple*, *Bryant* v. *Quebec Bank*, [1893] A. C. 170.

Attorney—*Sale of Land.*]—Acting under a power of attorney from the defendant, empowering him to attend to and transact all the defendant's business in connection with her properties, both real and personal, and generally to do anything he might think necessary, etc., in the premises as fully and effectually as if she were personally present, the attorney entered into a contract for the sale of the defendant's farm to the plaintiff, and a deed was executed by the defendant and delivered over to the attorney for the purpose of carrying out the sale. The terms of purchase were that the plaintiff was to pay off certain incumbrances, make a cash payment, and execute a mortgage to secure the balance of the purchase money, which he did, making the cash payment and mortgage to the attorney as trustee for the defendant, which the attorney was willing to hand over to the latter on her delivering up possession, which she refused to do:—

Held, that the power was a sufficient authority to the attorney to receive the purchase money and bind the defendant in the arrangement made; and that the plaintiff was entitled to possession of the land. *McClellan* v. *McCaughan*, 23 O. R. 679.

Attorney—*Salvage Moneys.*]—A crew of sailors, claiming salvage from the owners of a vessel picked up at sea, gave a power of attorney to P., authorizing him to bring suit or otherwise settle and adjust any claim which they might have for salvage services, etc.:—

Held, affirming the decision of the local Judge in admiralty, 3 Ex. C. R. 33, that P. was not authorized to receive payment of the sum awarded for salvage, or to apportion the respective shares of the sailors therein.

Taschereau, J., took no part in judgment, entertaining doubts as to the jurisdiction of the Court to hear the appeal. *Churchill* v. *McKay*—*In re The Ship "Quebec,"* 20 S. C. R. 472.

Bankers—*Collection—Set-off.*]—Bankers are subject to the principles of law governing ordinary agents, and, therefore, bankers to whom as agents a bill of exchange is forwarded for collection, can receive payment in money only, and cannot bind the principals by setting off the amount of the bill of exchange against a balance due by them to the acceptor. *Donogh* v. *Gillespie*, 21 A. R. 292.

Foreman of Railway Company—*Contract.*]—Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line, but on one connecting therewith, it was:—

Held, that this was evidence to be submitted to a jury of a contract to that effect, binding the defendants, and that a nonsuit was wrong; Hagarty, C. J. O., dissenting. *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

Notary—*Statute of Frauds.*]—The ante-nuptial contract in question was not signed by the parties, but by the notaries in their own names, they having full authority from the parties to do so:—

Held, that this was a sufficient signature within the Statute of Frauds to bind the parties. *Taillifer* v. *Taillifer*, 21 O. R. 337.

IV. Rights of Agent against Principal.

Commission—*Contract.*]—In a written contract of agency the principal agreed to pay to the agent a fixed commission on all sales of goods manufactured by the former effected by or through the latter. The contract was made terminable at the end of a year on a month's notice by either party; but it contained no express agreement by the principal to employ for any period or to manufacture any goods:—

Held, that these terms could not be imported into the contract by implication. *Morris* v. *Dinnick*, 25 O. R. 291.

PRINCIPAL AND SURETY.

See Bond—Collateral Security—Fraudulent Conveyance—Guaranty and Indemnity.

I. Discharge and Release of Surety.

1. *Course of Dealing.*

Discharge of Collateral Security.]—A. and B., partners in business, borrowed money from C., giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved, A. assumed all the liabilities of the firm, and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note:—

Held, affirming the decision of the Court of Appeal, 20 A. R. 695, that, by the terms of the dissolution of partnership, the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change, his release of the principal, A., discharged B., the surety, from liability for the debt. *Allison* v. *McDonald*, 23 S. C. R. 635.

Extending Time—*Notice of Suretyship.*]—Held, reversing the judgment of Robertson, J., 19 O. R. 169, that, as there was no evidence whatever of the plaintiff's knowledge of the covenant under which the alleged suretyship arose, and as he had no reason to think that the relation of principal and surety existed, his dealing with the debtor did not work a release, assuming that the relationship did exist.

Per Hagarty, C. J. O., and Osler, J. A., that the defendant, as a volunteer, could not set up the rights of a surety under the covenant of the mortgagor, the grantor of the equity of redemption, against the plaintiff, the creditor of the mortgagor. *Northwood* v. *Keating*, 18 Gr. 643, referred to. *Blackley* v. *Kenney*, 18 A. R. 135.

Interference with Rights of Surety.]—The Union Bank agreed to discount the paper of S., A., & Co., railway contractors, indorsed by O'G., as surety, to enable them to carry on a railway contract for the Atlantic & North-West R. W. Co. O'G. indorsed the notes on an understanding or an agreement with the contractors and the bank that all moneys to be earned under the contract should be paid directly to the bank and not to the contractors, and an irrevocable assignment by the contractors of all moneys to the bank was in consequence executed. After several estimates had been thus paid to the bank, it was found that the work was not progressing favourably, and the railway company then, without the assent of O'G., but with the assent of the contractor and the bank, guaranteed certain debts due to creditors of the contractors, and out of moneys subsequently earned by the contractors made large payments for wages, supplies, and provisions necessary for carrying on the work. In October, 1888, the bank, also without the assent of O'G., applied for and got possession of a cheque for $15,000 which had been accepted by the bank and held by the company as security for the due performance of the contract, in consideration of signing a release to the railway company "for all payments heretofore made by the company for labour employed on said contract and for material and supplies which went into the work." The contract under certain circumstances gave the right to the company to employ men and additional workmen, etc., as they might think proper, but did not give the right to guarantee contractors' debts or pay for provisions and food, etc.:—

Held, that there was such a variation of the rights of O'G. as surety as to discharge him; Taschereau and Gwynne, JJ., dissenting. *O'Gara* v. *Union Bank of Canada*, 22 S. C. R. 404.

Novation — *Mortgagor and Assignee of Equity of Redemption.*]—Where a mortgagor has assigned his equity of redemption, the assignee covenanting with him to pay the mortgage debt, though as between the mortgagor and the assignee the latter thus becomes

primarily liable for the debt, this does not create any privity of contract between the assignee and the mortgagee; and the mortgagor cannot contend, as against the mortgagee, that he has become a mere surety for the debt, and, as such, has been released by certain dealings between the mortgagee and assignee of the equity of redemption, unless such dealings constitute a new contract between them. *Mathers* v. *Helliwell*, 10 Gr. 172, distinguished. *Aldous* v. *Hicks*, 21 O. R. 95.

Novation — *Mortgagor and Assignee of Mortgage — Reservation of Rights.*] — A new agreement between the debtor and creditor extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract, and releases the surety.

And a provision in such agreement reserving the rights of the creditor against the surety, though effectual as regards the extension of time, is idle as regards the stipulation for an increased rate of interest, and, notwithstanding such reservation, the surety is discharged. *Bristol and West of England Land, Mortgage, and Investment Co.* v. *Taylor*, 24 O. R. 286.

Novation — *Vendor and Assignee of Purchaser.*]—An agreement for sale and purchase of several lots, entered into between the plaintiffs and the defendant, described the lots by their plan number, and after providing for payment of the purchase money, part in cash and part at times fixed therein, with a right of prepayment, contained the words: "Company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The defendant sold and assigned his interest in the agreement to a third person, who made several payments to the plaintiffs, and sold several lots and parts of lots, which were conveyed to the purchasers by the plaintiffs, who did not first insist upon payment of all interest, and who also on one occasion gave time to the third person for payment of interest:—

Held, 1. That there was no novation, the relations which the defendant himself created between the plaintiffs and the third person sufficiently accounting for the dealings between them.

2. That the proportion of the purchase price applicable to each lot was to be ascertained by dividing the balance of purchase money, after deducting the cash payment, by the number of lots.

3. That the plaintiffs were not entitled to convey lots without requiring payment of all interest in arrear at the time of each conveyance, and interest to the date of the conveyance upon the portion of principal being paid.

4. That t' ugh the plaintiffs had no right to convey parts of lots, or to convey without requiring payment of interest, the defendant, even if merely a surety, was not wholly released by their doing this, and giving time for payment of interest, but was released as to interest in arrear when lots were conveyed and time was given, and was entitled to credit for the full proportion of purchase money of those lots of which parts had been conveyed. *Land Security Co.* v. *Wilson*, 22 A. R. 151. Affirmed by the Supreme Court.

Satisfaction of Principal Debt—*Release of Debtor—Novation.*]—Held, by the Court of Appeal, reversing the decision of the Chancery Division, 22 O. R. 235, that a creditor may by express reservation preserve his rights against a surety, notwithstanding the release of the principal debtor, the transaction in such a case amounting in effect to an agreement not to sue, but if the effect of the transaction between the creditor and the principal debtor is to satisfy and discharge and actually extinguish the debt, there is nothing in respect of which the creditor can reserve any rights against the surety:—

Held, by the Supreme Court of Canada, affirming the decision of the Court of Appeal, that, as according to the evidence there was a complete novation of the debt secured by the promissory note sued on, and a release of the maker, the indorsers on the note were also released. *Holliday* v. *Hogan*, 20 A. R. 298. *Holliday* v. *Jackson*, 22 S. C. R. 479.

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2. *Neglect of Obligee.*

Employer — *Guarantee Policy—Employee—Defalcations—Notice—Supervision.*]—A guarantee policy insuring the honesty of W., an employee, was granted upon the express conditions, (1) that the answers contained in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept, and (2) that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had become guilty of any criminal offence entailing or likely to entail loss to the employers and for which a claim was liable to be made under the policy. There was a defalcation in W.'s accounts, and the evidence shewed that no proper supervision had been exercised over W.'s books, and the guarantors were not notified until a week after the employers had full knowledge of the defalcation, and W. had left the country:—

Held, affirming the judgment of the Court below, that as the employers had not exercised the stipulated supervision over W., and had not given immediate notice of the defalcation, they were not entitled to recover under the policy. *Harbour Commissioners of Montreal* v. *Guarantee Company of North America*, 22 S. C. R. 542.

Municipal Corporation—*Bond—Collector—Non-disclosure of Defaults.*]—In an action by a municipal corporation against the sureties to the bonds of a defaulting collector of taxes, for the due performance of his duties for 1886 and 1887, it appeared that there had been great laxity on the plaintiffs' part, but that shortly before the collector absconded, in 1888, a majority of the members of the corporation had confidence in his honesty; while the defendants had not sought information from the plaintiffs as to the way he had performed his duties in former years:—

Held, that the non-disclosure by the plaintiffs to the defendants of a motion having been made in council in 1885 that if he roll for 1884 was not returned by the next meeting, an inquiry before the County Court Judge would be asked for; or of a resolution in August, 1885, instructing the treasurer to take proceedings against the collector and his sureties for the balance due on the 1884 roll unless fully settled before 10th September next, which it was; or of another like

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resolution in 1886, in reference to the taxes of 1885, which were afterwards, in 1888, paid over in full by him, and of the non-return by him of the 1885 roll until 1888, were not such non disclosures as amounted to constructive fraud on the plaintiffs' part sufficient to relieve the defendants from liability on their bonds. *Township of Adjala* v. *McElroy*, 9 O. R. 580, specially considered. *Town of Meaford* v. *Lang*, 20 O. R. 42, 541.

II. Liability of Surety.

Bond—*Condition — Breach — Demand—Executors and Administrators.*]—It is a condition precedent to the liability of the sureties in a bond conditioned for the delivery up by the principal *on demand* of all moneys received and not paid out by him, that a personal demand of payment should be made on him.

And where the principal in a bond so conditioned dies before any demand for payment is personally made on him, a demand on his personal representatives is insufficient to charge the sureties. *Port Elgin Public School Board* v. *Eby*, 26 O. R. 73.

Bond—*Duties of Registrar of Deeds.*]—*See County of Middlesex* v. *Smallman*, 20 O. R. 487, *post* 862.

Bond — *Indemnity — Payment — Condition Precedent—Judgment—Payment into Court.*]—The defendants, husband and wife, executed in favour of the plaintiff, the husband's retiring partner, a bond conditioned to be void if the husband should save, defend, and keep harmless and fully indemnify the plaintiff from all loss, costs, charges, and damages and expenses which he might at any time sustain, or suffer, or be put to for or by reason of non-payment by the husband of the liabilities of the firm as the same became due, it being the intention and the plaintiff was thereby "indemnified or intended so to be from all and every liability of every nature and kind soever of the said firm."

Judgments were recovered by creditors of the firm against them, and the plaintiff now sued the defendants to recover the amount to pay these judgments, although he had not himself paid them:—

Held, that he was entitled to have the judgments and costs paid and the amounts necessary were for that purpose ordered to be paid into Court by the defendants. *Boyd* v. *Robinson*, 20 O. R. 404.

Bond—*Indemnity—Payment—Condition Precedent—Judgment — Penalty.*]—Under a bond conditioned to be void if the person on whose behalf it is given "shall indemnify and save harmless (the obligee) from payment of all liability of every nature and kind whatsoever," a right of action against the sureties arises in favour of the obligee as soon as judgment is recovered against him on a claim coming within the security. Payment of such claim by him is not a condition precedent. *Boyd* v. *Robinson*, 20 O. R. 404, approved.

A bond without a penalty may be good as a covenant or agreement. *Mewburn* v. *Mackelcan*, 19 A. R. 729.

III. Rights of Surety.

Contribution from Co-sureties.]—Where one of several sureties has been released by the creditor giving time to the principal debtor, with the consent of the other sureties, the latter cannot, upon payment of the debt, recover contribution from the co-surety.

Three out of four sureties on a note obtained from the holder an extension of time by a renewal during the absence and without the consent or approval of the fourth surety, the holder retaining the original note.

After payment of the renewal by the three who had obtained the extension, they brought an action against the fourth for contribution:—

Held, that they could not recover. *Worthington* v. *Peck*, 24 O. R. 535.

Security Held by Creditor—*Release Without Consent of Surety—Judgment.*]—The plaintiffs, who held a number of promissory notes of a customer, indorsed by various persons, and also a mortgage from the customer on certain lands to secure his general indebtedness, sued the defendant as indorser of one of the notes. Before action brought, they had released certain of the mortgaged lands, without the consent of the defendant:—

Held, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make them account for their dealings with the mortgaged property when that security had answered its purpose, or the debt had been paid by the sureties, or when in any other event the application of the moneys from the security could be properly ascertained.

Decision of Robertson, J., 25 O. R. 503, modified. *Molsons Bank* v. *Heilig*, 26 O. R. 276.

PRINTING.

See Costs, III.

PRIVATE WAY.

See Way, VIII.

PRIVILEGE.

See Defamation, VI.—Evidence, I.—Solicitor, VI.

PRIVY COUNCIL.

Appeal to—*New Issue.*]—Where a writ and declaration alleged that the defendant had been guilty of wilful deceit, and had fraudulently effected a transference of fire insurance in his books after a fire had occurred, from a company of which he was agent, to the appellants, of whom he was also agent, with a specific fraudulent purpose, and such charges of fraud and deceit failed:—

Held, that the appellants could not be allowed in final appeal to contend for the first time that the pleadings and evidence disclosed such negligence or breach of duty by the respondent as their agent as is in law sufficient to infer his liability for the amount paid by them under the insurance so transferred. Fraud was of the essence of the declaration, and the evidence of the respondent directed to that issue cannot be accepted as representing all that he would have brought forward to rebut a charge of negligence, nor had the points connected with that issue been submitted to the Court below. *Connecticut Fire Ins. Co.* v. *Kavanagh*, [1892] A. C. 473.

Appeal to—*Security — Execution.*]—Where the plaintiffs were appealing to the Privy Council from a judgment of the Court of Appeal dismissing with costs an appeal from the judgment of the Queen's Bench Division in favour of the defendants with costs, and had given security in $2,000, as required by sec. 2 of R. S. O. ch. 41:—

Held, that the order of a Judge of the Court of Appeal, under sec. 5, allowing the security, should not have stayed the proceedings in the action, and so much of the order as related to the stay should be rescinded:—

Held, also, that the plaintiffs not having given security to stay execution for the costs in the Courts below, and the stay being removed, if they now desired to have execution for such costs stayed, they should give security therefor as provided by Rule 804, which is made applicable by sec. 4 of the Act:—

Held, also, that if an order for payment out of the High Court of money therein, awaiting the result of the litigation, was "execution" within the meaning of sec. 3, it was stayed by the allowance of the security, and required no order; if it was not execution, a Judge of the Court of Appeal had no jurisdiction to stay proceedings in the Court below; and it was for the High Court to determine whether such an order was "execution," and if not, whether the money should be paid out. *McMaster* v. *Radford*, 16 P. R. 20.

PROBATE COURT.

Jurisdiction—*Trustees' Accounts.*]—A Court of Probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other Court, and a Court of equity, in a suit to remove the executors and trustees, may investigate such accounts again, and disallow charges of the trustees which were passed by the Probate Court. *Grant* v. *Maclaren*, 23 S. C. R. 310.

PRODUCTION OF DOCUMENTS.

See EVIDENCE, IX.

PROHIBITION.

I. GENERALLY.

Error in Law.]—Prohibition will not lie to a Division Court merely because the Judge has erred in his construction of a statute where he does not, by this error in construction, give himself jurisdiction he does not in law possess.

Judgment of the Queen's Bench Division, 19 O. R. 487, reversed. *In re Long Point Co.* v. *Anderson*, 18 A. R. 401.

Error in Law.]—The facts not being in dispute, prohibition to a Division Court was granted on the ground that the Judge had given an erroneous interpretation to 51 Vict. ch. 23, sec. 2 (O.), in holding that a magistrate's order thereunder was equivalent to the final judgment of a Court, and in entertaining an action thereon for arrears of payments. *Re Sims* v. *Kelly*, 20 O. R. 291.

Evidence—*Examination of Judgment Debtor.*]—The refusal of evidence is not ground for prohibition. That the Judge has refused to allow the defendant, under examination upon judgment summons, to make explanations as to his dealing with money lent by and repaid to him after judgment, is not a ground for prohibition against proceeding upon an order for committal for making away with property. *Re Reid* v. *Graham*, 25 O. R. 573. *See S. C.*, 26 O. R. 126.

Excessive Jurisdiction.]—An order of prohibition is an extreme measure, to be granted summarily only in a very plain case of excessive jurisdiction on the part of a subordinate tribunal. *Re Cummings and County of Carleton*, 25 O. R. 607. *See S. C.*, 26 O. R. 1.

Question of Fact.]—Where the Judge found that money was handed over voluntarily by the defendant to a constable upon his arrest, and determined that it could be garnished:—

Held, that the question whether the garnishee was indebted to the defendant was a question of fact within the jurisdiction of the inferior Court, and that prohibition would not lie. *Re Field* v. *Rice*, *Re Ford* v. *Rice*, 20 O. R. 309.

Territorial Jurisdiction of Division Court—*Transfer.*]—Under R. S. O. ch. 51, sec. 87, as amended by 52 Vict. ch. 12, sec. 5 (O.), either party in a Division Court action may, after notice disputing the jurisdiction has been duly given, apply to have the action transferred to another Court. If no application be made, and if in fact there be jurisdiction, prohibition will not lie merely because the Judge has assumed that, as no application for a transfer had been made, he had jurisdiction, *i.e.*, has not tried the question of jurisdiction. But if, in fact, there be no jurisdiction, the objection still holds good, and prohibition will be granted.

Judgment of the Queen's Bench Division, 22 O. R. 583, affirmed. *In re Thompson* v. *Hay*, 20 A. R. 379.

Time of Application for.]—If the right to prohibition exists, it is optional with the defendant to apply at the outset of the Division Court proceedings, or he may wait till the latest stage of appeal, so long as there is anything to prohibit. *In re Brazill* v. *Johns*, 24 O. R. 209.

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II. PARTICULAR TRIBUNALS.

Arbitrators.]—*See Re Township of Anderdon and Township of Colchester North*, 21 O. R. 476, *ante* 712; *Re Cummings and County of Carleton*, 25 O. R. 607, 26 O. R. 1, *ante* 688.

County Courts.]—*See* COUNTY COURT.

County Court Judge—*Municipal Investigation—Persona Designata.*]—The council of the city of Toronto, under the provisions of R. S. O. 1887 ch. 184, sec. 477, passed a resolution directing a County Court Judge to inquire into dealings between the city and persons who were or had been contractors for civic works, and ascertain if the city had been defrauded out of public moneys in connection with such contracts; to inquire into the whole system of tendering, awarding, carrying out, fulfilling, and inspecting contracts with the city; and to ascertain in what respect, if any, the system of the business of the city in that respect was defective. G., who had been a contractor with the city and whose name was mentioned in the resolution, attended before the Judge and claimed that the inquiry as to his contracts should proceed only on specific charges of malfeasance or misconduct, and the Judge refusing to order such charges to be formulated, he applied for a writ of prohibition:—

Held, affirming the judgment of the Court of Appeal for Ontario, Gwynne, J., dissenting, that the County Court Judge was not acting judicially in holding this inquiry; that he was in no sense a Court and had no power to pronounce judgment imposing any legal duty or obligation on any person; and he was not, therefore, subject to control by writ of prohibition from a superior Court:—

Held, per Gwynne, J., that the writ of prohibition would lie, and in the circumstances shewn it ought to issue. *Godson* v. *City of Toronto*, 18 S. C. R. 36.

Division Courts.]—*See* DIVISION COURT, IV.

Justice of the Peace.]—*See Company of Adventurers of England* v. *Joannette*, 23 S. C. R. 415, *ante* 469.

License Commissioners.]—*See Re Thomas's License*, 26 O. R. 448, *ante* 560.

Revising Officers.]—*See Re North Perth—Hessin* v. *Lloyd*, 21 O. R. 538, *ante* 761.

III. PART PROHIBITION.

Judgment—*Excessive Amount.*]—Where a Division Court has jurisdiction at the time of the institution of an action, but, by the addition of interest accruing during its pendency, judgment is given for an amount beyond the jurisdiction of the Court, prohibition will be granted until the Judge amends the judgment by striking out the excess; or a partial prohibition will be issued to prevent the enforcement of judgment for the excess. *Re Elliott* v. *Biette*, 21 O. R. 595.

Judgment—*Excessive Amount.*]—Where in an action for breach of contract judgment was given in a Division Court for $108.63:—

Held, that prohibition should go only as to the excess over $100. *Trimble* v. *Miller*, 22 O. R. 500.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROMOTER.

See COMPANY, VIII.

PROVINCIAL FISHERIES.

See GAME.

PROVINCIAL PENAL LEGISLATION.

See CONSTITUTIONAL LAW, II.

PROVINCIAL SUBSIDIES.

See CONSTITUTIONAL LAW, II.

PROXIMATE CAUSE.

See NEGLIGENCE, IV.

PUBLIC HEALTH.

Board of Health—*Physician—Dismissal—Remedy.*]—Section 67 of the Act by which municipal corporations were established in Nova Scotia, 42 Vict. ch. 1, giving them "the appointment of health officers . . and a board of health," with the powers and authorities formerly vested in Courts of Sessions, does not repeal ch. 29 of R. S. N. S., 4th ser., providing for the appointment of boards of health by the Lieutenant-Governor in Council; Ritchie, C. J., doubting the authority of the Lieutenant-Governor to appoint in incorporated counties.

A board of health, appointed by the executive council by resolution, employed M., a physician, to attend upon small-pox patients in the district "for the season" at a fixed rate of remuneration per day. Complaint having been made of the manner in which M.'s duties were performed, he was notified that another medical man had been employed as a consulting physician, but, refusing to consult with the new appointee, he was dismissed from his employment.

He brought an action against the municipality, setting forth in his statement of claim the facts of his engagement and dismissal, and

claiming payment for his services up to the date at which the last small-pox patient was cured, and special damages for loss of reputation by the dismissal.

The Act R. S. N. S., 4th ser., ch. 29, sec. 12, allows the board of health to incur reasonable expenses, which are defined by 37 Viet. (N. S.) ch. 6, sec. 1, to be services performed and bestowed and medicine supplied by the physicians in carrying out its provisions, and makes such expenses a district, city, or county charge, to be assessed by the justices, and levied as ordinary county rates:—

Held, per Fournier, Gwynne, and Taschereau, JJ., affirming the judgment of the Court below, that the contract with M. was to pay him $6.50 per day so long as small-pox should prevail in the district during the season; that his dismissal was wrongful; and the fulfillment of the contract could be enforced against the municipality by action.

Per Ritchie, C. J., and Strong, J.—There was sufficient ground for the dismissal of M. Assuming, however, his dismissal to have been unjustifiable, M.'s only remedy would have been by mandamus to compel the municipality to make an assessment to cover the expense incurred. But the claim being really one for damages for wrongful dismissal, it did not come within the "reasonable expenses" which may be incurred by a board of health and made a charge on the county, and the municipality was, therefore, not liable.

Per Patterson, J.—The proper remedy for the recovery of the expenses mentioned in sec. 12 is by action, and not by mandamus to compel an assessment; but a claim for damages for wrongful dismissal does not come within the section, and is not made a county charge. *County of Cape Breton* v. *McKay*, 18 S. C. R. 639.

Summary Conviction — *By-law.*]— Held, that the unloading of manure from a car on a certain part of railway premises into waggons, to be carried away, came within the terms of a by-law amending the by-law appended to the Public Health Act, R. S. O. ch. 205, and prohibiting the unloading of manure on said part of said premises; that the use of the word "manure" in the amending by-law was not of itself objectionable; and that it was not essential to shew that the manure might endanger the public health.

A conviction for unloading a car of manure on the premises, as contrary to the by-law, was therefore affirmed. *Regina* v. *Redmond*, *Regina* v. *Ryan*, *Regina* v. *Burk*, 24 O. R. 331.

Summary Conviction—*By-law—Appeal to Sessions.*]—Where there is a conviction for an offence under the by-law set out in the schedule to the Public Health Act, R. S. O. ch. 205, as distinguished from any of the provisions in the Act itself, an appeal will lie from such conviction to the Sessions, notwithstanding sec. 112, which has no application. *Regina* v. *Coursey*, 26 O. R. 685.

Reversed on other grounds, 27 O. R. 181.

PUBLIC MORALS AND CONVENIENCE.

Municipal By-law—*Swearing in Street or Public Place—Private Office in Custom House.*]—A city by-law enacted that no person should make use of any profane swearing, obscene, blasphemous, or grossly insulting language, or be guilty of any other immorality or indecency, in any street or public place:—

Held, that the object of the by-law was to prevent an injury to public morals, and applied to a street or a public place *ejusdem generis* with a street, and not to a private office in the custom house. *Regina* v. *Bell*, 25 O. R. 272.

PUBLIC OFFICERS.

See Action, III.

PUBLIC SCHOOLS.

See Constitutional Law, III.

I. Expenditure by School Boards.

Erection of School House—*Contract—Ultra Vires.*]—The school board of a city, town, or incorporated village has no authority to contract for the building of a school house, until the necessary funds have been provided, under 54 Viet. ch. 55, sec. 116, or for one involving the expenditure of any greater sum than has been so provided.

The plaintiff, a freeholder, ratepayer, and elector of the town of Fort William, and a supporter of the public schools therein, suing on behalf of himself and all other ratepayers, was held entitled to an injunction to restrain the proceeding with the erection of a school house, in a case where the contract price exceeded the amount provided under sec. 116, and to an order compelling the repayment to the school corporation of certain sums paid by individual members of the school board to the contractors for a portion of the work already performed. *Smith* v. *Fort William School Board*, 24 O. R. 366.

Payment of Solicitor's Bill—*Right of Ratepayer to Taxation.*]—*See McGingan* v. *McGingan*, 21 O. R. 289, 19 A. R. 56, 21 S. C. R. 267, *ante* 226.

II. Formation and Alteration of School Sections.

Award — *By-law—Petition—Appeal—Time—Waiver.*]—In the absence of satisfactory evidence of waiver of the objection by all persons interested, a county council has no jurisdiction under sub-sec. 3 of sec. 82 of the Public Schools Act, 54 Viet. ch. 55 (O.), to appoint arbitrators to hear an appeal from the action or refusal to act of a township council and to determine or

alter the boundaries of school sections, unless a notice of appeal has been duly given within the time mentioned in sub-sec. 1.

Where a by-law of the county council appointing arbitrators was passed pursuant to a notice of appeal, in the form of a petition, filed with the county clerk after such time had expired, and there was no waiver:—

Held, that the authority of the arbitrators to enter upon the inquiry being affected by the want of jurisdiction of the council to pass the by-law, their award could not be confirmed by sec. 96 of the Public Schools Act; and the by-law was quashed.

The application to quash was made by a ratepayer of the school section whose boundaries were in question, acting at the request of the trustees of the section, and the solicitors acting for him were also retained by the trustees, whose secretary-treasurer appeared before the committee of the county council, before the by-law was passed, and before the arbitrators, and did not make objections to the jurisdiction of either body:—

Held, that, in the absence of proof of the authority of the secretary-treasurer to represent the trustees, it could not be said that they had waived their right to object to the proceedings, nor that the rights of the applicant were entirely gone and merged in those of the trustees. *Re Martin and County of Simcoe*, 25 O. R. 411.

Award — *Finality — Union School Sections.*]—An award of arbitrators under secs. 87 and 88 of the Public Schools Act, 1891, as to readjustment of union school sections, is conclusive for five years, though the award be that no change be made in the boundaries. *In re Union School Section East and West Wawanosh*, 26 O. R. 463.

Award — *Finality — Union School Section — Appeal — Petition.*]—The petition for the formation, alteration, or dissolution of a Union School Section under 54 Vict. ch. 55, sec. 87, sub-sec. 1 (O.), must be, in all cases, the joint petition of five ratepayers from each of the municipalities concerned, otherwise the award based upon it will be void *ab initio*, and sec. 96, validating defective awards where there has been no notice to quash given within the time prescribed, has no application.

When the award in such case is that no action be taken, the restriction in sub-sec. 11 of sec. 87 against new proceedings for a period of five years does not apply.

Semble, no appeal lies from such an award as last referred to.

In re Union School Section East and West Wawanosh, 26 O. R. 463, not followed. *Union School Section* v. *Lockhart*, 26 O. R. 662.

Varied by a Divisional Court, 27 O. R. 345.

By-law — *Seal — Signature — Injunction — Parties.*]—A by-law of a township corporation for the purpose of dividing a school section is invalid unless under the corporate seal, and signed by the head and by the clerk of the corporation.

The township corporation and the individual members of the proposed new school board are proper parties to an action to have an invalid by-law for such a purpose set aside. *Holt* v. *Township of Medonte*, 22 O. R. 302.

By-law — *Time for Passing.*]—Sub-sec. 3 of sec. 81 of the Public Schools Act, 54 Vict. ch. 55 (O.), provides that by-laws passed under the said section for altering, etc., school sections, shall not be passed later than 1st May in the year, and shall not take effect before the 25th December next thereafter:—

Held, that the word "year" as used therein means the calendar year commencing 1st January and ending 31st December, and that a by-law altering certain school sections passed on the 25th September was invalid. *In re Trustees of School Section No. 5 of the Township of Asphodel and Humphries*, 24 O. R. 682.

Petition — *Appeal — Superintendent — Visitors — Jurisdiction — Mandamus.*]—Upon an application by the appellant for a writ of *mandamus* to compel the respondents to establish a new school district in the parish of Ste. Victoire, in accordance with the terms of a sentence rendered on appeal by the Superintendent of Education under 40 Vict. ch. 22, sec. 11 (Q.), the respondents pleaded *inter alia* that the superintendent had no jurisdiction to make the order, the petition in appeal not having been approved of by three qualified school visitors. The decree of the superintendent alleged that the petition was approved of by one L., inspector of schools, as well as by three visitors:—

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the petition in appeal must have the approval of three visitors qualified for the municipality where the appeal to the superintendent originated, and as one of the three visitors who had signed the petition in appeal was parish priest of an adjoining parish, and not a qualified school visitor for the municipality of Ste. Victoire, the sentence rendered by the superintendent was null and void.

Taschereau, J., dissented on the ground that as the decree of the superintendent stated that L., the inspector of schools, was a visitor, it was *primâ facie* evidence that the formalities required to give the superintendent jurisdiction had been complied with: C.S.L.C. ch. 15, sec. 25; Arts. 1863, 1864, R. S. Q. *Hus* v. *School Commissioners for the Municipality of the Parish of Ste. Victoire*, 19 S. C. R. 477.

Protestant Separate Schools — *Extension of Boundaries.*]—The boundary of a Protestant separate school section cannot be extended into or over an adjoining public school section, where the teacher in the latter is not a Roman Catholic. *Banks* v. *Township of Anderdon*, 20 O. R. 296.

Roman Catholic Separate Schools — *Incorporation — Formalities.*]—Six persons, Roman Catholics, some of whom were supporters of an existing Roman Catholic Separate School, No. 6, and others, Public School supporters in several adjoining Public School sections, convened a meeting for the purpose of establishing a Roman Catholic Separate School, which they thereupon assumed to do; but only three of them were residents of the same school section, and also heads of families:—

Held, that the requirements of 49 Vict. ch. 46 (O.), secs. 22, 24, were not complied with, and consequently there was no valid incorporation of the trustees elected at such meeting.

Per Boyd, C.—The creation of corporations is a prerogative act, and where the power to make them is, as in this case, delegated to private persons, the method prescribed by the legislature should be substantially followed. In such case form is of the substance, and blunder in form means invalidity.

Held, also, that a question as to the valid incorporation of trustees of a Roman Catholic Separate School does not come within the purview of 49 Viet. ch. 46, sec. 68 (O.), R. S. O. 1887 ch. 225, sec. 67, which presupposes incorporation.

Decision of Ferguson, J., affirmed.

Held, also, per Ferguson, J., that the words "or other municipal authorities" in this section do not embrace the municipality itself.

Held, also, per Meredith, J., that the incorporation must be by Roman Catholics within an existing Public School section, with the same boundaries and number as such Public School section; and, therefore, apart from the informality of the proceedings, there could be no valid incorporation here; that the relief of the dissatisfied supporters of Roman Catholic Separate School No. 6—if they were entitled to any—was in additional school accommodation under R. S. O. 1887 ch. 227, sec. 28, sub-sec. 11, and not as here sought; that no provision is made for the withdrawal of a Roman Catholic Separate School supporter from one section to support another; and that the plaintiffs' remedy, if duly incorporated, was not in an action to recover rates collected by the defendants for others, but in proceedings to compel the collection of their rates. *Trustees of Roman Catholic Separate School Section No. 10 of Arthur* v. *Township of Arthur*, 21 O. R. 60.

See, also, *In re Wilson and County of Elgin*, 21 A. R. 585, 24 S. C. R. 706, *post* 835.

III. High Schools.

Alteration of Districts.]—Under sec. 6 of the High Schools Act, 54 Viet. ch. 57 (O.), as amended by 57 Viet. ch. 58, sec. 1 (O.), a county council has power to detach a township from a High School district without the consent of that township or of the other townships included in the high school district in question. *In re Wilson and County of Elgin*, 21 A. R. 585, 24 S. C. R. 706.

Trustee—*Appointment to Fill Vacancy.*]—In a High School board of a High School district constituted under sec. 11 of 54 Viet. ch. 57 (O.), a vacancy occurred by reason of the expiration of the term of office of one of the trustees appointed by a town, whereupon the town council passed a by-law appointing the plaintiff to fill the vacancy. At a subsequent meeting, in the absence of any of the causes provided for by the Act, namely, death, resignation, or removal from the district, etc., the council passed a by-law amending their previous by-law by substituting the name of the defendant for that of the plaintiff:—

Held, that the plaintiff was duly appointed to fill the vacancy, and that he was entitled to the seat, and the subsequent appointment of defendant was illegal. *Regina ex rel. Moore* v. *Nagle*, 26 O. R. 249.

Trustee—*Proceeding to Remove—Quo Warranto.*]—*See* Quo Warranto.

PUBLIC WORKS.

See Contract, III.—Crown, II.

QUEBEC LAW.

See Crown, I.—Foreign Law and Foreigner—Supreme Court of Canada, I., II., III., VII., XI., XII., XIII., XV., XVI., XVIII., XXI.

QUO WARRANTO.

Information—*High School Trustees—Civil Proceeding—Single Judge.*]—A motion for an information in the nature of a *quo warranto* is the proper proceeding to take to inquire into the authority of a person to exercise the office of a High School trustee. *Askew* v. *Manning*, 38 U. C. R. 345, 361, followed.

Such a proceeding is a civil, not a criminal, one; and is properly taken before a single Judge in Court, by way of motion, upon notice. *Regina ex rel. Moore* v. *Nagle*, 24 O. R. 507.

See Municipal Corporations, VIII.

RAILWAYS AND RAILWAY COMPANIES.

I. Aid by Municipalities.

Bonus—*Condition—Change of Circumstances.*]—A railway company, having obtained a bonus from the plaintiffs upon condition that its machine shops should be "located and maintained" within the city limits, did so erect and maintain them for some years, until authorized by legislation it amalgamated with and lost its identity in another company, all the engagements and agreements of the amalgamating companies being preserved. The amalgamated company was afterwards leased in perpetuity to a much larger railway company, who removed the shops outside the city limits:—

Held, that although all engagements and agreements made by the original company were preserved, the amalgamation and leasing in perpetuity by the larger company of the smaller under the authority of Parliament imposed new relations upon the amalgamated road which worked a change in the policy as to the site and size of the machine shops, and that the engagement had been satisfied by the maintenance of the said shops by the original company during its independent existence. *City of Toronto* v. *Ontario and Quebec R. W. Co.*, 22 O. R. 344.

See, also, *County of Halton* v. *Grand Trunk R. W. Co.*, 19 A. R. 252, 21 S. C. R. 716, *ante* 116.

II. Amalgamation.

See cases under preceding sub-title.

III. Bonds and Bondholders.

Security—*Second Mortgagee—Purchase—Trust—Banks.*]—W. having agreed to advance money to a railway company for completion of its road, an agreement was executed by which, after a recital that W. had so agreed and that a bank had undertaken to discount W.'s notes indorsed by E. to enable W. to procure the money to be advanced, the railway company appointed said bank its attorney irrevocable, in case the company should fail to repay the advances as agreed, to receive the bonds of the company (on which W. held security) from a trust company with which they were deposited, and sell the same to the best advantage, applying the proceeds as set out in the agreement. The railway company did not repay W. as agreed, and the bank obtained the bonds from the trust company, and having threatened to sell the same, the company, by its manager, wrote to E. & W. a letter requesting that the sale be not carried out but that the bank should substitute E. & W. as the attorneys irrevocable of the company for such sale, under a provision in the aforesaid agreement, and if that were done, the company agreed that E. & W. should have the sole and absolute right to sell the bonds for the price and in the manner they should deem best in the interest of all concerned, and apply the proceeds in a specified manner, and also agreed to do certain other things to further secure the repayment of the moneys advanced. E. & W. agreed to this, and extended the time for payment of their claim, and made further advances, and, as the last mentioned agreement authorized, they re-hypothecated the bonds to the bank on certain terms. At the expiration of the extended time the railway company again made default in payment, and notice was given them by the bank that the bonds would be sold unless the debt was paid on a certain day named; the company then brought an action to have such sale restrained:—

Held, affirming the decision of the Court below, that the bank and E. & W. were respectively first and second incumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees of the company in respect thereof, and there was no rule of equity forbidding the bank to sell or E. & W. to purchase under that sale.

Held, further, that if E. & W. should purchase at such sale, they would become absolute holders of the bonds and not liable to be redeemed by the company.

Held, also, that the dealing by the bank with the bonds was authorized by the Banking Act. *Nova Scotia Central R. W. Co.* v. *Halifax Banking Co.*, 21 S. C. R. 536.

Trustees—*Possession—Liability—Privileged Claim—Unpaid Vendor.*]—In virtue of the provision of a trust conveyance, granting a first lien, privilege, and mortgage upon the railway property, franchise, and all additions thereto of the South Eastern Railway Company, and executed under the authority of 43 & 44 Vict. (Q.) ch. 49, and 44 & 45 Vict. (Q.) ch. 43, the trustees of the bondholders took possession of the railway. In actions brought against the trustees after they took possession, by the appellants, for the purchase price of certain cars and other rolling stock used for operating the road, and for work done for and materials delivered to the company after the execution of the deed of trust, but before the trustees took possession of the railway:—

Held, 1st, affirming the judgments of the Court below, that the trustees were not liable. 2. That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when movables become immovable by destination (as was the result with regard to the cars and rolling stock in this case) and the immovable to which the movables are attached is in possession of a third party or is hypothecated) Art. 2017, C. C. 3. But, even considered as movables, such cars and rolling stock became affected and charged by virtue of the statute and mortgage made thereunder, as

security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendors.

Per Gwynne, J., that the appellants might be entitled to an equitable decree, framed with due regard to the other necessary appropriations of the income in accordance with the provision of the trust indenture, authorizing the payment by the trustees "of all legal claims arising from the operation of the railway, including damages caused by accidents and all other charges," but such a decree could not be made in the present action.

Per Strong, J.—*Quære*, whether the principle as to the applicability of current earnings to current expenses, incurred either whilst or before a railway comes under the control of the Court by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by Courts in this country. *Wallbridge* v. *Farwell*, *Ontario Car and Foundry Co.* v. *Farwell*, 18 S. C. R. 1.

IV. Carriage of Goods.

Liability as Carriers or Warehousemen.]—When a shipper stores goods from time to time in a railway warehouse, loading a car when a carload is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire, the shipper has no remedy against the company.

Judgment of the Common Pleas Division, 23 O. R. 454, reversed. *Milloy* v. *Grand Trunk R. W. Co.*, 21 A. R. 404.

Liability Beyond the Line — *Contract — Evidence — Damages.*]—Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line, but on one connecting therewith, it was:—

Held, that this was evidence to be submitted to a jury of a contract to that effect binding the defendants, and that a nonsuit was wrong; Hagarty, C. J. O., dissenting. The measure of damages against carriers for non-delivery of trees considered. *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245.

Liability Beyond the Line — *Contract — Agent.*]—E., in British Columbia, being about to purchase goods from G., in Ontario, signed, on request of the freight agent of the Northern Pacific Railway Company in British Columbia, a letter to G. asking him to ship goods *viâ* Grand Trunk Railway and Chicago & North-Western, care of Northern Pacific Railway at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Railway Company at Toronto, who sent it to G., and wrote to him: "I enclose you card of advice, and if you will kindly fill it up when you make the shipment, and send it to me. I will trace and hurry them through, and advise you of delivery to consignee." G. shipped the goods, as suggested in this letter, deliverable to his own order in British Columbia:—

Held, affirming the decision of the Court of Appeal, 21 A. R. 322, and of the Chancery Division, 22 O. R. 645, that on arrival of the goods at St. Paul, the Northern Pacific Railway Company were bound to accept delivery of them for carriage to British Columbia, and to expedite such carriage; that they were in the care of said company from St. Paul to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company were liable to G. for the value of the goods which were delivered to E. at British Columbia, without an order from G., and not paid for. *Northern Pacific R. W. Co.* v. *Grant*, 24 S. C. R. 546.

Liability for Negligence—*Evidence—Conjecture — Reduced Rate — Release.*]—Where the findings of the jury as to the grounds of negligence in an action against a railway company for damage to goods were based on mere conjecture, the verdict for the plaintiffs was set aside, but as it could not be said that there was no evidence of negligence on other grounds, a new trial was directed.

Per MacMahon, J., dissenting.—A presumption of negligence arose from the non-delivery of the goods, and the plaintiffs were not bound to shew any particular acts of negligence.

The plaintiffs' agent shipped a quantity of plate glass by the defendants' railway, signing an agreement that, in consideration of the defendants receiving the goods at a reduced rate of twenty-three cents per 100 pounds, they should not be responsible for any damage arising in the course of the transit, including negligence. The defendants had two rates, namely, the twenty-three cents, a third-class rate, and a double first-class rate of sixty cents, which they contended were in accordance with the Canadian Joint Freight Classification, adopted by them and approved by the Governor in Council under sec. 226 of 51 Vict. ch. 29 (D.), the Railway Act, the said classification stating that the third-class rate applied where the goods were "shipped at owners' risk—shipper signing special plate glass release form." The plaintiffs' agent was aware of the two rates, and signed the agreement assenting to the lower rate, under the belief that the defendants could not, under sec. 246, take advantage of the provision absolving them from liability where the damage was occasioned by negligence. No by-laws approving of the company's tariff under which these rates were charged had been approved of by the Governor in Council, although a by-law fixing a first-class rate of sixty-six cents and a third-class rate of fifty cents had *inter alia* been so approved:—

Held, per Meredith, C. J., that notwithstanding the payment of the lower rate, and the agreement signed by their agent, the defendants could not, under sec. 246, relieve themselves from liability when negligence was proved.

Per Rose, J.—The third-class rate was the only rate "lawfully payable." If only one rate was fixed, the provision in the freight classification as to release was *ultra vires* as contrary to the provisions of sec. 246.

Per MacMahon, J.—No by-law fixing the rate at sixty cents having been approved of by the Governor in Council, there was no freight

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G., and not paid for. *North-
Co.* v. *Grant*, 24 S. C. R. 516

Negligence—*Evidence*—*Con
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"lawfully payable," without which there could be no alternative rate, and the release, which would otherwise have been valid, was inoperative. *Cobban* v. *Canadian Pacific R. W. Co.*, 26 O. R. 732. Affirmed by the Court of Appeal, 23 A. R. 115.

Liability for Negligence — *Limitation — Special Contract.*]—By sec. 246 (3) of the Railway Act, 1888, 51 Viet. ch. 29 (D.), "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants:"—

Held, affirming the decision of the Court of Appeal, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to the amount of damages to be recovered for loss or injury to such goods arising from negligence. *Grand Trunk R. W. Co.* v. *Vogel*, 11 S. C. R. 612, and *Bate* v. *Canadian Pacific R. W. Co.*, 15 A. R. 388, distinguished.

The Grand Trunk Railway Company received from R. a horse to be carried over its line, and the agent of the company and R. signed a contract for such carriage, which contained this provision: "The company shall in no case be responsible for any amount exceeding one hundred dollars for each and any horse," etc.:—

Held, affirming the decision of the Court of Appeal, 21 A. R. 204, and of the Common Pleas Division, 24 O. R. 75, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than $100, though the value of the horse largely exceeded that amount. *Robertson* v. *Grand Trunk R. W. Co*, 24 S. C. R. 611.

Liability of Crown as Common Carrier.] —*See* CROWN, II.

V. CARRIAGE OF PASSENGERS AND LUGGAGE.

Luggage—*Special Contract—Notice—Negligence.*]—The plaintiff purchased from an agent of the defendant company at Ottawa, what was called a land seeker's ticket, the only kind of return ticket issued on the route, for a passage to Winnipeg and return, paying some thirty dollars less than the single fare each way. The ticket was not transferable, and had printed on it a number of conditions, one of which limited the liability of the company for baggage to wearing apparel not exceeding $100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket, explaining that it was for the purpose of identification, but did not read nor explain to her any of the conditions, and, having sore eyes at the time, she was unable to read them herself. On the trip to Winnipeg an accident happened to the train, and the plaintiff's baggage, valued at over $1,000, caught fire and was destroyed. In an action for damages for such loss the jury found for the plaintiff for the amount of the alleged value of the baggage:—

Held, reversing the judgment of the Court of Appeal, 15 A. R. 388, and of the Divisional Court, 14 O. R. 625, Gwynne, J., dissenting, that there was sufficient evidence that the loss of the baggage was caused by the defendants' negligence, and the special conditions printed on the ticket not having been brought to the notice of the plaintiff, she was not bound by them, and could recover her loss from the company. *Bate* v. *Canadian Pacific R. W. Co.*, 18 S. C. R. 697.

Ticket — *Condition*—"*Via Direct Line*"—*Damages.*]—A condition in a railway ticket as to travelling "*via* direct line" was rejected as meaningless, each of three possible routes being circuitous, though one was shorter in point of mileage than the others.

The amount of damages allowed by the jury to the plaintiff, because of his removal from the train while taking one of the longer routes, was reduced by this Court as unwarrantably large.

Semble, that in this country it is not the law that a passenger rightfully travelling upon his ticket is bound to pay fare wrongfully demanded, or to leave the train on the conductor's order, at the peril of not being able to recover damages for an assault committed in expelling him by force.

The American cases on the subject considered and not followed.

Judgment of the Queen's Bench Division, 20 O. R. 603, varied. *Dancey* v. *Grand Trunk R. W. Co.*, 19 A. R. 664.

Ticket—*Non-production—Refusal to Pay Fare.*]—By sec. 248 of the General Railway Act, 51 Viet. ch. 29, any passenger on a railway train who refuses to pay his fare may be put off the train:—

Held, reversing the decision of the Court of Appeal, 20 A. R. 476, and of the Queen's Bench Division, 22 O. R. 667, Fournier, J., dissenting, that the contract between the person buying a railway ticket and the company on whose line it is intended to be used, implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for refusing or being unable so to produce and deliver it up, the company is not liable to an action for such ejectment. *Grand Trunk R. W. Co.* v. *Beaver*, 22 S. C. R. 498.

See Quebec Central R. W. Co. v. *Lortie*, 22 S.C. R. 336, *post* 844; *Jones* v. *Grand Trunk R. W. Co.*, 18 S. C. R. 696, *post* 847; *Oldright* v. *Grand Trunk R. W. Co.*, 22 A. R. 286, *post* 848; *Canadian Pacific R. W. Co.* v. *Chalifoux*, 22 S. C. R. 721, *post* 848; *Haist* v. *Grand Trunk R. W. Co.*, 26 O. R. 19, 22 A. R. 504, *post* 844.

VI. FIRE FROM ENGINES.

See Wealleans v. *Canada Southern R. W. Co.*, 21 A. R. 297, *Michigan Central R. R. Co.* v. *Wealleans*, 24 S. C. R. 309, *post* 857.

VII. GOVERNMENT RAILWAYS.

See CROWN, I., II.

VIII. Injury to Animals.

"At Large"—*Highway—Jury.*]—Cattle are "at large" within the meaning of sec. 271 of 51 Viet. ch. 29 (D.) when the herdsman in following one of the herd which has strayed gets so far from the main body that he is unable to reach them in time to prevent their loitering or stopping on the highway at its intersection with a railway when he sees a train approaching.

The question whether cattle are at large or not need not under all circumstances be submitted to the jury. It is for the Judge in that case as in others to say whether there is any evidence for the jury that the cattle were in charge within the meaning of the Act. *Thompson* v. *Grand Trunk R. W. Co.*, 22 A. R. 453.

Cattle Guards—*Highway — "Place Where they might Properly be."*]—In an action for damages for the loss of horses killed on the defendants' railway, the statement of claim alleged that the horses "escaped" from the plaintiffs' farm, passed down a concession road to an allowance for road which was intersected by the railway "on the level," then along the allowance for road to the point of intersection, and thence along the railway to the place where they were struck by a passing train. The only negligence charged was that the defendants had not constructed and maintained cattle-guards or fences. It was not alleged that the horses were in charge of any person:—

Held, upon demurrer, that the horses being, contrary to the provisions of sec. 271 of the Railway Act of Canada, 51 Viet. ch. 28, within half a mile of the intersection and not in charge of any person, they did not get upon the railway from an adjoining place, where, under the circumstances, they might properly be, within the meaning of 53 Viet. ch. 28, sec. 2 (D.); and therefore the defendants were not liable. *Nixon* v. *Grand Trunk R. W. Co.*, 23 O. R. 124.

Fences—*Adjoining Property.*]—53 Viet. ch. 28, sec. 2 (D.), amending the Dominion Railway Act of 1888, enacts "... and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there."

Horses belonging to the plaintiff, while running at large, strayed from premises adjoining the defendants' line of railway, where they had been without permission of the occupant, on to the railway track, which, contrary to the statute, was unfenced, and were run over by a locomotive and killed. No affirmative by-law had been passed by the local municipality permitting horses to run at large:—

Held, that the defendants were not liable. *Duncan* v. *Canadian Pacific R. W. Co.*, 21 O. R. 355.

Gates — *Farm-crossing.*] — It is the duty of the railway company to make and duly maintain gates at farm crossings with proper fastenings, and the knowledge of the owner of the farm that the fastenings are insufficient, and his failure to notify the company of that fact, will not prevent him from recovering damages from the company if his cattle stray from his farm, owing to the insufficiency of the fastenings, and are killed or injured. *McMichael* v. *Grand Trunk R. W. Co.*, 12 O. R. 547, approved. *Dunsford* v. *Michigan Central R. W. Co.*, 20 A. R. 577.

Government Railway.]—*See Gilchrist* v. *The Queen*, 2 Ex. C. R. 300, *ante* 296.

IX. Injury to Persons.

1. *Alighting from Trains.*

Government Railway.]—*See Martin* v. *The Queen*, 2 Ex. C. R. 328, 20 S. C. R. 240, *ante* 296.

Negligence—*Contributory Negligence.*]—L. was the holder of a ticket and a passenger on the company's train from Levis to Ste. Marie, Beauce. When the train arrived at Ste. Marie station, the car upon which L. had been travelling was some distance from the station platform, the train being longer than the platform, and L., fearing that the car would not be brought up to the station, the time for stopping having nearly elapsed, got out at the end of the car, and, the distance to the ground from the steps being about two feet and a half, in so doing he fell and broke his leg, which had to be amputated. The action was for $5,000 damages, alleging negligence and want of proper accommodation. The defence was contributory negligence. Upon the evidence the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, gave judgment in favour of L. for the whole amount. On appeal to the Supreme Court of Canada:—

Held, reversing the judgments of the Courts below, that in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident was wholly attributable to his own default in alighting as he did, and therefore he could not recover; Fournier, J., dissenting. *Quebec Central R. W. Co.* v. *Lortie*, 22 S. C. R. 336.

Negligence—*Contributory Negligence—Payment — Receipt — Trial.*] — In an action for negligence, whereby the plaintiff was injured in alighting from a train, the defendants denied the negligence and pleaded contributory negligence, and also a payment of $10 to the plaintiff before action and a receipt in writing signed by him therefor, "in lieu of all claims I might have against said company on account of an injury received . . by reason of my stepping off a train . . ; such act being of my own account, and not in consequence of any negligence or otherwise on behalf of such railway company or any of its employees." The plaintiff replied that if he signed the receipt, he was induced to do so by fraud and undue influence:—

Held, by the Queen's Bench Division, that the issue raised by the document was not a distinct issue, but rather a matter of evidence upon the issues of negligence and contributory negligence, and should have been submitted to the jury, and not separately tried by the Judge. *Johnson* v. *Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408, distinguished.

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v. *Michigan Central R. W.*

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The document would not support a plea of accord and satisfaction, nor of release, nor did it operate by way of estoppel.

Held, by the Court of Appeal, that the payment and receipt might constitute accord and satisfaction :—

Held, also, that an issue as to the effect of the payment and receipt and its procurement by fraud may be tried by the Judge presiding at the trial of an action to recover damages for the alleged injury, and need not necessarily be left to the jury.

Judgment of the Queen's Bench Division reversed. *Haist* v. *Grand Trunk R. W. Co.*, 26 O. R. 19, 22 A. R. 504.

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2. *At Crossings.*

Notice of Approach.]—In an action against a railway company for injuries alleged to have been caused by the negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing, whereby the plaintiff was struck by an engine and hurt, the case was withdrawn from the jury by consent and referred to the full Court to assess damages or enter a nonsuit. On appeal to the Supreme Court of Canada from the decision of the full Court assessing damages to the plaintiff :—

Held, Gwynne and Patterson, JJ., dissenting, that the decision was not open to review on appeal, but if the merits could be considered the decision should be affirmed.

Per Gwynne and Patterson, JJ., that the case was properly before the Court, and, as the evidence shewed that the servants of the company had complied with the statutory requirement as to giving notice of the approach of the train, the company were not liable. *Canadian Pacific R. W. Co.* v. *Fleming*, 22 S. C. R. 33.

Notice of Approach—*Defect in Construction of Road-bed.*]—Judgment of the Chancery Division in favour of the plaintiffs, reported 19 O. R. 164, affirmed by the Court of Appeal, upon the ground that the defendants had omitted to comply with the statutory requirements as to ringing the bell when approaching a railway crossing ; Burton, J.A., dissenting. *Rosenberger* v. *Grand Trunk R. W. Co.*, 8 A. R. 482, 9 S. C. R. 311, considered.

Per Hagarty, C. J. O.—Where a railway company in constructing their railway cross an existing highway in a diagonal direction, leaving the road-bed of the line some feet below the level of the highway, they exceed their statutory powers and are liable to indictment. They are therefore trespassers *ab initio* and chargeable with all injuries resulting even indirectly in consequence of the dangerous condition of the highway to those lawfully using it, and this liability attaches to a company operating the line who have not themselves been concerned in the original improper construction.

Per Maclennan, J. A.—At the time the road was constructed it was illegal to make a crossing in the manner in which it was made by the company constructing the road, and at the time of the accident it was an illegal crossing, no matter what company was operating it.

Held, by the Supreme Court of Canada, affirming the judgment of the Court of Appeal, that a railway company has no authority to build its road so that part of its road-bed shall be some distance below the level of the highway, unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road and any other company operating it is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it.

A company which has not complied with the statutory condition of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of the carriage over the dangerous part of the highway on to the track, though there was no contact between the engine and the carriage. *Grand Trunk R. W. Co.* v. *Rosenberger*, 9 S. C. R. 311, followed. *Sibbald* v. *Grand Trunk R. W. Co.*, *Tremayne* v. *Grand Trunk R. W. Co.*, 18 A. R. 184, 20 S. C. R. 259.

Notice of Approach — *Evidence of Negligence.*]—In an action to recover damages for the death of the plaintiff's husband, who was killed at a railway crossing by a train of the defendants, the jury found that the engine bell was not rung on approaching the highway, nor kept ringing until the engine crossed it ; that the deceased did not see the train approaching in time to avoid it ; and that he had no warning of its approach ; and assessed damages at $1,000 :—

Held, by the Queen's Bench Division, that the plaintiff was entitled to judgment upon these findings, notwithstanding that the jury, to a question whether the deceased, if he saw the train approaching, used proper care to avoid it, answered "we don't know."

Held, by the Court of Appeal, affirming the decision of the Queen's Bench Division, that in an action to recover damages for causing the death of a person, there is sufficient evidence of negligence to be submitted to the jury, when it is sworn that the deceased was seen approaching the railway track in a vehicle just before the passing of a train ; that immediately after the train passed the deceased and the horses were found dead at the crossing ; and that the statutory signals of the approach of the train were not given.

Judgment of the Queen's Bench Division affirmed. *Johnson* v. *Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408.

Notice of Approach—*Station Yard*—"*Train of Cars*"—*Unusual Danger*—"*Stop, Look, and Listen.*"]—A highway crossed the defendants' line at right angles ; their passenger station lay adjacent to the highway on the east, and their shunting ground and yard adjacent to it on the west. The shunting yard was less than eighty rods in extent from the highway, and eight tracks crossed the highway with intervals of a few feet between them. The defendants in shunting a train of flat cars drew them from the east end to the west end of the yard, and after a pause backed them easterly. After backing for some distance the engine uncoupled from the train of cars, switched upon another track to the south, and the train and engine both continued to back down on different tracks

to the highway, at a speed of about six miles an hour. At the time the plaintiff was proceeding along the highway from south to north, and was about to cross the tracks. The flat cars had reached the highway and were passing over it. The plaintiff, while watching those in front of her, did not see or hear the engine coming down on the other track, and was struck by the tender and injured. There was no look out man on the tender, and there was contradictory evidence as to the ringing of the bell at all, though at most it was not rung until the engine had run some distance towards the highway, and the whistle was not blown. The jury found that the accident was caused by the negligence of the defendants, and that the negligence consisted in not ringing the bell in time :—

Held, by the Queen's Bench Division, that where the company are not able to comply with the terms of sec. 256 of 51 Vict. ch. 29 (D.) as to ringing a bell or sounding a whistle at least eighty rods from a crossing, because the engine starts to cross within that distance, some other kind of precaution should be taken to warn the public of danger ; and where, as in this case, the crossing is unusually dangerous, it is incumbent upon them to use even greater and other precautions than those required by the statute :—

Held, also, that an engine with tender, moving reversely, is a "train of cars" within the meaning of sec. 260, and some one should be stationed on the tender to warn persons crossing the track.

The rule "stop, look, and listen," as applied by the Pennsylvania State Courts to persons about to cross a railway track, is not in force here, and is not one that should be adopted.

Upon appeal to the Court of Appeal :—

Held, per Hagarty, C. J. O., that there was sufficient in the general facts of the case to justify a verdict in favour of the plaintiff :—

Held, per Osler and Maclennan, JJ.A., that whether sec. 256 of the Railway Act, 1888, applied or not under the circumstances of this case, the defendants did not object to its application by the trial Judge, and the jury having on contradictory evidence found negligence against them in not ringing the bell in passing over the distance from the starting point to the crossing, the verdict should not be interfered with.

Per Burton, J. A., that sec. 256 did not apply to shunting in a station yard, and that there had been misdirection on that point, but that the defendants had no right to use the highway as part of their station yard, and were therefore trespassers *ab initio*, and liable for all damages resulting from their dangerous use thereof.

In the result the judgment of the Queen's Bench Division was affirmed. *Hollinger* v. *Canadian Pacific R. W. Co.*, 21 O. R. 705, 20 A. R. 244.

See Morrow v. *Canadian Pacific R. W. Co.*, 21 A. R. 149, *ante* 738.

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3. *At Stations.*

Negligence —*Invitation — Way.*] — The approach to a station of the Grand Trunk Railway from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass around the rear car to reach the platform. J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go around the rear, when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly, and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. In an action by the widow of J. against the company :—

Held, Fournier and Gwynne, JJ., dissenting, that the company had neglected no duty which it owed to the deceased as one of the public :—

Held, per Strong and Patterson, JJ., that while the public were invited to use the planked walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied guaranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass around a train in motion :—

Held, per Taschereau, J., that the death of the deceased was caused by his own negligence.

The decision of the Court of Appeal, 16 A. R. 37, affirmed. *Jones* v. *Grand Trunk R. W. Co.*, 18 S. C. R. 696.

Negligence — *Way — Platform — Excavation*] —A railway company is bound to provide for passengers safe means of ingress to and egress from its stations ; and where a passenger arriving at a station at night walked along a platform, not intended but frequently used as a means of exit, but which was not in any way guarded, and after leaving the platform fell into an excavation in the company's grounds and was injured, the company was held liable in damages. *Oldright* v. *Grand Trunk R. W. Co.*, 22 A. R. 286.

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4. *By Derailment of Train.*

Cause—*Defect.*] - Held, reversing the judgments of the Superior Court and Court of Queen's Bench for Lower Canada (appeal side), that where the breaking of a rail is shewn to be due to the severity of the climate and the suddenly great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selecting, testing, laying, and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. Fournier, J., dissented, and was of opinion that the accident was caused by a latent defect in the rail, and that a railway company is responsible, under the Code, for injuries resulting from such a defect. *Canadian Pacific R. W. Co.* v. *Chalifoux*, 22 S. C. R. 721.

Government Railway.] — *See Dubé* v. *The Queen*, 3 Ex. C. R. 147, *ante* 295.

5. *By Shunting.*

Negligence — *Volenti Non Fit Injuria.*]—Where a railway company sent an engine and crew to the yard of a lumber company, and, under the direction of servants of the lumber company, cars of lumber were shunted from place to place by this engine and crew, the railway company were held liable in damages for the death of a servant of the lumber company, who was in a car counting lumber, caused by negligence in the management of the engine.

A finding by the jury that "the deceased voluntarily accepted the risks of shunting" was held to mean that he had accepted the ordinary risks and not risks arising from negligence. *Smith* v. *Baker*, [1891] A. C. 325, applied.

Judgment of the Queen's Bench Division, 25 O. R. 209, affirmed. *Hardman* v. *Canada Atlantic R. W. Co.*, 22 A. R. 292.

Affirmed by the Supreme Court of Canada, 25 S. C. R. 205.

See Hollinger v. *Canadian Pacific R. W. Co.* 21 O. R. 705, 20 A. R. 244, *ante* 846.

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6. *Shunting Frogs.*

Continuous Duty.]—The duty of a railway company under sub-sec. 3 of sec. 262, 51 Viet. ch. 29 (D.), is not only to fill with packing the spaces behind and in front of every railway frog, but continuously to keep the same filled. *Misener* v. *Michigan Central R. R. Co.*, 24 O. R. 411.

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7. *Servants.*

Negligence — *Accident — Cause — Conjecture — Release — Benefit Society.*]—Action under the Workmen's Compensation for Injuries Act against a railway company by the deceased's administratrix for damages sustained through deceased's death while engaged, as alleged, in coupling the defendants' cars, caused, as alleged, by his being struck by the overlopping lumber on a lumber car, through the absence of stakes in the sockets thereof. There was no direct evidence to shew how the accident happened, it being merely a matter of conjecture :—

Held, that the action was not maintainable.

The plaintiff was paid a sum of $250 by a benefit insurance society in connection with the railway, though a distinct organization, of which the deceased was a member. The plaintiff gave a receipt stating that the railway company was relieved from all liability. The deceased's certificate did not profess to be an insurance against accidents, and the railway company were no party to the receipt :—

Held, that the receipt formed no bar to the action against the defendants; nor was there any right to deduct the amount received from the benefit society from the sum the plaintiff was entitled to as damages. *Hicks* v. *Newport, etc., R. W. Co.*, 4 B. & S. 403 *note*, distinguished. *Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 299.

Negligence — *Accident — Evidence — Specific Directions.*]—W. was an employee of the railway company whose duty it was to couple cars in their Toronto yard. In performing this duty on one occasion, under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed owing to the engine backing down and bringing the cars together before the coupling was made. On the trial of an action for damages resulting from such injury the conductor denied having given directions for the coupling, and it was contended that W. improperly put his hand between the draw bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions, and W. obtained a verdict, which was affirmed by the Common Pleas Division, 23 O. R. 436, and the Court of Appeal, 20 A. R. 528 :—

Held, per Fournier, Taschereau, and Sedgewick, JJ., that, though the findings of the jury were not satisfactory upon the evidence, a second court of appeal could not interfere with them :—

Held, per King, J., that the finding that specific directions were given must be accepted as conclusive; that the mode in which the coupling was done was not an improper one, as W. had a right to rely on the engine not being moved until the coupling was made, and could properly perform the work in the most expeditious way, which it was shewn he did; that the conductor was empowered to give directions as to the mode of doing the work, if, as was stated at the trial, he believed that using such a mode could save time; and that W. was injured by conforming to an order to go to a dangerous place, the person giving the order being guilty of negligence. *Grand Trunk R. W. Co.* v. *Weegar*, 23 S. C. R. 422.

See Misener v. *Michigan Central R. R. Co.*, 24 O. R. 411, *ante* 849.

X. Lands and their Valuation.

See Crown, 1.

Award—*Appeal—Review.*]—Where an award of compensation made in an arbitration under the Canadian Railway Act, 1888, 51 Viet. ch. 29, was appealed from under sec. 161, sub-sec. 2 :—

Held, that the Court rightly exercised its jurisdiction by reviewing the award as if it had been the judgment of a subordinate Court, that is, by deciding whether a reasonable estimate of the evidence had been made. It was not authorized by the section to disregard the award and deal with the evidence *de novo* as if it had been a Court of first instance. *Atlantic and North-West R. W. Co.* v. *Wood*, [1895] A. C. 257.

Award — *Interest — Confirmation of Title — Diligence.*]—On a petition to the Superior Court praying that a railway company be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent. on the amount of an award previously deposited in Court under sec. 170 of the Railway Act, and praying further that the company should be enjoined and ordered to proceed to confir-

mation of title with a view to the distribution of the money, the company pleaded that the Court had no power to grant such an order, and that the delay in proceeding to confirmation of title had been caused by the petitioner, who had unsuccessfully appealed to the higher Courts for an increased amount:—

Held, reversing the judgment of the Court below, that by the terms of sec. 172 of the Railway Act it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon:—

Held, further, that assuming the Court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title: Railway Act, sec. 172: Fournier, J., dissenting. *Atlantic and North-West R. W. Co. v. Judah*, 23 S. C. R. 231.

Foreshore of Harbour—*Statutory Right to Take—Conflict with Municipality—Jus Publicum—Crossing.*]—By 44 Vict. ch. 1, sec. 18, the Canadian Pacific Railway Company "have the right to take, use, and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf, or sea, in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways." By 50 & 51 Vict. ch. 56, sec. 5, the location of the company's line of railway between Port Moody and the city of Westminster, including the foreshore of Burrard Inlet, at the foot of Gore avenue, Vancouver city, was ratified and confirmed. The Act of incorporation of the city of Vancouver, 49 Vict. ch. 32, sec. 213 (B.C.), vests in the city all streets, highways, etc., and in 1892 the city began the construction of works extending from the foot of Gore avenue, with the avowed object of crossing the railway track at a level and obtaining access to the harbour at deep water. On application by the railway company for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway:—

Held, affirming the judgment of the Court below, that as the foreshore forms part of the land required by the railway company, as shewn on the plan deposited in the office of the Minister of Railways, the *jus publicum* to get access to and from the water at the foot of Gore avenue is subordinate to the rights given to the railway company by the statute, 44 Vict. ch. 1, sec. 18*a*, on the said foreshore, and therefore the injunction was properly granted. *City of Vancouver v. Canadian Pacific R. W. Co.*, 23 S. C. R. 1.

Lands Injuriously Affected — *By Whom Work Done—Question of Fact.*]—*See Grand Trunk R. W. Co. v. Fitzgerald*, 19 S. C. R. 359.

Lands Injuriously Affected—*Right to Compensation.*]—The sections of the Dominion Railway Act, 1888, under the headings "Plans and Surveys" and "Lands and their Valuations," apply as well to lands "Injuriously Affected," as to lands taken for the purposes of the railway. It is no answer to a complaint by a landowner that the company is proceeding without having taken the necessary steps under these sections, that it has the authority of the Railway Committee of the Privy Council for the execution of the works. *Corporation of Parkdale v. West*, 12 App. Cas. 602, followed.

Held, also, that a by-law passed by the municipal council for granting aid to the railway, and the validating Act, 58 Vict. ch. 68 (O.), did not affect this question. *Hendrie v. Toronto, Hamilton, and Buffalo R. W. Co.*, 26 O. R. 667. *See*, also, *S. C.*, 27 O. R. 46.

Lands Taken—*Compensation—Life Tenant—Remainderman.*]—Although under C. S. C. ch. 66, sec. 11, as amended by 24 Vict. ch. 47, sec. 1, a railway company could obtain a good title in fee simple to expropriated lands by a conveyance from the tenant for life thereof, they were not justified in paying the compensation money to the tenant for life; and where such payment was made in 1871 the company were ordered to pay the amount over again to the persons entitled in remainder whose title accrued within six years of the time of bringing the action. *Cameron v. Wigle*, 24 Gr. 8, approved.

Judgment of Street, J., affirmed, Burton, J. A., dissenting. *Young v. Midland R. W. Co.*, 19 A. R. 265.

Affirmed by the Supreme Court of Canada, 22 S. C. R. 190.

Lands Taken — *Compensation—Mortgagee.*]—A mortgagor does not represent his mortgagee for purposes of the Railway Act of Ontario, and is not included in the enumeration of the corporations or persons who under sec. 13 of R. S. O. ch. 170 are enabled to sell or convey lands to the company. He can only deal with his own equity of redemption, leaving the mortgagee entitled to have his compensation for lands taken separately ascertained. *In re Toronto Belt Line R. W. Co.*, 26 O. R. 413.

Lands Taken — *Compensation—Mortgagee.*]—A railway company took possession of certain lands under warrant of the County Court Judge, and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs, who received no notice of, and took no part in, the arbitration proceedings, and gave no consent to the taking of possession. An award was made, but was not taken up by either the railway company or the owners. The plaintiffs brought this action against the railway company and the owners for foreclosure, offering in their claim to take the compensation awarded, and release the lands in the possession of the railway company:—

Held, that the railway company were proper parties to the action, and that the plaintiffs were entitled to a judgment against all the defendants with, in view of the offer, a provision for the release of the lands in the possession of the railway company on payment to the plaintiffs of the amount of the award.

Per Osler and Maclennan, JJ.A.—Sub-sec. 25 of sec. 20, R. S. O. ch. 170, applies only where the compensation has been actually ascertained and paid into Court. *Scottish American Investment Co. v. Prittie*, 20 A. R. 398.

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Lands Taken—*Compensation — Purchaser.*] —Where there is a right to compensation against a railway company for lands taken for railway purposes, such lands forming part of lands owned by a party, the conveying away of the whole of such lands does not of itself carry the right to compensation.

The right to compensation is not barred until the expiration of twenty years from the time the land is entered upon and taken for the railway purposes. *Ross* v. *Grand Trunk R. W. Co.*, 10 O. R. 447, followed. *Essery* v. *Grand Trunk R. W. Co.*, 21 O. R. 224.

Lands Taken—*Deviation — Plan—Notice—Compensation — Warrant of Possession—Jurisdiction—Injunction.*]—Under the Railway Act of Ontario, R. S. O. ch. 170, a railway company, having filed an original plan shewing the location of its line, and desiring to acquire other lands compulsorily for the purpose of an alteration from the original location, however small the deviation may be, must file, under sub-sec. 7 of sec. 10, a plan of the proposed deviation.

Semble, under the Dominion Railway Act this requirement must also be observed.

The notice required by sub-sec. 1 and the certificate of a surveyor under sub-sec. 2 of sec. 20 of the Railway Act of Ontario should state in cash the sum which would be a fair compensation for the lands to be taken and damages.

And where a railway company, without having filed any plan of a proposed deviation, applied for and obtained from a County Court Judge a warrant for possession en a notice in which, in addition to a sum in cash, certain crossings and station privileges were offered as compensation for the land and the damages, and which was accompanied by a surveyor's certificate that the sum offered was a fair compensation therefor:—

Held, that the foundation of the Judge's authority to issue a warrant rested on a proper compliance by the railway company with the above sub-sections, and that he had acted herein without jurisdiction.

The High Court of Justice has power to restrain railway companies from acting upon warrants so obtained, and it is not necessary to proceed by *certiorari*. *Brooke* v. *Toronto Belt Line R. W. Co.*, 21 O. R. 401.

XI. Liability for Acts of Agents.

See McGill v. *Grand Trunk R. W. Co.*, 19 A. R. 245, *ante* 839.

XII. Lien for Disbursements.

Working Arrangement—*Pledge of Immovables—Creditors—Registry Laws.*]—The respondent obtained against the Montreal and Sorel Railway Company a judgment for the sum of $675 and costs, and caused a writ of *venditioni exponas* to issue against the railway property of that company. The appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition *à fin de charge* for the sum of $35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company was entered into between the Montreal and Sorel Railway Company and the appellant company, and stated amongst other things that "the Montreal and Sorel Railway Company was burdened with debts, and had neither money nor credit to place the road in running order, etc." The amount claimed for disbursements, etc., was over $35,000. The Superior Court, whose judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition *à fin de charge*. On appeal to the Supreme Court the respondents moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient to give jurisdiction to the Court. The Court without deciding the question of jurisdiction, heard the appeal on the merits:—

Held, 1. That such an agreement must be deemed in law to have been made with intent to defraud, and was void as to the anterior creditors of the Montreal and Sorel Railway Company. 2. That, as the agreement granting the lien or pledge affected immovable property and had not been registered, it was void against the anterior creditors of the Montreal and Sorel Railway Company: Arts. 1977, 2015, and 2094, C. C. 3. That Art. 419, C. C., does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledgor's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an *opposition à fin de conserver* to be paid out of the proceeds of the judicial sale: Art. 1972, C. C. *Great Eastern R. W. Co.* v. *Lambe*, 21 S. C. R. 431.

XIII. Limitation of Actions.

Compensation for Land Taken.]—The right to compensation is not barred until the expiration of twenty years from the time the land is entered upon and taken for railway purposes. *Ross* v. *Grand Trunk R. W. Co.*, 10 O. R. 447, followed. *Essery* v. *Grand Trunk R. W. Co.*, 21 O. R. 224.

Compensation for Land Taken.]—Where compensation money was paid by a railway company to a tenant for life in 1871, the company were ordered to pay the amount over again to the persons entitled in remainder whose title accrued within six years of the time of bringing the action. *Cameron* v. *Wigle*, 24 Gr. 8, approved. *Young* v. *Midland R. W. Co.*, 19 A. R. 265, 22 S. C. R. 190.

Damage by Reason of Railway — *Lord Campbell's Act.*]—The plaintiff's father was killed on the 10th February, 1891, by a fall from a bridge, part of a highway, which crossed the defendants' line, and had been negligently allowed by them to be out of repair. The action was begun on the 14th November, 1891,

more than six months after the accident, no letters of administration having been taken out :—

Held, per Burton, Osler, and Maclennan, JJ.A., Hagarty, C.J.O., expressing no opinion, that this was not "damage sustained by reason of the railway," and that the limitation clauses of the Railway Act did not apply :—

Held, also, per Hagarty, C. J. O., Burton and Maclennan, JJ.A., Osler, J.A., expressing no opinion, that the provisions of R. S. O. ch. 135, Lord Campbell's Act, are not affected by special legislation of this kind, so that in that view also the action was begun in time.

Judgment of Robertson, J., 21 O. R. 628, affirmed on other grounds. *Zimmer* v. *Grand Trunk R. W. Co.*, 19 A. R. 693.

Death of Servant—*Widow's Right of Action—Prescription.*]—The husband of the respondent was injured while engaged in his duties as the appellants' employee, and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the lifetime of the husband, the widow, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death.

Held, by the Supreme Court of Canada, that at the time of the death of the respondent's husband all right of action was prescribed under Art. 2262, C. C., and that this prescription is one to which the tribunals are bound to give effect, although not pleaded : Arts. 2267 and 2188, C. C.

Held, by the Judicial Committee of the Privy Council, that the Civil Code of Lower Canada does not make it a condition precedent to the right of action given by Art. 1056 to the widow of a person dying as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under Art. 2262 (2). The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein, and is exempt from the rule of prescription which barred the claim of the deceased. *Robinson* v. *Canadian Pacific R. W. Co.*, [1892] A. C. 481.

Easement—*Enjoyment against Railway Company.*]—*See Canada Southern R. W. Co.* v. *Town of Niagara Falls*, 22 O. R. 41, *ante* 623.

XIV. Miscellaneous Cases.

Assessment of Railway—*Construction by Mining Company.*]—By R. S. N. S., 5th ser., ch. 53, sec. 9, sub-sec. 30, the road-bed, etc., of all railway companies in the Province is exempt from local taxation. By sec. 1, the first part of the Act, from secs. 5 to 33 inclusive, applies to every railway constructed and in operation or thereafter to be constructed under the authority of any Act of the legislature; and by sec. 4, part 2 applies to all railways constructed or to be constructed under the authority of any special Act, and to all companies incorporated for their construction and working. By sec. 5, sub-sec. 15, the expression "the company" in the Act means the company or person authorized by the special Act to construct the railway :—

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that part 1 of this Act applies to all railways constructed under Provincial statutes, and is not exclusive of those mentioned in part 2 ; that a company incorporated by an Act of the legislature as a mining company, with power "to construct and make such railroads and branch tracks as might be necessary for the transportation of coals from the mines to the place of shipment and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another Act, 49 Viet. ch. 45 (N. S.), to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part 2 of ch. 53, R. S. N. S., 5th ser., entitled 'of railways,'" is a railway company within the meaning of the Act ; and that the reference in 49 Viet. ch. 145, sec. 1, to part 2 does not prevent said railway from coming under the operation of the first part of the Act. *International Coal Co.* v. *County of Cape Breton*, 22 S. C. R. 305.

Closing Public Lane in City.]—Art. 997 of the Civil Procedure Code relates, on its true construction, not to every illegal act done by an association therein mentioned, but only to such acts as are professedly or manifestly done in the assertion of some special power, franchise, or privilege not conferred upon it by law.

Where an information under that Article alleged that the respondent company had closed a public lane under the pretext that they had acquired private interests therein which entitled them so to do :—

Held, that this did not amount to an allegation that they closed it in the exercise of any power, franchise, or privilege within the meaning of the Article :—

Held, also, that the Court had jurisdiction under Art. 998 to prohibit the issue of a writ of information under Art. 997; but that after issue the Attorney-General is *dominus litis*, and can discontinue proceedings or control their conduct and settlement independently of any private relator.

Held, that, assuming the lane in question to have been a public one, the respondent company were entitled to close, occupy, and use it with the assent of the city council, which assent was empowered by sec. 12 of the Railway Act of Canada, 1888. *Casgrain* v. *Atlantic and North-West R. W. Co.*, [1895] A. C. 282.

Conveyance of Easement — *Resolutions—Ultra Vires—Estoppel—Prescription.*]—The Act of incorporation of a railway company, the predecessors in title of the plaintiffs, and which was incorporated for the purpose of constructing and operating a certain line of railway, conferred upon the company, in respect of the disposition of lands acquired by them, powers of "letting, conveying, and otherwise departing therewith, for the benefit and on account of the company, from time to time, as they should deem necessary."

Nearly forty years before the commencement of this action the predecessors in title of the

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defendants laid pipes for conveying water along the railway track of the plaintiffs' predecessors, using them for such purpose almost continuously up to the present time, such privilege having been given to them by resolution of the directors of the company, who, a few years subsequently, passed another resolution, and in pursuance thereof executed a deed granting, releasing, and confirming such right and privilege, which at the time this action was brought had become vested in the defendants.

The undertaking of the original railway company became vested in the plaintiffs, who, a few years before the commencement of this action, desiring to alter the position of their track, gave notice of expropriation to the immediate predecessors in title of the defendants, and placed the track over the water pipes.

The plaintiffs now sought to have the resolutions and deed mentioned declared *ultra vires*, and also claimed an injunction restraining the user of the water pipes, and, if necessary, an order for their removal:—

Held, that the resolutions and deed were *ultra vires* as not within the powers specified by the charter, or such as could fairly be regarded as incidental thereto, or reasonably derived by implication therefrom:—

Held, also, that the plaintiffs were not estopped from asserting their own title and denying the defendants':—

Held, lastly, that the defendants, not having used and enjoyed their easement for forty years, had not acquired a title thereto by prescription under R. S. O. ch. 111, sec. 35. *Canada Southern R. W. Co.* v. *Town of Niagara Falls*, 22 O. R. 41.

Trespass—*Arrest—Justice of the Peace.*]—Section 283 of the Railway Act of Canada, 51 Vict. ch. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where the constable arrests an offender and takes him before the justice.

A summary conviction of the defendant by a justice for the county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested, but merely summoned. *Regina* v. *Hughes*, 26 O. R. 486.

XV. Traffic Arrangements.

Agreement with Foreign Company—*Lease of Road—Transfer of Immunities—Negligence—Fire.*]—Held, by the Court of Appeal, that a railway company incorporated under the laws of this Province cannot, without legislative sanction, confer upon a foreign railway company the immunities and privileges which it possesses, and the foreign railway company, in running engines over the line of railway in this Province, is subject to the common law liability imposed upon a person using a dangerous and fire-emitting machine, and is liable for damages without proof of negligence.

Per Hagarty, C.J.O., dissenting.—Parliament has, in effect, sanctioned the agreements between the Canadian and foreign companies, and the user of locomotives by the latter is therefore lawful.

An insurance company by whom a fire loss has been paid has no *locus standi* as co-plaintiff in an action by the assured against the wrongdoer whose negligence has caused the fire.

The Canada Southern Railway Company, by its charter and amendments thereto, has authority to enter into an agreement with any other railway company with respect to traffic arrangements or the use and working of the railway or any part thereof, and by the Dominion Railway Act of 1879 it is authorized to enter into traffic arrangements and agreements for the management and working of its railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years:—

Held, by the Supreme Court of Canada, reversing the decision of the Court of Appeal, that authority to enter into an arrangement for the "use and working" or "management and working" of its road conferred upon the company a larger right than that of making a forwarding agreement or of conferring running powers; that the company could lawfully lease a portion of its road to a foreign company and transfer to the latter all its rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in its use of the road so leased, to the same extent as the Canada Southern Railway Company is itself protected. *Wealleans* v. *Canada Southern R. W. Co.*, 21 A. R. 297, *Michigan Central R. R. Co.* v. *Wealleans*, 24 S. C. R. 309.

RAPE.

See Criminal Law, II., IV.—Seduction.

RATIFICATION.

See Estoppel — Fraud and Misrepresentation—Principal and Agent, I.

REASONABLE AND PROBABLE CAUSE.

See Malicious Prosecution, III.

RECEIVER.

I. By Way of Equitable Execution.

See Assessment and Taxes—Attachment—Covenant—Execution—Executors and Administrators, X.

II. In Partnership Actions.

Appointment.]—Where partnership articles provide that on dissolution the partners shall appoint a person to collect the accounts and settle the partnership affairs, the Court will, on

failure of the parties to agree on some person, appoint a receiver. *Mitchell* v. *Lister*, 21 O. R. 22.

Interim Sale of Assets.]—Under special circumstances an order may be made, in an action for the dissolution and winding-up of an insolvent partnership, for the sale of the assets by the receiver before the trial. *McLaren* v. *Whiting*, 16 P. R. 552.

RECOGNIZANCE.

Bail—*Estreat.*]—*See Re Talbot's Bail*, 23 O. R. 65, *ante* 265.

Controverted Municipal Elections.]—*See Regina ex rel. Mangan* v. *Fleming*, 14 P. R. 458, *ante* 701.

[Motion to Quash Municipal By-law.]—*See Re Burton and Village of Arthur*, 16 P. R. 160, *ante* 695.

Motion to Quash Summary Conviction.]—*See Regina* v. *Robinet*, 16 P. R. 49, *ante* 266.

REEVE.

See Intoxicating Liquors, III.

REFERENCE.

See Practice, XIV.—Trial, VI.

REGISTRY LAWS.

I. Effect of Registering or Omission to Register, 859.

II. Instruments which may be Registered, 862.

III. Proof for Registration, 862.

IV. Registrars, 862.

Registration of Municipal By-laws—*See* Municipal Corporations, VI.

I. Effect of Registering or Omission to Register.

Assignment of Lease without Leave—*Notice.*]—*See Baldwin* v. *Wanzer*, 22 O. R. 612, *ante* 593.

Building Loan—*Further Advances—Priority of Subsequently Registered Mortgage—Notice.*]—After purchasing land under an agreement which provided that $2,000 of the purchase money was to be secured by mortgage subsequent to a building loan not exceeding $12,000, the purchaser executed a building mortgage to a loan company for $11,500, which was at once registered, but only part of that sum was then advanced. The plaintiff, who had succeeded to the rights of the vendor under the above agreement, then registered her mortgage for $2,000, and claimed priority over subsequent advances made by the loan company under their mortgage, but without actual notice of the plaintiff's mortgage, or of the terms of the agreement for the sale of the land :—

Held, Robertson, J., dissenting, that the plaintiff was not entitled to the priority claimed by her.

Decision of Ferguson, J., 24 O. R. 426, reversed.

Per Boyd, C.—The further advances were made upon a mortgage providing for such advances, and to secure which the legal estate had been conveyed, and equity as well as law protected the first mortgage so advantageously placed, as against the subsequent mortgage, even though registered, where notice had not as a fact been communicated to the first mortgagee respecting the subsequent instrument, and the Registry Act did not apply. *Pierce* v. *Canada Permanent Loan and Savings Co.*, 25 O. R. 671. Affirmed by the Court of Appeal, 23 A. R.

See now 57 Vict. ch. 34 (O.)

Dation en Paiement—*Warranty—Forfeiture for Non-registration.*]—The parties to a gift *inter vivos* of certain real estate, with warranty by the donor, did not register it, but by a subsequent deed, which was registered, changed its nature from an apparently gratuitous donation to a deed of giving in payment (*dation en paiement.*) In an action brought by the testamentary executors of the donor to set aside the donation for want of registration :—

Held, affirming the judgment of the Court below, that the forfeiture under Art. 806, C. C., resulting from neglect to register, applies only to gratuitous donations, and as the deed in this case was in effect the giving of a thing in payment (*dation en paiement*) with warranty, which under Art. 1592 is equivalent to sale, the testamentary executors of the donor had no right of action against the donee based on the absence of registration of the original deed of gift *inter vivos*. *Lacoste* v. *Wilson*, 20 S. C. R. 218.

Easement—*Notice—Equitable Interest.*]—A municipal council who, with the oral consent of the owner, build a sewer through land, acquire an equitable right to compel a conveyance of so much of the land as is occupied by the sewer, but a purchaser of the land without notice of the consent or of the existence of the sewer is protected by the Registry Act. *Jarvis* v. *City of Toronto*, 21 A. R. 395. Affirmed by the Supreme Court, 25 S. C. R. 237.

Easement—*Notice—Purchaser for Value.*]—Where the defendants in 1871, without authority, diverted a watercourse on certain land, and afterwards made compensation therefor to the then owner of the land, the plaintiff's predecessor in title :—

Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a *bonâ fide* purchaser for value without actual notice ; the defendants having shewn no prescriptive right to divert the watercouse ; and the diversion being wrongful as against the plaintiff.

Knapp v. *Great Western R. W. Co.*, 6 C. P. 187; *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173; *Wallace* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 551; and *Partridge* v. *Great Western R. W. Co.*, 8 C. P. 97, distinguished.

The plaintiff, having failed to prove actual damage, was allowed nominal damages for the wrong; and, instead of granting a mandatory injunction to compel the restoration of the watercourse, the Court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict. ch. 29, sec. 90, sub-sec. *h* (D.). *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

Indian Lands—*Mortgage Before Patent—Notice.*]—A patent of Indian lands was obtained by the patentee by virtue of his title under certain assignments from the original locatee duly registered in the Indian Department, and it appeared that certain prior assignees from the locatee had executed a mortgage on the lands to the plaintiff, of which the patentee had no actual notice, neither the assignment to the mortgagors nor the mortgage having been registered in the department, though the mortgage was registered in the county registry office; and the plaintiff now sought to foreclose his mortgage:—

Held, that the patentee was entitled to priority over the mortgage to the extent of the moneys paid for obtaining the patent, and that the registration of the mortgage in the county registry office was not notice to him. *Re Reed* v. *Wilson*, 23 O. R. 552.

Judgment—*Mortgage—Priorities—Rectification.*]—By R. S. N. S., 5th ser., ch. 84, sec. 21, a registered judgment binds the lands of the judgment debtor, whether acquired before or after such registry, as effectually as a mortgage; and deeds or mortgages of such lands, duly executed but not registered, are void against the judgment creditor who first registers his judgment.

A mortgage of land was made, by mistake and inadvertence, for one-sixth of the mortgagor's interest instead of the whole. The mortgage was foreclosed and the land sold. Before the foreclosure, a judgment was registered against the mortgagor, and two years afterwards an execution was issued, and an attempt made to levy on the five-sixths of the land not included in the mortgage.

In an action for rectification of the mortgage and for an injunction to restrain the judgment creditor from levying:—

Held, affirming the judgment of the Court below, Strong and Patterson, JJ., dissenting, that as to the said five-sixths of the land the plaintiff had only an unregistered agreement for a mortgage, which, by the statute, was void as against the registered judgment of the creditor. *Grindley* v. *Blakie*, 19 N. S. Reps. 27, approved and followed. *Miller* v. *Duggan*, 21 S. C. R. 33.

Pledge of Immovable—*Right of Retention as against Execution Creditors.*]—Art. 419, C. C., does not give to a pledgee of an immovable, who has not registered his deed, a right of retention as against the pledgor's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an *opposition à fin de conserver* to be paid out of the proceeds of the judicial sale: Art. 1972, C. C. *Great Eastern R. W. Co.* v. *Lambe*, 21 S. C. R. 431.

II. Instruments which may be Registered.

Charge—*Letter.*]—A letter in the following form., "I agree to charge the east half of lot number nineteen . . with the payment of the two mortgages . . amounting to $750 . . and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said mortgages," is not a mere executory agreement, but operates as a present charge in favour of the mortgagees named, upon the lands described, and may be registered against them. *Hoofstetter* v. *Rooker*, 22 A. R. 175. Affirmed by the Supreme Court of Canada, 26 S. C. R. 41.

III. Proof for Registration.

Witness—*Irregularity.*]—Per Maclennan, J.A.—An affidavit of execution for the purpose of registration may be made by a person who in fact witnesses the signature, but who writes, his name, not as witness, but as the person to whom the letter (the instrument for registration) is addressed.

Per Osler and Maclennan, JJ.A.—Where an instrument is in fact registered, sec. 80 of the Registry Act cures any irregularity in the proof for registration. *Hoofstetter* v. *Rooker*, 22 A. R. 175. Affirmed by the Supreme Court of Canada, 26 S. C. R. 41.

IV. Registrars.

Fees—*Abstract.*]—A registrar's abstract having been demanded of all instruments registered upon two township lots comprised in a certain mortgage:—

Held, that the registrar was entitled to charge $2 on each general search of the township lots and twenty-five cents for the first hundred words and fifteen cents for each additional hundred words of the abstract, as provided in R. S. O. ch. 114, sec. 95, sub-secs. 2 and 4; but the fact that the lots had subsequently to the mortgage been sub-divided by the mortgagors, without the assent of the mortgagee, into a number of lots upon registered plans, did not, under sub-sec. 2, justify him in charging also as for a separate search on each of the lots as shewn on the said plans. *Morse* v. *Lamb*, 23 O. R. 167.

Reversed by a Divisional Court, 23 O. R. 608.

Liability of Sureties.]—Held, that the sureties to a bond, dated 8th January, 1886, given in accordance with Schedule A. of the Registry Act, R. S. O. ch. 114, for the performance of the duties, etc., of the registrar, being the form of bond prescribed by the Act in force prior to the introduction of the provisions giving the municipalities a share in the fees, were not liable for the non-payment over of such share.

Decision of Street, J., 19 O. R. 349, affirmed. *County of Middlesex* v. *Smallman*, 20 O. R. 487.

RELEASE.

Of Cause of Action—*Validity—Trial.*]—A settlement of a pending action, agreed to by an illiterate plaintiff without communication with her solicitor and without fair disclosure of facts, cannot stand, and its validity may be tried in the pending action if pleaded in bar. *Johnson* v. *Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408.

See, also, *Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 299, *ante* 849; *Haist* v. *Grand Trunk R. W. Co.*, 26 O. R. 19, 22 A. R. 504, *ante* 844.

Of Surety.]—*See* PRINCIPAL AND SURETY, I.

REMOVAL OF ACTIONS.

See COUNTY COURT, II.—SURROGATE COURT.

REMOVAL OF TRUSTEES.

See TRUSTS AND TRUSTEES, XIII.

RENEWAL.

See BILLS OF SALE, VI.—LANDLORD AND TENANT, XVIII—PRACTICE, XIX.

RENT.

See LANDLORD AND TENANT, XIX.

REPLEVIN.

Booms—*Proprietary Rights—Revendication—Estoppel by Conduct.*]—O'S., claiming to be the legal depositary, and T. McG., claiming to be the usufructuary, of certain booms, chains, and anchors in the Nicolet river, under 36 Vict. ch. 81, (Q.), and which G. B., being in possession of the same for several years under certain deeds and agreements from T. McG., had stored in a shed for the winter, brought an action *en revendication* to replevy the same and for $5,000 damages:—

Held, affirming the judgment of the Court below, that O'S. and T. McG. were not entitled to the possession as alleged, and that they were precluded by their conduct and acquiescence from disturbing G. B.'s possession. *See Ball* v. *McCaffrey*, 20 S. C. R. 319. *O'Shaughnessy* v. *Ball*, 21 S. C. R. 415.

See SOLICITOR, IV.

REPLY.

See CRIMINAL LAW, III.—PLEADING, VI.

REPORT.

See PRACTICE, XIV.

RES JUDICATA.

See ESTOPPEL.—SUPREME COURT OF CANADA, XI.—TRIAL, I.

Information of Intrusion—*Title—Surrender.*]—In proceedings on an information of intrusion exhibited by the Attorney-General for Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the Crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that Province: *The Queen* v. *Farwell*, 14 S. C. R. 392. The appellant having registered his grant and taken steps to procure an indefeasible title from the Registrar of Titles of British Columbia, thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the Attorney-General to direct the appellant to execute to the Crown in right of Canada a surrender or conveyance of the said lands:—

Held, affirming the decision of the Exchequer Court, 3 Ex. C. R. 271, that the judgment in intrusion was conclusive against the appellant as to the title. *The Queen* v. *Farwell*, 14 S. C. R. 392, and *Attorney-General for British Columbia* v. *Attorney-General for Canada*, 14 App. Cas. 295, commented on and distinguished.

2. That the proceedings on the information of intrusion did not preclude the Crown from the further remedy claimed. *Farwell* v. *The Queen*, 22 S. C. R. 553.

Promissory Note—*Indorser—Maker—Partnership—Judgment.*]—The defendant was sued by the same plaintiffs in a former action as indorser of a promissory note, and judgment was entered in his favour upon the defence that he indorsed it for the accommodation of the plaintiffs without consideration. In this action he was sued upon certain other notes and upon the judgment recovered in that action against the firm who were the makers of the notes, as a partner in that firm, along with the other partner:—

Held, by Street, J., that the fact of his establishing his defence in the former action had no effect upon the question of his liability in this.

Held, by the Court of Appeal, reversing the decision of Street, J., that the dismissal of the former action was an answer to this action in so far as it was an action upon the judgment, the plaintiffs seeking to prove that the defendant was, as regards them, a partner by estoppel, and therefore bound by the judgment against the firm. *Ray* v. *Ishister*, 24 O. R. 497, 22 A. R. 12. Affirmed, 26 S. C. R. 79.

Specific Performance—*Interest in Mine—Share of Proceeds.*]—S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eighth of an interest in his, M.'s, interest in a gold mine, but failed to recover, as the Court held the alleged agreement to be within the Statute of Frauds. On the hearing M. denied the agreement as alleged, but admitted that he had agreed to give S. one-

eighth of his interest in the proceeds of the mine when sold, and it having been afterwards sold, S. brought another action for payment of such share of the proceeds:—

Held, reversing the decision of the Supreme Court of Nova Scotia, Fournier and Taschereau, JJ., dissenting, that S. was not estopped by the first judgment against him from bringing another action:—

Held, also, that the contract for a share of proceeds was not one for sale of an interest in land within the Statute of Frauds. *Stuart* v. *Mott*, 23 S. C. R. 384.

RESOLUTIONS.

See BANKRUPTCY AND INSOLVENCY, II.—BY-LAWS.

RESTRAINT OF TRADE.

See COVENANT.

RETAINER.

See BANKRUPTCY AND INSOLVENCY, I.—SOLICITOR, III., VIII.

RETURNING OFFICER.

See PARLIAMENTARY ELECTIONS, III.

REVENUE.

I. CUSTOMS DUTIES.

Oils — *Undervaluation — Seizure — Notice — Waiver — Deposit — Penalty — Prescription.*]—The suppliants, who were manufacturers of oils in the United States, sold some of their oils in retail lots to purchasers in Canada. The price of such oils to the consumer at Rochester was taken as a basis upon which the price per gallon to the Canadian purchaser was made up, but the goods were entered for duty at a lower value —two sets of invoices being used, one for the purchaser in Canada, and the other for the company's broker at the port of entry:—

Held, that the oils were undervalued.

(2.) The suppliants, having established a warehouse in Montreal as the distributing point of their Canadian business, exported oils from the United States to Montreal in wholesale lots. The invoices shewed prices which were not below the fair market value of such oils when sold at wholesale for home consumption in the principal markets of the United States:—

Held, that there was no undervaluation.

(3.) When goods are procured by purchase in the ordinary course of business, and not under any exceptional circumstances, an invoice correctly disclosing the transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad is, as a general rule, assumed to indicate the market value thereof. It is presumed that he buys at the ordinary market value.

(4.) It is not the value at the manufactory, or place of production, but the value at the principal markets of the country, *i.e.*, the price there paid by consumers or middlemen to dealers, that should govern. Such value for duty must be ascertained by reference to the fair market value of such or like goods, when sold in like quantity and condition for home consumption in the principal markets of the country, whence they are exported.

(5.) The neglect of an importer, whose goods have been seized, to make claim to such goods by notice in writing as provided by sec. 198 of the Customs Act, 1883, may be waived by the act of the Minister of Customs in dealing with the goods in a manner inconsistent with an intention on his part to treat them as condemned for want of notice. *Quære:* Does sec. 198 apply to a case where money is deposited in lieu of goods seized?

(6.) The additional duty of fifty per cent. on the true duty, payable for undervaluation under sec. 102 of The Customs Act, 1883, is a debt due to Her Majesty which is not barred by the three years' prescription contained in sec. 207, but may be recovered at any time in a Court of competent jurisdiction. *Quære:* Is such additional duty a penalty? *Vacuum Oil Co.* v. *The Queen*, 2 Ex. C. R. 234.

Proprietary Medicines — *Constituent Parts — Value.*]—Some time before the Dominion of Canada was constituted, the *J. C. A. Co.*, manufacturers of proprietary medicines in the United States, established a branch of their business in St. John's, P.Q., and commenced to import from the United States certain articles required in the preparation of their medicines. These articles were in the form of liquid compounds, and were valued for duty under the provisions of the Act 29 & 30 Vict. (Can.) ch. 6, sec. 11, then in force, at the aggregate of the fair market value of the several ingredients entering into the compounds so imported, with the addition of all costs and charges of transportation. These ingredients, after arrival in Canada, were mixed, bottled, and sold under various names. The import entries were made under the rates of duty fixed by the Customs authorities in virtue of the provisions of the said Act, they being fully aware of the purposes to which the articles imported were to be applied. The company continued to import such goods in this way for upwards of twenty years, except some alterations they were called upon to make in the valuation for duty of certain liquids in 1883, when, on the 22nd May, 1885, the Dominion Customs authorities seized large quantities of their manufactured medicines, and caused an information to be laid against the company for smuggling, evasion of the payment of duties, undervaluation, and for knowingly keeping and

selling goods illegally imported, contrary to the provisions of the Customs Act, 1883:—

Held, (1.) That there was no importation of goods as compounded medicines ready for sale, and that the duty having been paid upon the fair market value, in the place of exportation, of the ingredients of which the liquid in bulk were composed, there was no foundation for the seizure. (2.) Where the constituent parts or ingredients of a specific article are imported, their value for duty within the meaning of secs. 68 and 69 of the Customs Act, 1883, is not the fair market value of the completed article in the place of exportation, but is simply the fair market value there of the several ingredients. The form in which the material is imported constitutes the discriminating test of the duty. (3.) Notwithstanding the interpretation clause in the Customs Act, 1883, which provides that Customs laws shall receive such liberal construction as will best insure the protection of the revenue, etc., in cases of doubtful interpretation the construction should be in favour of the importer. (4.) Where an importer openly imports goods and pays all the duties imposed on them at the fair market value thereof in the place of exportation at the time the same were exported, he has not imported such goods with intent to defraud the revenue, simply because he had the mind to do something with them which, had it been done in the country from which they were exported, would have enhanced their value, and, consequently, made them liable to pay a higher rate of duty, but which, in fact, was never done before the goods came into his possession after passing the Customs. *The Queen* v. *J. C. Ayer Co.*, 1 Ex. C. R. 232.

"Shaped" Lumber.]—Under item (Departmental No.) 726 in schedule "C." of the Tariff Act, 1885, oak lumber sawn, but not "shaped, planed, or otherwise manufactured," may be imported into Canada free of duty. The plaintiff imported a quantity of white oak lumber from the United States, which had been sawn to certain dimensions so as to admit of it being used in the manufacture of railway cars and trucks without waste of material, but yet before being used for such purpose had to be re-cut and fitted:—

Held, that the lumber, being merely sawn to such dimensions as would enable it to be worked up without waste, was not "shaped" within the meaning of the Tariff Act, and was not dutiable. *Magann* v. *The Queen*, 2 Ex. C. R. 64.

Ship—*Cargo—Harbour—Report—Forfeiture—Procedure.*]—Held, (1.) Where there has been nothing done by the master to show an intent to defraud the Customs, a vessel entering a port for shelter, before reaching a place of safety there, has not "arrived" at such port within the meaning of 40 Vict. ch. 10, sec. 12, so as to justify seizure of her cargo for not reporting to the Customs authorities. (2.) Where false statements are made by the master regarding the character of the cargo and port of destination of his vessel, which would subject him to a penalty under sub-sec. 2 of sec. 12, 40 Vict. ch. 10, they cannot be relied on to support an information claiming forfeiture of the cargo for his not having made a report in writing of his arrival as required by sub-sec. 1 of sec. 12 of the said Act. (3.) That sec. 10 of 44 Vict. ch. 11, amending secs. 119 and 120 of 40 Vict. ch. 10, merely provides a procedure to be followed when the Customs Department undertakes to deal with questions of penalties and forfeitures, and does not divest the Crown of its right to sue for the same in the manner provided by secs. 100 and 101 of 40 Vict. ch. 10, even where departmental proceedings have been commenced under the said provisions of 44 Vict. ch. 11, sec. 10. (4.) That even if secs. 100 and 101 of the said Act, 40 Vict. ch. 10, had been repealed by the later statute, the Crown could proceed by information *in rem* at common law, and this right could not be taken away except by express words or necessary implication. *The Queen* v. *MacDonell*, 1 Ex. C. R. 99.

Teas—*Transit through United States.*]—The plaintiffs made two shipments of tea from Japan to New York for transportation in bond to Canada. In one case the bills of lading were marked "in transit to Canada;" in the other the teas appeared upon the consular invoice, made at the place of shipment, to be consigned to the plaintiffs' brokers in New York for transhipment to Canada. On the arrival of both lots at New York, and pending a sale thereof in Canada, they were allowed to be sent to a bonded warehouse as unclaimed goods for some five or six months, and were finally entered at the New York Customs House for transportation to Canada, and forwarded to Montreal. There was nothing to shew that the plaintiffs at any time proposed to make any other disposition of the teas, and there was nothing in what they did that contravened the laws and regulations of the United States or of Canada with respect to the transportation of the goods in bond:—

Held, affirming the judgment of the Exchequer Court, 2 Ex. C. R. 126, Gwynne, J., dissenting, that, as it clearly appeared that the tea was never entered for sale or consumption in the United States; that it was shipped from there within the time limited by law for goods during transit to remain in a warehouse; and that no act had been done changing its character in transit; it was therefore "tea imported into Canada from a country other than the United States but passing in bond through the United States," and under sec. 10 of the Act relating to duties on Customs, R. S. C. ch. 33, not liable to duty as goods exported from the United States to Canada. But *see* now 52 Vict. ch. 14 (D.) *Carter, Macy, & Co.* v. *The Queen*, 18 S. C. R. 706.

Watch Cases—*Value—Misrepresentation—Costs.*]—The rule for determining the value for duty of goods imported into Canada, prescribed by the 58th and 59th sections of the Customs Act, R. S. C. ch. 32, is not one that can be universally applied. When the goods imported have no market value, in the usual and ordinary commercial acceptation of the term in the country of their production or manufacture, or where they have no such value for home consumption, their value for duty may be determined by reference to the fair market value for home consumption of like goods sold under like conditions. *Vacuum Oil Co.* v. *The Queen*, 2 Ex. C. R. 234, referred to.

(2.) The goods in question in this case were part of a job lot of discontinued watch cases, and at the time of their sale for export were

not being bought and sold in the markets of the United States. They could be purchased for sale or use there, but only at published prices, which were greater than any one would pay for them. The claimants bought the goods for export at their fair value, being about half such published prices. They let their agent in Canada know the prices paid, but withheld from him the fact that the purchase was made on the condition that the goods were to be exported. The agent, without intending to deceive the Customs appraiser, represented that the prices paid were those at which the goods could be had in the United States when purchased for home consumption. The representation was untrue. On the question of the alleged undervaluation the Court found for the claimants, but, because of such misrepresentation, without costs. *Smith* v. *The Queen*, 2 Ex. C. R. 417.

II. Inland Revenue.

Slide and Boom Dues—*Statutes—Regulations.*]—Inasmuch as the provisions and enactments relating to tolls in 31 Vict. ch. 12 are in substance and effect the same as those contained in ch. 28 of the Consolidated Statutes of Canada, under which the present regulations relating to timber passing through the slides were made, in virtue of the provisions of sec. 71 of 31 Vict. ch. 12, such regulations are in effect to be construed as having been made under the later statute. *Merchants' Bank of Canada* v. *The Queen*, 1 Ex. C. R. 1.

III. Succession Duty.

Executors —*Legacies—Residue.*]—A testator devised and bequeathed all his real and personal estate to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees, and others to charitable associations, and provided that the residue of his estate should be divided *pro rata* among the legatees :—

Held, that it was the duty of the executors to deduct the succession duty payable in respect of the pecuniary legacies, before paying the amounts over to the legatees, and they had no right to pay such succession duty out of the residue left after paying the legacies in full. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

REVERSION.

See Action, I.

REVISING OFFICER.

See Parliamentary Elections, IV.

REVIVAL.

See Will, III.

REVIVOR.

See Scire Facias and Revivor.

REVOCATION.

See Trusts and Trustees, XIV.—Will, III.

RIDEAU CANAL.

Conditional Gift — *Expropriation — Acquiescence—Forfeiture for Breach of Condition Subsequent—Remedy Against the Crown for Unauthorized Use of Land—Abandonment by Crown —Solicitor and Client — Privileged Communication—Evidence.*]—The Act 9 Vict. ch. 42 was passed with the object of removing doubts as to the application of sec. 29 of the Act 7 Vict. ch. 11 to certain lands set out and expropriated from one S. at Bytown. By the first section of the first mentioned Act it was enacted that the proviso contained in sec. 29 of the Ordnance Vesting Act should be construed to apply to all lands at Bytown set out and taken from S. under the provisions of the Rideau Canal Act, except,—

(1) So much thereof as was actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers' Bridge, and of the Basin and Bywash, as they stood at the passing of the Ordnance Vesting Act, and excepting also,

(2) A tract of two hundred feet in breadth on each side of the said canal,—the portion of the said land so excepted having been freely granted by the said Nicholas Sparks to the late Colonel By of the Royal Engineers for the purposes of the canal—and excepting also,

(3) A tract of sixty feet round the said Basin and Bywash . . . which was then freely granted by the said Nicholas Sparks to the Principal Officers of Ordnance for the purposes of said canal, provided that no buildings should be erected thereon.

The site of the canal and the two hundred feet which were included within the limits of the land so set out and ascertained had been given by an instrument, dated 17th November, 1826, under the hands of S. and B., the latter of whom was acting for the Crown, by which it was agreed that such portion of the land so freely given as might be required for His Majesty's service should be restored to S. when the canal was completed. The canal was completed in 1832. Subsequent to the passing of the Act 9 Vict. ch. 42 all the lands of S., so set out and ascertained, were given up to him, except the portions above described, and deeds in the terms of the Act were exchanged between S. and the principal officers of Ordnance in regard to the land so given up and so retained, respectively :—

Held, that, apart from the question of acquiescence and delay on the part of S. and those claiming under him, the Act 9 Vict. ch. 42 and the deeds of surrender so exchanged were conclusive between the parties so far as the area and boundaries of the lands to be retained and restored respectively were concerned.

2. That the lands so retained were held by the Crown for the purposes of the canal, and that as to the tract of sixty feet around the Basin and Bywash there was attached a condition that no buildings were to be erected thereon.

3. That the proviso, "that no buildings shall be erected on the said tract of sixty feet," did not create a condition subsequent, a breach of which would work a forfeiture and let in the heirs, nor would the use by the Crown of a portion of the lands in question for purposes other than the "purposes of the canal" work such a forfeiture.

4. The Court has no power to restrain the Crown from making any unauthorized use of the land, or to compel the Crown to remove any buildings erected thereon contrary to the terms of the grant.

Semble, that the Crown cannot alien the land held for the purposes of the canal or any portion thereof, and if it should do so the suppliants would have their action against the grantee. If the Crown should abandon the land or any portion of it, the land or such part of it would revert to the suppliants and they might enter and possess it. *Magee* v. *The Queen*, 3 Ex. C. R. 304.

RIGHT OF WAY.

See STREET RAILWAYS, IV.—WAY, VIII.

RIPARIAN OWNER.

See WATER AND WATERCOURSES, VI.

ROAD COMPANY.

See WAY, IX.

RULE OF ROAD.

See SHIP, I.

SALE OF GOODS.

See CONTRACT—FRAUDULENT CONVEYANCE.

Conditional Sale— *Default — Seizure—Re-sale—Right to Sue for Deficiency.*]—After default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, with a provision that on default the whole price should fall due, and that the vendors should be at liberty to resume possession, nothing being said as to re-sale, the vendors seized the machine and re-sold it, and, after crediting the proceeds, brought this action to recover the balance of the original price:—

Held, per Boyd, C., dissenting from the decision of Armour, C.J., at the trial, that the plaintiffs were entitled to judgment.

Difference between American and English authority pointed out.

Held, per Robertson, J., *contra*, that by resuming possession the plaintiffs put an end to the contract of sale, and had no longer any right of action in respect to it.

Held, also, per Armour, C.J., that 51 Vict. ch. 19 (O.), as to conditional sales, is not retrospective; and per Boyd, C., that its provisions are declaratory of the common law in providing for a re-sale in case of default. *Lamond* v. *Davall*, 9 Q. B. 1030, and *Maclean* v. *Dunn*, 4 Bing. 722, specially referred to.

Held, by the Court of Appeal, Maclennan, J.A., dissenting, that by the re-sale the original agreement had been put an end to, and that the plaintiffs had no right of action.

Per Maclennan, J.A.—The vendors became, in effect, mortgagees of the machine, and on default in payment were entitled forthwith to sell and then sue for the unpaid balance. *Sawyer* v. *Pringle*, 20 O. R. 111, 18 A. R. 218.

Conditional Sale— *Default — Judgment — Subsequent Seizure—Re-sale — Right to Prove Claim for Deficiency.*]—The defendants purchased machinery from a company under a conditional contract of sale in writing, providing that the property should remain in the company until payment of the price in full, with the right to resume possession and re-sell on non-payment, but without any provision that in such latter event the purchase money was to be applied *pro tanto*, and the defendants remain liable for any balance. On default, after certain payments had been made, the company obtained judgment on notes which had been given for the purchase money, and subsequently seized and sold the machinery, and, applying the proceeds, sought and were allowed to prove a claim in the Master's office for the balance due on the judgment:—

Held, that the whole matter was examinable in the Master's office, although judgment had been recovered, and, as the consideration for the judgment had disappeared by the intentional act of the company in taking possession and selling, the claim should have been disallowed. *Sawyer* v. *Pringle*, 18 A. R. 218, followed. *Arnold* v. *Playter—Waterous Engine Works Co.'s Claim*, 22 O. R. 608.

Conditional Sale—*Manufactured Article—Vendor's Lien—Requirements of Statute.*]—The lien of an unpaid vendor of a manufactured article is not invalidated if, without his direction or connivance, the purchaser paints out or obliterates the name and address of the vendor that were, pursuant to the Conditional Sales Act, 51 Vict. ch. 19 (O.), properly marked on the article at the time of the conditional sale.

Semble, that an instrument in the form of a promissory note with conditions thereunder written is an instrument evidencing a conditional sale within the first and sixth sections of that Act. *Wettlaufer* v. *Scott*, 20 A. R. 652.

Party Liable for Price—*To Whom Credit Given.*]—A., doing business under the name of J. A. & Sons, assigned all his property and effects to H. for benefit of creditors. H., by power of attorney, authorized A. to collect all moneys due his estate, etc., and to carry on the business if expedient. A. continued the business as before, and in the course of it purchased goods from F., to whom, on some occasions, he gave notes signed "J. A. & Sons, H. trustee, per

A." All the goods so purchased from F. were charged in the books to J. A. & Sons, and the dealings between them after the assignment continued for five years. Finally, A. being unable to pay what was due to F., the latter brought an action against H. on notes signed as above, and for the price of goods so sold to A. :—

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that the evidence at the trial of the action clearly shewed that the credit for the goods sold was given to A. and not to H. ; that A. did not carry on the business after the assignment at the instance or as the agent of H., nor for the benefit of his estate ; that A. was not authorized to sign H.'s name to notes as he did ; and that H. was not liable either as the person to whom credit was given or as an undisclosed principal :—

Held, further, that if H. was guilty of a breach of trust in allowing A. full control over the estate, that would not make him liable to F. in this action. *Hechler* v. *Foxsyth*, 22 S. C. R. 489.

Party Liable for Price—*Vacating Judgment—Fraud.*]—A manufacturing company transferred to a syndicate, which had lent it money, its works, plant, and material, and in effect its whole business, which the syndicate proceeded to carry on, on the company's premises, for its own benefit, and at its own risk. The managing director of the company, who had become the manager of the syndicate, after the above transfer, but pursuant to a correspondence commenced a few days before it, ordered, as in his former capacity, certain goods from the plaintiff, who, subsequent to the transfer, supplied the goods ordered, which were used by the syndicate, and he afterwards took a note of the company for their price, on which, when dishonoured, he sued and obtained judgment against the company, being, however, all the time, ignorant of the circumstances above mentioned. About a week prior to the judgment a winding-up order was obtained against the company, hearing of which, the plaintiff at once commenced this action against the syndicate for the price of the goods, and afterwards, before trial, he obtained *ex parte* an order vacating the judgment against the company :—

Held, that the plaintiff was entitled to recover from the syndicate the price of the goods :—

Held, also, per Robertson, J., that the judgment vacated was absolutely null and void, having been obtained after the winding-up order without the leave of the Court.

Per Meredith, J., that the judgment was, at any rate, irregularly entered, and, when set aside, was as if it had never existed. *Keating* v. *Graham*, 26 O. R. 361.

Property Passing—*Warehouse Receipt—Non-payment of Price.*] — The defendants had over 4,000,000 feet of lumber in a yard in Rockland, Ont., and sold 1,500,000 through an agent to L. of Montreal on six months' credit, ratifying the sale by a letter to the owners of the yard as follows :—Montreal, 12th January, 1887. Messrs. W. C. Edwards & Co., Rockland, Ont. Gentlemen,—You will please ratify Mr. Lemay's order for one million feet 3 mill culls 8-13 feet and 493,590 feet 3 mill culls 14-16 feet sold to Mr. William Little, f.o.b. of barges, with option to draw them from the piles, if he wants some during winter. Yours truly, N. Hurteau et Frère.

A few days after the sale the agent gave an order on the owners of the yard for delivery of the lumber to L., which order was accepted by the owners. L. had given a six months' note for the price of the lumber, and just before it matured he asked the defendants to renew, which they refused, and on L. saying that he could not pay, the defendants replied that he must keep his lumber, whereupon he was informed by L. of his agreement with the plaintiff made about a month after the purchase from the defendants, by which he pledged to the plaintiff the warehouse receipt for the lumber as collateral security for advances to him by the plaintiff. On the trial of an interpleader issue to determine the title to this lumber it was shewn by the evidence that the quantity sold to L. had never been separated from the defendants' lot in the yard, and that the defendants had always kept it insured, considering it theirs until paid for :—

Held, affirming the judgment of the Court of Appeal, Strong and Gwynne, JJ., dissenting, that the property in the lumber never passed out of the defendants. *Ross* v. *Hurteau*, 18 S. C. R. 713.

Property Passing—*Right to Possession—Payment of Price.*]—The defendant agreed to get out wood for the mortgagors of the plaintiffs, whose mortgage covered certain wood then piled, as also future acquired wood brought on the premises, and to place it upon the premises at a specified price, and the mortgagors agreed to pay part of the price as the wood was got out, and the balance in cash upon and according to a measurement to be made by them. Subsequent to the date of the mortgage, wood was got out, placed on the premises, and measured in the presence of all parties, and the quantity agreed upon, and marked with the plaintiffs' mark :—

Held, that the property in the wood became at once vested in the mortgagors, and through them in the plaintiffs ; but such vesting did not transfer the right of possession without payment of the price ; and therefore the plaintiffs could not maintain trespass or trover for wood taken away by the defendant after appropriation and before payment of the full price ; but were entitled, upon amendment of the pleadings, to a declaration of their right to the property, and to possession upon payment of the amount due, and to an account of the wood not received by them. *Rogers* v. *Devitt*, 25 O. R. 84.

Quality — *Particular Chattel — Representation.*]—McD. bought at auction, through an agent, a billiard table described in the auctioneer's advertisement as "a full size 6 pocket English billiard table made by Thurston," etc., and wrote to M. & Co., makers of billiard tables in Toronto, describing his table and asking terms of exchanging it for a new one of another style. On receiving the information asked, McD. wrote that he could not accept the terms offered. M. & Co. afterwards wrote the following letter :—Toronto, October 2nd, 1886. D. C. McDougall, Esq., Agent Halifax Banking Co., Antigonish. Dear Sir,—Your laconic reply to our letter of 24th instant to hand. We would

drop the matter if it was not for an inquiry which we have just received from a private party in the far North-West who would like to purchase a good second-hand English table. We would therefore kindly ask you to make us your offer for the proposed exchange, and if we can possibly do it, we will accept it. Give us as near a description as you can of your table—maker's name is essential—but as you have nothing with it but the billiard outfit (no life and pyramid balls and boards) you should not make your price too high, or a deal will be impossible. Awaiting your kind reply, we remain, yours truly, Samuel May & Co. To which McD. answered: I may just say I never saw our table yet, but am informed it is a very nice one, made by "Thurston," and very little the worse of wear, being in the private family of Sir Edward Kenny in his country residence near Halifax. This gentleman who purchased the table for us writes thus: "I got the 3 billiard balls and marker, and 19 cues, which is all that is needed for billiards. I am told the table is a great bargain, cost £200 in England, and is not much the worse for wear." The table is 6 x 12, and for particulars we would refer you to Jerry E. Kenny, Esq., or F. D. Clark, auctioneer, Halifax. Yours truly, D. C. McDougall, M. & Co. then wrote accepting the offer, and adding, "We trust that the English table is fully as represented; and if you are satisfied, you may ship it at once, with billiard balls, markers, 19 cues, cloth, and what else there may be. In the meantime we will get up a 4½ x 9 Eclipse Combination table in best style, and with outfits for pool, carom, and pin pool games. Awaiting your early reply, we remain, dear Sir, yours truly, Samuel May & Co. The table shipped by McD. on reaching Toronto was found to be an American made table with English cushions and worth only from $15 to $25. M. & Co. brought an action for the original price of the new table:—

Held, affirming the judgment of the Court below, that McD. agreed to deliver to M. & Co. an English built table made by Thurston as described in his letter, and having failed to deliver such a table, he was liable to pay the full price of the one obtained from M. & Co. *May* v. *McDougall*, 18 S. C. R. 700.

Quality—*Warranty—Delivery—Acceptance.*]—In a contract for the purchase of deals from A. by S. *et al.*, merchants in London, it was stipulated, *inter alia*, as follows:—"Quality—Sellers guarantee quality to be equal to the usual Etchemin Stock and to be marked with the Beaver Brand," and the mode of delivery was f. o. b. vessels at Quebec, and payment by drafts payable in London 120 days' sight from date of shipment. The deals were shipped at Quebec on board vessels owned by P. & Bros., at the request of P. & P., intending purchasers of the deals. When the deals arrived in London they were inspected by S. *et al.* and found to be of inferior quality, and S. *et al.*, after protesting, sold them at reduced rates. In an action in damages for breach of contract:—

Held, reversing the judgment of the Court below, that the delivery was to be at Quebec, subject to an acceptance in London, and that the purchasers were entitled to recover under the express warranty as to quality, there being abundant evidence that the deals were not of the agreed quality; Arts. 1507, 1473, 1073, C. C.: Strong, C.J., and Sedgewick, J., dissenting. *Stewart* v. *Atkinson*, 22 S. C. R. 315.

Quantity—*Description—"Car-load"—Contract—Performance—Option.*]—The defendants agreed to buy from the plaintiff a car-load of hogs at a rate per pound, live weight. The plaintiff shipped a "double-decked" car-load, and the defendants refused to accept this, contending that a "single-decked" car-load should have been shipped. There was conflicting evidence as to the meaning given in the trade to the term "car-load of hogs," and it was shewn that hogs were shipped sometimes in the one way and sometimes in the other:—

Held, Hagarty, C. J. O., dissenting, that the plaintiff had the option of loading the car in any way in which a car might be ordinarily or usually loaded, and that he having elected to ship a double-decked car-load, the defendants were bound to accept. *Hanley* v. *The Canadian Packing Co.*, 21 A. R. 119.

Sale by Sample—*Inspection.*]—*See Fisher* v. *Cassady*, 14 P. R. 577, *ante* 197.

Sale by Sample—*Inspection—Agency—Ratification.*]—Held, by the Court of Appeal, that in a sale by sample of goods to be "laid down" at a certain place, inspection, if desired, must be made there, and if a proper opportunity of making inspection be afforded, and the buyer refuse to inspect and demand that the goods be shipped to another place for inspection, the seller is justified in treating this as a breach of contract:—

Held, by the Supreme Court of Canada, affirming the judgment of the Court of Appeal, that where goods are sold by sample, the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there, when opportunity therefor is afforded, is a breach of the contract to purchase.

Evidence of mercantile usage will not be allowed to add to or affect the construction of a contract for sale of goods, unless such custom is general. Evidence of usage in Canada will not affect the construction of a contract for sale of goods in New York by persons domiciled there, unless the latter are shewn to have been cognizant of it, and can be presumed to have made their contract with reference to it.

If parties in Canada contract to purchase goods in New York, through brokers, first by telegram and letters, and completed by exchange of bought and sold notes signed by the brokers, the latter may be regarded as agents of the purchasers in Canada; but if not, if the purchasers make no objection to the form of the contract, or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract. *Oelrichs* v. *Trent Valley Woollen Mfg. Co.*, 20 A. R. 673, 23 S. C. R. 682.

Sale by Weight—*Completion of Contract—Vendor's Risk—Depositary—Acceptance.*]—Held, per Ritchie, C.J., Strong and Fournier, JJ., affirming the judgment of the Court below, that where goods and merchandize are sold by weight, the contract of sale is not perfect, and the property in the goods remains in the vendor and

Arts. 1507, 1473, 1073,
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Atkinson, 22 S. C. R. 315.

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A. R. 119.

Inspection.]—*See Fisher* v.
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Oelrichs v. *Trent Valley*
A. R. 673, 23 S. C. R. 682.

-Completion of Contract—
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not perfect, and the pro-
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they are at his risk, until they are weighed, or until the buyer is in default to have them weighed; and this is so even where the buyer has made an examination of the goods and rejected such as were not to his satisfaction :—

Held, also, per Ritchie, C.J., Fournier and Taschereau, JJ., that where goods are sold by weight and the property remains in the possession of the vendor, the vendor becomes in law a depositary, and if the goods while in his possession are damaged through his fault and negligence, he cannot bring action for their value.

Per Patterson, J.—It was doubtful whether there was sufficient evidence of acceptance in this case to dispense with the writing necessary under Art. 1235, C.C., to effect a perfect contract of sale. *Ross* v. *Hannan*, 19 S. C. R. 227.

Sale of Timber.]—*See* TIMBER AND TREES.

Warranty of Title.—*Failure of Consideration—Sale by Pledgees.*]—The plaintiffs sued a bank to recover the price paid the bank for certain goods which, owing to a Customs seizure and forfeiture, the plaintiffs never received.

The bank was never in actual possession of the goods, but a bill of lading was indorsed to them as a security for advances, and this bill of lading was indorsed and delivered by the bank directly to the plaintiffs.

The jury found that it was the bank which sold the goods to the plaintiffs; that they professed to sell with a good title; that they had not a good title: and that the plaintiffs could not by any diligence have obtained the goods:—

Held, that upon these findings and the evidence, and having regard to the provisions of the Bank Act, R. S. C. ch. 120, the transaction must be regarded as a sale by the bank as pledgees with the concurrence of the pledgor, and not as a mere transfer of the interest of the bank under the bill of lading; and that the plaintiffs were entitled to recover the price as upon an implied warranty of title and a failure of consideration. *Morley* v. *Attenborough*, 3 Ex. 500, commented on and distinguished. *Peuchen* v. *Imperial Bank*, 20 O. R. 325.

SALE OF LAND.

I. CONTRACT OF SALE.

Breach—*Measure of Damages.*]—*See Loney* v. *Oliver*, 21 O. R. 89, *ante* 324.

Conditions—*Objection to Title—Time.*]—An agreement for the sale of land contained the condition that "the vendee is to examine the title at his own expense, and to have ten days from the date hereof for that purpose, and shall be deemed to have waived all objections to title not raised within that time :"—

Held, by Street, J., that, notwithstanding this condition, in the absence of a condition that he should take a bad title, the vendee was entitled to have a good title; and at any time before conveyance to shew that the vendor could not make any title to the property in question. And under the circumstances of this case, that the vendee had not, by his conduct and delay, waived his right to object to the title, but, as he had not raised the objection in the proper manner, at the proper time, he should have no costs of his action for specific performance or rescission of the contract.

Upon appeal to the Court of Appeal :—

Held, per Hagarty, C. J. O., and Osler, J. A., that this condition did not, even in the absence of objection within the time limited, compel the vendee to accept a defective title.

Per Burton and Maclennan, JJ.A., that the condition was sufficiently wide to bind the vendee, in the absence of objection within the limited time, to accept such title as the vendor might be able to give.

Judgment of Street, J., affirmed. *Nason* v. *Armstrong*, 22 O. R. 542, 21 A. R. 183. *See S. C.*, 25 S. C. R. 263.

Illegality — *Immoral Consideration.*]—*See Hager* v. *O'Neill*, 21 O. R. 27, 20 A. R. 198; *Clark* v. *Hagar*, 22 S. C. R. 510, *ante* 667.

Incumbrances—*Local Improvement Rates.*]—In a contract for sale and exchange of certain lands free from incumbrances, it was provided that "unearned fire insurance premium, interest, taxes, and rental" should be "proportioned and allowed to date of completion of sale :"—

Held, notwithstanding, that special frontage rates imposed for local improvements and construction of sewers by by-laws passed prior to the contract, the period for payment of which had not expired, were incumbrances to be discharged by the vendors respectively :—

Held, also, that the vendors were likewise bound to discharge a special frontage rate imposed by a by-law passed subsequently both to the date of the contract and the date fixed for the completion of the sale, inasmuch as the work was actually done and the expenditure actually made before the contract, the council having first done the work and then passed the by-law to pay for it, under 53 Viet. ch. 50, sec. 38 (O.). The substantial charge as a whole came into existence upon the finishing of the work. *Cumberland* v. *Kearns*, 18 O. R. 151, 17 A. R. 281, commented on and distinguished. *Re Graydon and Hammill*, 20 O. R. 199.

Incumbrances—*Local Improvement Rates—Covenants—Purchase Money.*]—A contract for the sale of land provided for the payment of the purchase money in quarterly instalments; when half was paid, the vendor was to convey and give the usual statutory covenants; the purchaser was to pay taxes from the date of the contract.

In an action to recover instalments under the contract :—

Held, that local improvement rates imposed by municipal by-laws after, the work having been done before, the dates of the contract, were incumbrances to be discharged by the vendor; but rates imposed and work done after the contract were not so. *Re Graydon and Hammill*,

20 O. R. 199, followed. *Les Ecclésiastiques de St. Sulpice de Montreal* v. *City of Montreal*, 16 S. C. R. 399, distinguished.

Held, also, that the covenant for payment of the instalments and the covenant against incumbrances, were independent; and the vendor was entitled to judgment for the instalments; but the purchaser was entitled to shew the existence of incumbrances as an equitable ground of relief, and, the time for completion of the contract not having arrived, to pay into Court so much of his purchase money as might be necessary to protect him against the incumbrances. *McDonald* v. *Murray*, 11 A. R. 101, and *Tisdale* v. *Dallas*, 11 C. P. 238 distinguished. *Armstrong* v. *Auger*, 21 O. R. 98.

Rescission—*Incumbrances.*]—W. bought property at auction, signing on purchase a memorandum by which he agreed to pay ten per cent. of the price down and the balance on delivery of the deed. The auctioneer's receipt for the ten per cent. so paid stated that the sale was on the understanding that a good title in fee simple clear of all incumbrances up to the first of the ensuing month was to be given to W., otherwise his deposit to be returned. After the date so specified W., not having been tendered a deed which he would accept, caused the vendor to be notified that he considered the sale off, and demanded repayment of his deposit, in reply to which the vendor wrote that all the auctioneer had been instructed to sell was an equity of redemption in the property; that W. was aware that there was a mortgage on it and had made arrangements to assume it; that a deed of the equity of redemption had been tendered to W.; and that he was required to complete his purchase. In an action against the vendor and auctioneer for recovery of the amount deposited by W.:—

Held, reversing the decision of the Supreme Court of Nova Scotia, that the vendor having repudiated the agreement, W., being entitled to a title in fee clear of incumbrance, and not bound to accept the equity of redemption, could at once treat the contract as rescinded and sue to recover his deposit. *Wrayton* v. *Naylor*, 24 S. C. R. 295.

Statute of Frauds.]—An acceptance in writing by the owner of land of a written offer therefor addressed to him but unsigned by any purchaser, and without any purchaser being named or in any way described therein, is not a sufficient memorandum to satisfy the Statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer.

Per Osler, J.A., dissenting, that such an instrument is a proposal to sell to any one who accepts the offer. *McIntosh* v. *Moynihan*, 18 A. R. 237.

Statute of Frauds.]—A contract for a share in the proceeds of a mine when it should be sold is not a contract for the sale of an interest in land within the Statute of Frauds. *Stuart* v. *Mott*, 23 S. C. R. 384.

Statute of Frauds — *Sheriff.*] — A sheriff, selling lands as an assignee for creditors, under R. S. O. ch. 124, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not, as in the latter case, agent for both vendor and purchaser. *McIntyre* v. *Faubert*, 26 O. R. 427.

II. Mortgaged Land.

See Mortgage.

III. Under Order of Court.

Sale by Tender—*Procedure — Time.*]—The words "peremptory" or "peremptorily" do not always mean "absolutely final," there being a discretion in the Court, under special and urgent circumstances, whether they shall have that meaning or not.

A sale by tender (not saying that the property will be sold to the highest bidder) is a mere attempt to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt.

In winding-up proceedings of a joint stock company, tenders were advertised for the purchase of the company's property, to be received by a certain time, when the sale was to be "peremptorily closed." At the time fixed one tender only had been received, and the referee enlarged the time for the arrival of a train which was late. Two more tenders were received by that train; one on behalf of the largest beneficiary under the mortgage to enforce which the sale was being held, and the other by a stranger, which was a little higher than that of the beneficiary. The latter then by his agent handed in a much higher tender, whereupon the referee conducted notice of the last tender to be given to the other tenderers, and on a subsequent day accepted the last, which was the highest tender:—

Held, that he was justified in so doing. *Re Alger and Sarnia Oil Co.*, 21 O. R. 440. Affirmed, 19 A. R. 446.

See Infant, II.

SALVAGE.

See Ship, V.

SCALE OF COSTS.

See Costs, IV.

SCHOOL SECTIONS.

See Public Schools.

SCHOOL TRUSTEES.

See Public Schools.

SCIRE FACIAS AND REVIVOR.

See COMPANY, III., VI.

Decease of Plaintiff after Judgment—*Motion to Set Aside Execution—Irregularity.*]—After judgment pronounced by the Court upon default of defence the plaintiff died, and the defendant, desiring to have the judgment set aside and be let in to defend, issued a *præcipe* order under Rule 622 reviving the action in the name of the executor of the plaintiff's will.

Upon motion to set this order aside:—

Held, that Rule 622 should be read as applicable to a case in which final judgment has been entered; and, as it was necessary that the defendant should be allowed to carry on the proceedings, the order should be sustained. *Arnison* v. *Smith*, 40 Ch. D. 567, distinguished. *Curtis* v. *Sheffield*, 20 Ch. D. 398, and *Twycross* v. *Grant*, 4 C. P. D. 40, followed.

After the death of the plaintiff, and before the order of revivor, the solicitor who had acted for her issued a writ of *fi. fa. poss.* upon the judgment without the leave required by Rule 886:—

Held, that the writ was irregular; and it was competent for the party affected by it to apply to set it aside without first reviving the action. *Chambers* v. *Kitchen*, 16 P. R. 219. Affirmed, 17 P. R. 3.

Decease of Plaintiff after Verdict and before Judgment—*Assignment of Verdict—Assignee—Tort—Appeal.*]—In an action for malicious prosecution the jury found a general verdict for the plaintiff with damages. The defendant moved to set aside the verdict, etc., and his motion being dismissed, gave security for the purpose of an appeal, after which the plaintiff assigned "the verdict or judgment" to his daughter, and died about three months later. No judgment had been entered, nor was there any order or direction of the Judge for the entry of judgment. By an *ex parte* order, made on the application of the next friend of the plaintiff's daughter, after his death, the assignment to her was recited, and it was ordered that the action should stand revived in her name:—

Held, that the action could not be revived or continued by or against the daughter, she not being the assignee of a judgment, and the cause of action not being one capable of being assigned to her so as to sue for it in her own name; and the defendant's appeal could not be heard in the absence of the legal personal representative of the plaintiff.

Semble, the assignee of a judgment debt may obtain an order to enter a suggestion reviving the action for the purpose of issuing execution in his own name. *Philips* v. *Fox*, 8 P. R. 51, referred to.

Where a verdict only is taken at the trial, and the Judge does not pronounce judgment or direct findings of fact to be entered, a motion for judgment is necessary. *Wellbanks* v. *Conger*, 12 P. R. 354, referred to. *Blair* v. *Asselstine*, 15 P. R. 211.

Decease of Plaintiff Pendente Lite—*Tort—Appeal.*]—An action for injury to the person now survives to the executor of the plaintiff, who can, in case of his death *pendente lite*, on entering a suggestion of the death and obtaining an order of revivor, continue the action. *Mason* v. *Town of Peterborough*, 20 A. R. 683.

Ejectment — *Conveyance Pendente Lite—Lapse of Time—Agreement of Solicitors.*]—In 1867 an action of ejectment was brought by L., and notice of trial given and the case entered for trial for 15th October following. The trial was postponed, and on 21st October L. conveyed the lands to I. On 8th January, 1871, L. died, and on 14th May, 1886, I. conveyed to the plaintiff. In February, 1892, an *ex parte* order under Rule 620 was obtained by the plaintiff from the local registrar, reviving the action in the plaintiff's name. It appeared that in January, 1872, the then plaintiff's solicitors had notified the defendant's solicitors of the plaintiff's intention of reviving the action, and they gave notice of trial for the ensuing assizes, whereupon it was agreed between the solicitors that on the then plaintiff's solicitors refraining from reviving and proceeding to trial, the defendant's solicitors would abide by the result of another named suit, and if that result should be in favour of the plaintiff, an order of revivor might then issue and judgment be entered for the plaintiff:—

Held, by Galt, C.J., that the original action was governed by C. S. U. C., ch. 27, sec. 22, and terminated on the 21st October, 1867, when the plaintiff conveyed to I.; that after such a lapse of time, the plaintiff's rights being barred by the Statute of Limitations, no order of revivor should have issued, and that the Court would give no effect to the agreement made by the solicitor, for to do so would be an injustice to the client:—

Held, by the Court of Appeal, affirming the judgment of Galt, C.J., discharging the order of revivor, that the action was governed by C. S. U. C. ch. 27, and that it came to an end as soon as the conveyance to the present plaintiff's predecessor in title was made, except perhaps as to costs, for which the original plaintiff might probably have proceeded. *Lemesurier* v. *Macaulay*, 22 O. R. 316, 20 A. R. 421.

Ejectment—*Conveyance Pendente Lite.*]—Rules 383, 384, and 385, Ontario Judicature Act, 1881 (Con. Rules 620, 621, and 622), which relate to the transmission of interest *pendente lite*, and permit the continuance of an action by or against the person to or upon whom the estate or title has come or devolved, are applicable to an action of ejectment begun before the Act, when the conveyance of the land by the original plaintiff did not take place until after its passing. *Irvine* v. *Macaulay*, 16 P. R. 181.

SEAL.

See COMPANY, IV.—MUNICIPAL CORPORATIONS, VIII.—PUBLIC SCHOOLS, II.

SEAL FISHERY.

See SHIP, VI.

SEAMEN'S WAGES.

See Exchequer Court, I.

SEARCH.

See Intoxicating Liquors, III.

SEARCH WARRANT.

See Intoxicating Liquors, III.

SECURITY FOR COSTS.

See Costs, IV.

SEDUCTION.

Action by Mother—*Absence of Father.*]—Held, on demurrer to a statement of claim in an action of seduction, that the mother of the girl seduced, suing as her mistress, had a sufficient common law right to bring the action, in the absence from the Province of the girl's father:—

Held, also, that R. S. O. 1887 ch. 58, "An Act respecting the Action of Seduction," is only an enabling Act, enlarging the right to maintain the action, under circumstances which would not be sufficient at common law. *Gould* v. *Erskine*, 20 O. R. 347.

Action by Mother—*Death of Father after Seduction.*]—In an action, after the death of the father, by the mother for the seduction of her daughter in the lifetime of the father, who was an invalid supported by the mother and daughter, no evidence of the actual relationship of mistress and servant was given:—

Held, that the action was not maintainable. *Entner* v. *Benneweis*, 24 O. R. 407.

Action for Connection by Force—*Previous Acquittal for Rape—Amendment.*]—In an action for enticing away and having carnal knowledge of the plaintiff's daughter, the plaintiff was allowed at the close of the case to amend by setting up, as an alternative cause of action, the enticing away of the daughter and having connection with by force and against her will, and consequent loss of service. No application was made by the defendants to put in further evidence, nor was any suggestion made that they were in any way prejudiced by the amendment:—

Held, that the amendment was properly allowed:—

Held, also, that the fact of the defendants having been previously acquitted on an indictment for rape on the plaintiff's daughter was not a bar to the action. *Cole* v. *Hubble*, 26 O. R. 279.

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

Action—*Particulars—Examination.*]—The plaintiff in an action of seduction was examined for discovery by the defendant, but was able to give very little information:—

Held, nevertheless, that the defendant was not entitled to examine the plaintiff's daughter.

The defendant having made an affidavit denying the seduction and all knowledge of it, an order was made for particulars of specific acts, with regard to which the plaintiff proposed to give evidence. *Turner* v. *Kyle*, 2 C. L. T. 598, 18 C. L. J. 402, explained. *Hollister* v. *Annable*, 14 P. R. 11.

Action—*Particulars.*]—Where the defendant in an action of seduction denies the seduction on oath, the plaintiff will be required to furnish particulars of the times and places at which it is charged that the alleged seduction took place. *Hollister* v. *Annable*, 14 P. R. 11, approved. *Mason* v. *VanCamp*, 14 P. R. 296.

Action—*Pleading.*]—*See Daly* v. *Byrne*, 15 P. R. 4, *ante* 797.

See Criminal Law, IV.—Executors and Administrators, VI.

SEPARATE ESTATE.

See Bankruptcy and Insolvency, I.—Husband and Wife—Partnership, IV.

SEPARATE SCHOOLS.

See Public Schools.

SERVICE.

See Practice, XVI.

SESSIONS.

Appeal to—*Costs—Certiorari.*]—Where an appeal to the Sessions is dismissed without being heard and determined on the merits, there is no power to impose costs. *Re Madden*, 31 U. C. R. 333, followed.

When a notice of appeal is given for the wrong sessions, and the appeal is not heard on the merits, the right to certiorari is not taken away by sec. [illegible] ch. 178. *Regina* v. *Becker*, 20 O. R. [illegible].

Appeal to—*Summary Conviction—Public Health Act.*]—Where there is a conviction for an offence under the by-laws set out in the schedule to the Public Health Act, R. S. O. ch. 205, as distinguished from any of the provisions in the Act itself, an appeal will lie from such con-

viction to the Sessions, notwithstanding sec. 112, which has no application. *The Queen* v. *Coursey*, 26 O. R. 685.

Reversed on different grounds, 27 O. R. 181.

Order by — *Abatement of Nuisance — Certiorari—Costs.*]—The defendant was convicted at the General Sessions on an indictment for a nuisance in obstructing the highway by the erection of a wall thereon, and directed to abate the nuisance, which not having been done, the Sessions made an order directing the sheriff to abate the same at the defendant's costs and charges, and to pay the County Crown Attorney forthwith after taxation the costs of the application and order, and the sheriff's fees and costs and incidental expenses arising out of the execution of the order:—

Held, that the Sessions had no authority to make the order to the sheriff, the proper mode in such case being by a writ *de nocumento amovendo*; that the order, being a judicial act, was properly removed by *certiorari*, and must be quashed, but without costs.

Remarks as to the jurisdiction of the Sessions as to the costs. *Regina* v. *Grover*, 23 O. R. 92.

See CRIMINAL LAW, II.

SET-OFF.

Against Crown.]—*See The Queen* v. *Whitehead*, 1 Ex. C. R. 134, *ante* 307.

Judgment Against Stranger—*Prête-Nom.*]—A defendant cannot set up by way of compensation to a claim due to the plaintiff a judgment, purchased subsequent to the date of the action, against one who is not a party thereto, and for whom the plaintiff is alleged to be a *prête-nom.* *Bury* v. *Murray*, 24 S. C. R. 77.

See BANKRUPTCY AND INSOLVENCY, I.—BANKS, VI.—COSTS, II., V., VI.—JUDGMENT—PLEADING, III.

SETTLED ESTATES ACT.

Power to Grant Renewable Building Leases—"*Usual Custom.*"]—In applying the English Settled Estates Act of 1856, 19 & 20 Vict. ch. 120, to this Province, the words "usual custom" in sec. 2 must be satisfied with something less than the immemorial custom of England. It is satisfied by proof of a well recognized method or usage of framing building leases in a given locality. Under that statute and 53 Vict. ch. 14 (O.), the power to lease with extended right of renewal may be granted up to 999 years. *Re Watson's Trusts*, 21 O. R. 528.

SETTLEMENT OF ACTION.

See ACTION, IV.—COSTS, V.—[illegible]AL, IV.

SHARES.

See COMPANY.

SHEEP.

"Giving of Sheep to Double" — *Contract —Statute of Frauds.*]—The Statute of Frauds does not apply to a contract which has been entirely executed on one side within the year from the making so as to prevent an action being brought for the non-performance on the other side.

And, therefore, where the plaintiff delivered sheep to the defendant within a year from the making of a verbal contract with the defendant under which the latter was to deliver double the number to the plaintiff at the expiration of three years:—

Held, that the contract was not within the statute. *Trimble* v. *Lanktree*, 25 O. R. 109.

Protection of Sheep Act — *Action — Procedure.*]—The right of action given by R. S. O. ch. 214, sec. 15, to the owner of sheep killed by dogs, is to be prosecuted with the usual procedure of the appropriate forum. If, therefore, an action be properly brought in the County Court, it may be tried before a jury, and where it is so tried, they, and not the Judge, should apportion the damages, if an apportionment be required. *Fox* v. *Williamson*, 20 A. R. 610.

SHELLEY'S CASE.

See ESTATE.

SHERIFF.

Absconding Debtor—*Property in Hands of Third Person—Delivery to Sheriff.*]—*See Buntin* v. *Williams*, 16 P. R. 43, *ante* 1.

Action Against—*Interpleader—Exemptions.*]—*See In re Gould* v. *Hope*, 21 O. R. 624, 20 A. R. 347, *ante* 545.

Action Against — *Malicious Prosecution—Liability for Acts of Bailiff.*]—*See Gordon* v. *Rumble*, 19 A. R. 440, *ante* 643. *See* also *Beatty* v. *Rumble*, 21 O. R. 184, *ante* 643.

Action Against — *Trespass — Justification Under Execution.*]—In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act, R. S. N. S., 5th ser., ch. 94, the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A., and it was alleged that the husband's name was Daniel. The jury found that he was well known by both names, and that A.'s right to the goods seized was acquired from her husband after marriage, which would not make it her separate property under the Act:—

Held, reversing the judgment of the Court below, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without shewing the judgment: *McLean* v. *Hannon*, 3 S. C. R. 706, followed: and that under the findings of the

jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband, which was a complete answer to the action. *Crowe* v. *Adams*, 21 S. C. R. 342.

Assignee for Creditors — *Sale of Land—Statute of Frauds.*]—A sheriff, selling lands as assignee for creditors, under R. S. O. ch. 124, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not, as in the latter case, agent for both vendor and purchaser. *McIntyre* v. *Faubert*, 26 O. R. 427.

Poundage.]—Where goods seized by a sheriff under execution, and sold under an interpleader order, were afterwards found to be the goods of the claimant therein and not of the execution defendant :—

Held, that the sheriff was not entitled under Rule 1233 to an allowance in lieu of poundage in respect of the goods seized. *Turner* v. *Crozier*, 14 P. R. 272.

Poundage.]—A sheriff is not entitled to poundage under a writ of *fi. fa.* lands until there has been a sale under the writ. *Merchants' Bank* v. *Campbell*, 32 C. P. 170, followed. *French* v. *Lake Superior Mineral Co.*, 14 P. R. 541. *See* now Con. Rule 1375.

Poundage.]—A sheriff made a seizure under a *fi. fa.* against the goods of the defendants, but, learning that they were about to appeal, of his own motion, and for the purpose of saving expense to the parties, withdrew his officer in possession, and, the appeal having been subsequently brought, the execution was superseded. The appeal was dismissed, and the judgment debt and costs were afterwards settled by arrangement between the parties :—

Held, that the sheriff had not so withdrawn from the seizure as to disentitle him to poundage or an allowance in lieu thereof, and that, notwithstanding the superseding of the execution, he was entitled under Rule 1233 to such allowance—the words "from some other cause" in that Rule being wide enough to cover the case. *Brockville and Ottawa R. W. Co.* v. *Canada Central R. W. Co.*, 7 P. R. 372, and *Morrison* v. *Taylor*, 9 P. R. 390, approved and followed.

The Court will not interfere with the discretion exercised by the Master in fixing the amount of the allowance. *Weegar* v. *Grand Trunk R. W. Co.*, 16 P. R. 371.

Poundage—*Costs.*]—Where an interpleader issue, ordered upon the application of a sheriff who had seized certain goods under the direction of the execution creditors, was determined as to part of the goods in favour of the claimant and as to the remainder in favour of the execution creditors, and no costs of the issue were given to either party to it :—

Held, that the execution creditors should pay the sheriff his fees and poundage on the value of the part of the goods they were found entitled to, and his costs of the interpleader application and of a subsequent application to dispose of the costs, etc.; and that the execution creditors should have an order over against the claimant for one-half of such costs. *Ontario Silver Co.* v. *Tasker*, 15 P. R. 180.

Return — *Withdrawal — Attachment.*] — A sheriff's return to a writ of *fi. fa.* goods set forth that he was notified that the amount of the judgment to be executed had been attached by a judgment creditor of the execution creditor, and that the execution debtor (the garnishee) had thereupon satisfied the claim of the garnishor. In fact there was only an order to attach and a summons to pay over, but no order absolute :—

Held, that the return was insufficient in substance, because it shewed that the writ remained unexecuted without legal excuse; a garnishee order absolute would have operated as a stay of execution, but not so the attaching order and summons: the duty of the garnishee was to pay the sheriff, advising him at the same time of the existence of the attaching order, and this would have been equivalent to a payment into Court.

Where purchasers are not in question, the issue of a writ of execution gives a specific claim to the goods of a judgment debtor, which remains till satisfaction of the debt ; and, therefore, the withdrawal of the sheriff did not preclude further action upon the writ. *Genge* v. *Freeman*, 14 P. R. 330.

Venditioni Exponas—*Order.*]—A petition *en nullité de décret* has the same effect as an opposition to a seizure, and under Arts. 662 and 663, C. C. P., a sheriff cannot proceed to the sale of property under a writ of *venditioni exponas*, unless such writ is issued by an order of the Court or a Judge. *Bissonnette* v. *Laurent*, 15 Rev. Leg. 44, approved. Taschereau and Gwynne, JJ., dissenting. *Lefeuntun* v. *Véronneau*, 22 S. C. R. 203.

See EXECUTION—INTERPLEADER.

SHIP.

I. COLLISION.

Burden of Proof — *Admission — Evidence—Negligence—Cost of Survey—Notice—Demurrage.*]—During the early hours of the morning of 12th August, 1891, a collision occurred between the plaintiffs' vessel, lying moored to a dock in Windsor, Ontario, and a barge in tow of a tug. The defendants in their pleadings admitted the collision, but claimed that the plaintiffs' vessel was in fault, since there was

no light on board and no stern line out, in consequence of which latter neglect she swung out into the stream as the tug and its tow were passing at a reasonable distance away from her, and that the collision was occasioned thereby.

(1.) Upon the question as to who should begin :—

Held, that the defendants having admitted that their vessels were moving and the plaintiffs' vessel was at rest, and that a collision had occurred, they must begin on the question of liability for the accident, with a right to reply on the question of the amount of damage, if it were necessary to go into that question :—

Held, also, that it was necessary for the defendants to establish such negligence against the plaintiffs as would contribute to the accident, and that, as it was about daylight at the time of its occurrence, and the plaintiffs' vessel was admittedly seen by the tug when more than one hundred feet distant, the tow being at the time three hundred feet behind the tug, and further, since the evidence shewed that the plaintiffs' vessel was properly and securely moored to the dock, the absence of light did not constitute such negligence on the part of the plaintiffs as contributed to the accident. They were, therefore, entitled to recover for the damage arising from the negligent navigation of the tug and her tow, to the amount of the actual cost of the repairs and also the cost of towage to the ship-yard.

(2.) A survey of the damage done to their vessel was made at the plaintiffs' instance. Notice of intention to have a survey made was only given to one of the defendants, and that by mailing a letter to his address on the day before the survey was made. Notice of the result of the survey was given to the defendants :—

Held, that the cost of the survey was not chargeable to the defendants, because reasonable notice was not given to enable them to be present or to be represented thereat :—

Held, also, that demurrage should not be allowed, inasmuch as the vessel was lying idle at the time of the collision, and that as soon as the plaintiffs obtained a commission for her the vessel went to work, although repairs were not then completed—no loss of earnings occurring by reason of the accident. *Charlton* v. *The Colorado and Byron Trevice*, 3 Ex. C. R. 263.

Dangerous Channel—*Rule of Road—Manœuvres.*]—Two steamers of considerable length and draught, the one entering and the other leaving the port of N., signalled to each other that they both proposed to take the same channel, which, though short, was narrow and tortuous. The one steamer being fully committed to the channel, it was, under Art. 18 of R. S. C. ch. 79, the duty of the other steamer to remain completely outside until the first had passed completely through.

(2.) Where a collision appears possible, but as yet easily avoidable, neither vessel has a right to adopt manœuvres which place the other vessel in a position of unnecessary embarrassment or difficulty. The wrong-doer is solely responsible for damages from a consequent collision. *The City of Puebla*, 3 Ex. C. R. 26.

Refusal of Uninjured Vessel to Assist—*Rule of Road.*]—Under the provisions of sec. 10 of the Navigation Act, R. S. C. ch. 79, where a collision occurs, the ship neglecting to assist is to be deemed to blame for the collision in the absence of a reasonable excuse. Two steamships, the *C.* and the *J.*, were leaving port together in broad daylight, and a collision occurred between them. The *J.* received such injury as to be rendered helpless. The *C.* did not assist, or offer to assist, the disabled ship, but proceeded on her voyage. The excuse put forward by the master of the *C.* was that the *J.* did not whistle for assistance, although the evidence shewed that he must have been aware of the serious character of the damage sustained by her. He further attempted to justify his failure to assist by the fact that other ships were not far off; but it was shewn that these ships were at anchor and idle :—

Held, that the circumstances disclosed no reasonable excuse for failure to assist on the part of the *C.*, and that the consequences of the collision were due to her default :—

Held, also, that the *C.* was in fault under Art. 16 of sec. 2 of the Navigation Act for not keeping out of the way of the *J.*, the latter being on the starboard side of the *C.* while they were crossing. *Esquimalt and Nanaimo R. W. Co.* v. *The Cutch*, 3 Ex. C. R. 362.

Rule of Road.]—Action for damages to the plaintiff's schooner by a collision with the defendant's steamer in the Bay of Quinte. In the marine protest by the captain of the schooner, the cause of the collision was alleged to be that the steamer's wheel was put to port when it should have been put to starboard just before the collision. The action was twice tried. The judgment upon the first trial was set aside on the ground that the Judge, by adopting the opinion of assessors, had delegated his judicial functions (19 A. R. 298). The second trial resulted in a verdict for the plaintiff, which was affirmed by the Court of Appeal. The Supreme Court of Canada affirmed the judgment of the Court of Appeal. *Collier* v. *Wright*, 24 S. C. R. 714.

Speed—*Both Ships at Fault—Quantum of Damages.*]—Two steamers were approaching each other near a public harbour in a dense fog, those in charge having mutually learned their approximate whereabouts by an interchange of blast signals. Notwithstanding such proximity and the fact that the courses they were steering were such as would have brought them across each other's bows, one of them maintained a speed of from three to four miles an hour, and was running with a tide, at flood force, of one and a half knots per hour; the other was steaming at a speed of about three knots an hour, and no effort was made to alter her course. A collision occurred :—

Held, that both vessels had infringed the provisions of Arts. 13 and 18 of the Imperial Regulations for Preventing Collisions at Sea, and were, therefore, mutually to blame for the collision.

(2.) The word "moderate" in Art. 13 is a relative term, and its construction must depend upon the circumstances of the particular case. The object of this Article is not merely that vessels should go at speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as

possible for avoiding a collision when another ship suddenly comes into view at a short distance. It is a general principle that speed such that another vessel cannot be avoided after she is seen, is unlawful. *The Z* [illegible] D. 114, referred to.

(3.) The owner of a ship [illegible] injured in a collision is entitled to have it fully and completely repaired, and if a ship is totally lost, the owner is entitled to recover her market value at the time of the collision.

(4.) Where both ships are at fault, the law apportions the loss by obliging each wrongdoer to pay one-half the loss of the other.

The provisions of sec. 12 of R. S. C. ch. 79, limiting the liability of the party at fault in a collision to a sum of $38.92 for each ton of gross tonnage, were applied to this case. *The Heather Bell and The Fastnet*, 3 Ex. C. R. 40.

Speed—*Want of Fog-horn.*]—In a collision between a steamer and a sailing vessel, in a fog, the steamer was going half-speed. Had she been going dead slow she might have been stopped in time to prevent the collision :—

Held, that the steamer was partly in fault, although the collision was no doubt due to the want of a fog-horn on the sailing vessel. *The Zambesi and The Fanny Dutard*, 3 Ex. C. R. 67.

Steering-gear—*Speed — Rule of Road—Question of Fact — Appeal.*]—The steamship *S.* was proceeding up the harbour of Sydney, C.B., at a rate of speed of about 8 or 9 miles an hour. When entering a channel of the harbour, which was about a mile in width, her steam steering-gear became disabled, and she collided with the *J.*, a sailing vessel lying at anchor in the roadstead, damaging the latter seriously. It was shewn that the master of the *S.* had not acted as promptly as he might have done in taking steps to avoid the collision when it appeared likely to happen :—

Held, by the Exchequer Court, that even if the breaking of the steering-gear—the proximate cause of the collision—was an inevitable accident, the rate of speed at which the *S.* was being propelled, while passing a vessel at anchor in a roadstead such as this, was excessive, and that, in view of this and the further fact that the master of the *S.* was not prompt in taking measures to avert a collision when he became aware of the accident to his steering-gear, the *S.* was in fault and liable under Art. 18 of sec. 2 of R. S. C. ch. 79 :—

Held, also, that the provisions of Art. 21 of sec. 2 of R. S. C. ch. 79 should be applied to roadsteads of this character, and that, inasmuch as the *S.* did not keep to that side of fairway or mid-channel which lay on her starboard side, she was also at fault under this Article, and responsible for the collision which occurred.

Held, by the Supreme Court of Canada, affirming the decision of the Exchequer Court, Sedgwick and King, JJ., dissenting, that only a question of fact was involved, and, though it was doubtful if the evidence was sufficient to warrant the finding, the decision was not so clearly wrong as to justify an appellate Court in reversing it. *The Santanderino*, 3 Ex. C. R. 378, 23 S. C. R. 145.

II. Dᴇ[illegible]ᴀɢᴇ.

See Charlton v. The Colorado and Tyron Trevice, 3 Ex. C. R. 263, *ante* 889.

III. Master.

Bottomry Bond—*Essentials of*—*Broker's Commissions.*] The hypothecation of a ship is only justified when it is done to secure amounts due for necessary repairs to enable the ship to proceed with her voyage, or for necessaries or provisions required for the same purpose. Furthermore, in order to enable the creditor to benefit by the hypothecation, the following elements must be present in the transaction :—(*a*) The repairs must be performed and the necessaries or provisions supplied on the express condition that the claim is to be secured by a bond : (*b*) there must be a total absence of personal credit on the part of the owner or master ; (*c*) before pledging the ship, the master should, if it was at all possible to do so, have communicated with the owner ; and (*d*) there must not be sufficient cash or credit available to the master to pay the amount of the indebtedness so incurred.

(2.) A master gave a bottomry bond on his ship for repairs executed some time previous to the voyage he was then prosecuting, and which were done entirely on his personal credit at the time, and upon the distinct understanding that he would not be required to pay for them until his return from another voyage. It also appeared that the master had not communicated with the owners before entering into the bond, although means of communication were open to him ; and it was, moreover, shewn that the ship had enough credit at the place where the bond was made to pay the whole amount of the claim :—

Held, that the bond was void.

(3.) A ship-broker's commissions cannot be the object of a bottomry bond. *Christian v. The Joseph*, 3 Ex. C. R. 344.

Lien for Wages—*Statutes—Retroactivity.*]—The master of a vessel registered at the port of Winnipeg, and trading upon Lake Winnipeg, had, in the years 1888, 1889, and 1890, no lien upon the vessel for wages earned by him as such master.

(2.) Even if such a lien were held to exist, there was in the years mentioned no Court in the Province of Manitoba in which it could have been enforced ; and it could not now be enforced under the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict. (Imp.) ch. 27, or the Admiralty Act, 1891, 54 & 55 Vict. (D.) ch. 29, because to give those statutes a retroactive effect in such a case as this would be an interference with the rights of the parties. *Bergman v. The Aurora*, 3 Ex. C. R. 228.

Lien for Wages and Disbursements—*Borrowing Money.*]—The master of a ship sought to enforce a claim *in rem* for wages as well as for disbursements and liabilities assumed in respect of necessaries supplied the ship, for which he had made a joint note with the owner for $250 under an agreement that the note

The Colorado and Byron Tre-
53, ante 889.

I. MASTER.

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greement that the note

should be paid out of the earnings of the ship. This agreement was made without the consent or knowledge of the mortgagee :—

Held, that the master had a maritime lien for his wages, as well as for disbursements actually and necessarily made, and liability incurred in connection with the proper working and management of the ship, and that the limit of such liability would be to the value of the vessel and freight.

(2.) That the master did not exceed his authority in borrowing money on the note for the purposes of the ship, it appearing that the sum so borrowed had been duly and properly expended for the ship. *Reid* v. *The Queen of the Isles*, 3 Ex. C. R. 278.

Negligence of—*Hiring of Vessel—Liability.*]—*See Thompson* v. *Fowler*, 23 O. R. 644, *post* 894 ; *Cram* v. *Ryan*, 24 O. R. 500, 25 O. R. 524, *ante* 733.

IV. OWNERS.

Communication With—*Bottomry Bond.*]—*See Christian* v. *The St. Joseph*, 3 Ex. C. R. 344, *ante* 892.

Conversion of Vessel—*Joint Owners—Marine Insurance — Abandonment — Salvage.*]—A sale by one joint owner of property does not amount, as against his co-owner, to a conversion, unless the property is destroyed by such sale, or the co-owner is deprived of all beneficial interest.

A vessel, partly insured, was wrecked, and the ship's husband abandoned her to the underwriters, who sold her and her outfit to one K. The sale was afterwards abandoned, and the underwriters notified the ship's husband that she was not a total loss, and requested him to take possession. He paid no attention to the notice, and the vessel was libelled by K. for salvage, and sold under decree of the Court. The uninsured owner brought an action against the underwriters for conversion of her interest :—

Held, affirming the decision of the Supreme Court of New Brunswick, that the ship's husband was agent of the uninsured owner in respect of the vessel, and his conduct precluded her from bringing the action ; that he might have taken possession before the vessel was libelled ; and that the insured owner was not deprived of her interest by any action of the underwriters, but by the decree of the Court under which she was sold for salvage. *Rourke* v. *Union Insurance Co.*, 23 S. C. R. 344.

Co-owners — *Account — Jurisdiction of Exchequer Court — Indorsement of Writ.*]—The Exchequer Court has jurisdiction to hear and determine actions of account between co-owners of a ship.

Semble, in an action by the managing owner of a ship against his co-owner, that the indorsement on the writ need not shew that there is any dispute as to the amount involved. *Hall* v. *The Seaward*, 3 Ex. C. R. 268.

Demise or Hiring—*Negligence—Liability.*]—The defendant hired a tug from the plaintiff by a contract signed by both parties in these words, "I agree to charter tug . . to tow two barges from . . for which I agree to pay . . owner to supply engineer and captain . . ." The tug on the voyage was run on a rock through the negligence of the captain :—

Held, not a demise of the tug, but a contract of hiring, and that the defendant was not liable for the damage. *Thompson* v. *Fowler*, 23 O. R. 644.

See, also, *Cram* v. *Ryan*, 24 O. R. 500, 25 O. R. 524, *ante* 733.

Liability—*Disbursements—Evidence—Guaranty.*]—On a ship under charter being loaded, it was found that a sum of £173 was due the charterer for the difference between the actual freight and that in the charter party and as agreed, a bill for the amount was drawn by the master on the agents of the ship and also a bill of £753 for disbursements. These bills not being paid at maturity, notice of dishonour was given to V., the managing owner, who sent his son to the solicitors who held the bills for collection, to request that the matter should stand over until the ship arrived at St. John, where V. lived. This was acceded to, and V. signed an agreement, in the form of a letter addressed to the solicitors, in which, after asking them to delay proceedings on the draft for £753, he guaranteed, on the vessel's arrival or in case of her loss, payment of the said draft and charges, and also the payment of the draft for £173 and charges. On the vessel's arrival, however, he refused to pay the smaller draft, and to an action on his guaranty he pleaded payment, and that he was induced to sign the same by fraud. By order of a Judge the pleas of payment were struck out. On the trial the son of V. who had seen the solicitors swore that they told him that both bills were for disbursements, but it did not clearly appear that he repeated this to his father. V. himself contradicted his son, and stated that he knew that the smaller bill was for difference in freight, and there was other evidence to the same effect. His counsel sought to get rid of the effect of V.'s evidence by shewing that from age and infirmity he was incapable of remembering the circumstance, but a verdict was given against him :—

Held, affirming the decision of the Court below, that the defence of misrepresentation set up was not available to V. under the plea of fraud, and, therefore, was not pleaded ; that, if available without plea, it was not proved ; that nothing could be gained by ordering another trial, as, V. having died, his evidence would have to be read to the jury, who, in view of his statement that he knew the bill was not for disbursements, could not do otherwise than find a verdict against him :—

Held, further, that the delay asked for by V. was sufficient consideration to make him liable on his guaranty, even assuming that he would not have been originally liable as owner of the ship. *Vaughan* v. *Richardson*, 21 S. C. R. 35).

V. SALVAGE.

Blasting — *Remuneration — Vice-admiralty Court.*]—A ship was stranded on a rocky shore with a point of rock protruding through her hull. H. was employed to blast it away and so free the ship :—

Held, that this was not a salvage service.

(2.) That the Vice-Admiralty Court had jurisdiction to award reasonable remuneration in respect to the same. *The Watt*, 2 W. Rob. 70, referred to. *The Costa Rica*, 3 Ex. C. R. 23.

Crew—*Services—Lien—Agent—Release—Bar to Action.*]—A crew of a fishing schooner had performed certain salvage services in respect of a derelict ship, and gave the following power of attorney respecting the claim for such services to the agent of the owner of the schooner: "We, the undersigned, being all the crew of the schooner *Iolanthe* at the time said schooner rendered salvage services to the barque *Quebec*, do hereby irrevocably constitute and appoint Joseph O. Proctor our true and lawful attorney, with power of substitution, for us and in our name and behalf as crew of the said schooner, to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec* recently towed into the port of Halifax, Nova Scotia, by said schooner *Iolanthe*; hereby granting unto our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and also power at his discretion to constitute and appoint, from time to time, as occasion may require, one or more agents under him, or to substitute an attorney for us in his place, and the authority of all such agents or attorneys at pleasure to revoke;"—

Held, that this instrument did not authorize the agent to receive the salvage payable to the crew or to release their lien upon the ship in respect of which the salvage services were performed.

(2.) That payment of a sum agreed upon between the owners of such ship and the agent and the latter's receipt therefor, did not bar salvors from maintaining an action for their services. *The Quebec*, 3 Ex. C. R. 33.

Nature of Services—*Towage—Quantum of Remuneration—Costs.*]—A stranded vessel, abandoned by the owners to the underwriters and sold by them, was saved, and was brought by the purchasers to a shipwright for repairs:—

Held, that the towage of the vessel from the place where stranded to the dry dock was a salvage service.

(2.) Claim for use of anchor, chains, etc., used in saving vessel:—

Held, a salvage service.

(3.) Claim for personal services not performed on vessel:—

Held, not a salvage service.

(4.) Claim for services of tug in an unsuccessful attempt to remove vessel:—

Held, not a salvage service. Salvage is a reward for benefits actually conferred.

(5.) Held, following the usual rule, that not more than a moiety of the value of the *res* at the time when saved should be awarded to salvors, there being no exceptional feature except the small value of the *res*. Costs of salvors awarded out of other moiety. Costs of arrest and sale and of bringing fund into Court paid in priority to claims out of fund, in proportion to the value of the *res* at the time of delivery to the Dry Dock Company, and balance of the proceeds of sale, which was not sufficient to pay claim of possessory lien-holder. *The Gleniffer*, 3 Ex. C. R. 57.

Quantum of Remuneration — *Collision.*]—Where two vessels in collision are both at fault, and one vessel renders salvage services to the other, when the value of such services is determined, it should be divided and the salved vessel only be required to pay one-half of the amount. *The Zambesi and The Fanny Dutard*, 3 Ex. C. R. 67.

Special Contract—*Rate of Remuneration—Petition of Right.*]—A steamship belonging to the Dominion Government went ashore on the Island of Anticosti, and suppliants rendered assistance with their wrecking steamer in getting her afloat. The service rendered consisted in carrying out one of the stranded steamship's anchors, and in taking a hawser and pulling on it until she came off. For carrying out the anchor it was admitted that the suppliants had bargained for compensation at the rate of $50 an hour, but whether the bargain included the other part of the service rendered or not was in dispute. The service was continuous—no circumstances of sudden risk or danger having arisen to render one part of the work more difficult or dangerous than the other:—

Held, that the rate of compensation admittedly agreed upon in respect of carrying out the anchor must, under the circumstances, be taken as affording a fair measure of compensation for the entire service.

(2.) A petition of right will not lie for salvage services rendered to a steamship belonging to the Dominion Government. *Canette* v. *The Queen*, 3 Ex. C. R. 82.

Towage and Salvage—*Distinction—Volunteer—Rate of Remuneration.*]—Salvage means rescue from threatened loss or injury. No danger, no salvage. If the ship be in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal, but yet varies according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the salvors on the other hand.

(2.) A small packet steamer, while performing one of her regular trips between certain points in thick weather, discovered a large steamship lying at anchor in such a position as to be in imminent danger of becoming a total loss. The latter signalled the former and asked to be towed into port. This the packet steamer refused to do, wishing to prosecute her voyage, but agreed to tow the ship out of her dangerous position to the open sea, and there give her captain directions to enable him to reach his port of destination. This offer was accepted and acted upon. In conducting the ship to the open sea, the packet steamer performed the services both of a pilot and tug, and shewed skill and enterprise, and incurred appreciable risk, while so engaged:—

Held, a salvage and not a mere towage service.

Semble, while the Court is disposed to confine the claims of professional pilots and tugs to the tariff scale for such professional services, a volunteer ought to be allowed a more liberal rate of compensation. *Canadian Pacific Navigation Co.* v. *The C. F. Sargent*, 3 Ex. C. R. 332.

Towage and Salvage — *Distinction.*]—In a collision between a steamer and a sailing vessel,

the latter immediately became water-logged and helpless, and in a position where, though safe for the moment, she might very shortly have been in great danger :—

Held, that to rescue her was a salvage and not merely a towage service. *The Zambesi and The Fanny Dutard*, 3 Ex. C. R. 67.

VI. Seal Fishery.

Forbidden Waters—*Presence of Ship—Lawful Intention—Burden of Proof.*]—By sub-sec. 5 of sec. 1 of the Imperial Act 54 & 55 Vict. ch. 19, the Seal Fishery (Behring's Sea) Act, 1891, it is enacted that "if a British ship is found within Behring's Sea having on board thereof fishing or shooting implements or seal skins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this Act."

On 30th August, 1891, the ship "Oscar and Hattie," a fully equipped sealer, was seized in Gotzleb Harbour, in Behring Sea, while taking in a supply of water :—

Held, by the Exchequer Court, that the words "used or employed" are not to be confined to the particular use and employment of the ship on the occasion of her seizure, but extend to the whole voyage which she is then prosecuting ; and if the ship is found in the condition described in the sub-section, she is liable to forfeiture unless the presumption therein raised can be rebutted by owner or master.

Held, by the Supreme Court of Canada, affirming the judgment of the Court below, that when a British ship is found in the prohibited waters of Behring Sea, the burden of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of sub-sec. 5 :—

Held, also, reversing the judgment of the Court below, that there was positive and clear evidence that the "Oscar and Hattie" was not used or employed at the time of her seizure in contravention of sub-sec. 5. *The Queen v. The Oscar and Hattie*, 3 Ex. C. R. 241, 23 S. C. R. 396.

Forbidden Waters—*Presence of Ship—Evidence — Order in Council — Judicial Notice — Examination by Foreign War Vessel—Protocol.*]—The Admiralty Court is bound to take judicial notice of an order in council from which the Court derives its jurisdiction, issued under the authority of the Act of the Imperial Parliament, 56 & 57 Vict. ch. 23, the Seal Fishery (North Pacific) Act, 1893.

A Russian cruiser, manned by a crew in the pay of the Russian Government and in command of an officer of the Russian navy, is a "war vessel" within the meaning of the said order in council, and a protocol of examination of an offending British ship by such cruiser signed by the officer in command is admissible in evidence in proceedings taken in the Admiralty Court in an action for condemnation under the Seal Fishery (North Pacific) Act, 1893, and is proof of its contents.

The ship in question in this case, having been seized within the prohibited waters of the thirty mile zone round the Komandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the *onus* cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the order in council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and order in council. *The Minnie v. The Queen*, 23 S. C. R. 478.

VII. Seamen's Wages.

Action in Rem — *Jurisdiction of Exchequer Court—Personal Remedy Owner—Purchaser—Bill of Sale.*]—In the year 1887 A. sold a vessel to M. and S. under an agreement stipulating, among other things, that the vessel was to remain in the name and under the control of A. until the purchase-money was fully paid, and that, in the event of the terms of the contract not being performed by the vendees, A. was entitled to take possession, and the vendees would thereupon lose all claim or title they might have to the ship or to moneys paid by them in respect of the contract. This agreement was not registered. For some time the vendees performed the terms of the agreement, but having failed to do so after a certain period, A. resumed possession of the vessel. In an action *in rem* for wages due to a seaman employed by the vendees and which were earned during their possession of the vessel :—

Held, that the amount of the claim being below $200, the Exchequer Court had no jurisdiction under sec. 34 of the Inland Waters Seamen's Act.

(2.) That the property in the vessel had not passed to the vendees under the agreement, and that whatever rights the seaman had *in personam* must be enforced against the persons who employed him and not against the vendor.

(3.) That the agreement was not a bill of sale within the meaning of the Merchant Shipping Act, 1854, sec. 55.

(4.) That if summary proceedings had been taken as provided by the Inland Waters Seamen's Act, a direction might have been made to provide for the realization of the seaman's claim against the vessel, and she might have been tied up by the Court on his shewing that the vendees who employed him were then the supposed owners of the vessel, and when the action was brought were insolvent within the meaning of sec. 34 of the said Act. *The Jessie Stewart*, 3 Ex. C. R. 132.

VIII. Towage.

See The Gleniffer, 3 Ex. C. R. 57, *ante* 895 ; *Canadian Pacific Navigation Co. v. The C. F. Sargent*, 3 Ex. C. R. 332, *ante* 896 ; *The Zambesi and The Fanny Dutard*, 3 Ex. C. R. 67, *ante* 897.

SHOP LICENSE.

See Intoxicating Liquors, III.

SLANDER.

See Costs, IV.—Defamation.

SLANDER OF TITLE.

See DEFAMATION.

SOLICITOR.

I. ADMISSION TO PRACTISE.

Appeal.]—Per Strong and Taschereau, JJ.—It was never intended that the Supreme Court of Canada should interfere in matters respecting the admission of attorneys and barristers in the several Provinces. *In re Cahan*, 21 S. C. R. 100.

II. AUTHORITY.

1. *In Actions.*

Action—*No Retainer—Costs.*]—An action, brought by solicitors in the plaintiff's name, was dismissed with costs, and judgment entered against the plaintiff. The solicitors had acted without any written retainer from the plaintiff, or any instructions from her personally, relying on instructions received from the plaintiff's husband, which she positively denied ever having given, and also on letters written to her, the sending of which was not strictly proved, and which she denied ever having received:—

On a motion made theretor by the plaintiff, the judgment and all subsequent proceedings were set aside, and the solicitor ordered to pay the plaintiff's costs as between solicitor and client, and the defendant's costs as between party and party. *Scribner* v. *Parcells*, 20 O. R. 554.

Agreement Not to Appeal.]—An attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken. Per Taschereau, J., in *La Société Canadienne-Française de Construction de Montreal* v. *Daveluy*, 20 S. C. R. 449.

Appearance—*Ratification—Disavowal of.*]—In an action brought in 1866 for the sum of $800 and interest at twelve and a half per cent. against two brothers, S. J. D. and W. McD. D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of S. J. D. at Three Rivers, the other defendant, W. McD. D., then residing in the State of New York. On the return of the writ, the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken, and in December, 1880, upon the issue of an *alias* writ of execution, the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by S. J. D., saying: "Be so good as to file an appearance in the case to which the enclosed has reference," etc., and also prescription, ratification, and insufficiency of the allegations of the petition of disavowal. The petition in disavowal was dismissed:—

Held, that there was no evidence of authority given to the respondent or of ratification by the appellant of the respondent's act, and therefore the petition in disavowal should be maintained. *Dawson* v. *Dumont*, 20 S. C. R. 709.

Joining Plaintiffs Without Authority—*Costs.*]—By a resolution of the council of a municipal corporation, the mayor and clerk were instructed to grant a certificate under the corporate seal to the solicitors for the other plaintiffs authorizing them to join the corporation as plaintiffs in this action, upon receiving a bond, to the satisfaction of the mayor, indemnifying the corporation against all costs. A bond was accordingly handed to the mayor, who retained it, but the action was brought by the solicitors, and the corporation joined therein as plaintiffs, without the granting of any certificate under the corporate seal. After the action had been begun the mayor informed the defendants' solicitors that no certificate had been issued, and stated that he would not sign one until he had been properly advised by counsel:—

Held, that the action was brought in the name of the corporation without authority; and that the defendants had the right to move to have such name struck out.

Semble, that the corporation should have been parties to the motion.

Held, also, that as the solicitors for the plaintiffs other than the corporation were not guilty of any intentional wrong-doing in joining the corporation as plaintiffs, they should not be made liable for the defendants' costs. *Town of Barrie* v. *Weaymouth*, 15 P. R. 95.

Next Friend—*Retirement—Withdrawal of Authority—Costs.*]—Upon application to the Court therefor, the next friend of an infant plaintiff may be allowed to withdraw, upon such

terms as the circumstances of the case and the welfare of the infant may require.

Solicitors began an action in the name of an infant as plaintiff by her mother as next friend, with the consent of the latter. After the action had been some time in progress, the mother wrote a letter to the solicitors revoking the authority to use her name, to which they replied that proceedings would not be stayed unless she paid costs up to date, and that if she did not do so they would assume that she intended them to continue the action. She took no notice of this, and they went on with some proceedings, whereupon the defendant, instructed by the mother, moved to dismiss the action on the ground that it was being prosecuted without authority, and asked for costs against the solicitors :—

Held, in staying the proceedings, that there was nothing to prevent the mother from renouncing her character of next friend, and withdrawing from the litigation, subject to her remaining amenable to the jurisdiction of the Court as to liability for costs theretofore incurred.

As to costs :—

Held, that the Court reaches the solicitors of a plaintiff directly for the benefit of the defendant only where the plaintiff, as client, has a right to be recouped by the solicitor, and to the extent of that recoupment. The next friend here was liable to the solicitor for costs up to her letter, and the solicitor was liable to the next friend for costs subsequent thereto ; and as the former costs exceeded the latter, and, as between the next friend and the defendant, the former was liable for costs so long as she did not make a direct application against the solicitors, no order could be made in favour of the defendant ; but the next friend was entitled to be indemnified by the solicitors for costs incurred after her letter :—

Held, also, that it was competent for the defendant to move to stay the proceedings, although the normal practice is for the next friend to move. *Taylor* v. *Wood*, 14 P. R. 449.

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2. *To Receive Money.*

Mortgage.]—The onus of shewing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal, is upon the mortgagor, and unless this onus is clearly discharged, the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds. *In re Tracy—Scully* v. *Tracy*, 21 A. R. 454.

III. Costs.

1. *Delivery and Taxation of Bill.*

Accounting—*Inquiry Relating to Bills not Referred—Powers of Taxing Officers—Precipe Order of Reference.*]—By an order, obtained by clients upon precipe, a bill of costs was referred to taxation, and the taxing officer was directed to take an account of all sums of money received by the solicitor of or on account of the applicants.

Under this the taxing officer taxed the bill and took an account of the moneys received by the solicitor, and in so doing inquired into and determined the validity of a disputed agreement in the nature of a compromise relating to some older bills of costs not referred to taxation, but which the solicitor now claimed should be allowed at their face value against moneys received by him, and which the applicants claimed should be allowed only at the amount settled by the disputed agreement :—

Per Hagarty, C. J. O., and Burton, J. A., that the officer had no jurisdiction under the order to determine the validity of the agreement.

Per Osler and Maclennan, JJ. A., that he had jurisdiction.

The Court of Appeal being thus equally divided, the decisions of Armour, C. J., and the Common Pleas Divisional Court, 12 P. R. 612, were affirmed.

Held, by the Supreme Court of Canada, affirming the judgment of the Court of Appeal, that the officer not only had authority, but was obliged, to proceed and report as he did, and his report should be affirmed.

It is doubtful if a matter of this kind, which relates wholly to the practice and procedure of the High Court of Justice for Ontario, and of an officer of that Court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the Supreme Court. *Re O'Donohoe, a Solicitor*, 14 P. R. 317, *O'Donohoe* v. *Beatty*, 19 S. C. R. 356.

Application for Taxation—*Time—Special Circumstances.*]—The solicitor defended an action of ejectment and prosecuted three actions for malicious prosecution on behalf of the applicants.

On the 18th October, 1889, before the termination of any of the actions, the solicitor delivered to the applicants his bills of costs in them all up to that time. On the 20th April, 1890, he delivered further bills of costs in all the actions, which had then been brought to an end.

Application for a reference of all the bills to taxation was made on the 20th November, 1890 :—

Held, that the application was in time ; for the retainer existed until the litigation ended ; and the applicants had a full year from the delivery of the bills last delivered to apply for the taxation of all the bills :—

Held, also, that the "special circumstances" which, by sec. 34 of R. S. O. ch. 147, must exist to justify a reference to taxation after twelve months from delivery of the bills are not confined to cases of actual fraud or gross overcharge and pressure. *Re Norman*, 16 Q. B. D. 673, followed.

Held, also, that bringing three separate actions which might all have been joined in one, and charging excessive counsel fees, were special circumstances to be regarded in ordering a taxation after twelve months. *Re Butterfield, a Solicitor*, 14 P. R. 149.

Application for Taxation—*Time—Special Circumstances—Services as Parliamentary Agents.*]—Where a bill of charges and disbursements rendered by solicitors was posted to the client on the 11th April, 1893, but did not reach the client till a day or two later :—

Held, by the Master in Chambers, that an *ex parte* order for taxation made on the 11th

April, 1894, was made after the expiry of twelve months, and should be set aside.

The bill was for services rendered and moneys expended in obtaining an Act of Parliament for the divorce of the client from her husband :—

Held, by the Master, that it was a solicitor's bill, and as such taxable under the Solicitors' Act.

Quære, per Street, J., as to this.

Held, per Street, J., that "special circumstances" justifying an order for taxation after twelve months from delivery of the bill must be proved by the affidavits filed upon the application, and where they consist of alleged overcharges, they should be plainly indicated by the applicant, on whom lies the onus of establishing them.

And where the only overcharge indicated was the payment to a physician, who was absent from his business three days for the purpose of giving evidence before a parliamentary committee, of $50 and his disbursements, and it appeared that the solicitors had paid the amount in good faith, and the client had at one time assented to it, and it did not appear that the physician's attendance could have been secured for any lesser sum :—

Held, that there were no special circumstances warranting an order for taxation after the lapse of twelve months and after settlement of the bill by cash and notes, which latter had been paid in part and renewed from time to time.

Decision of the Master on this point reversed. *In re Chisholm and Logie, Solicitors*, 16 P. R. 162.

Application for Taxation by Solicitor—*Dispute as to Retainer—Reference as to Quantum.*]—Where one of two alleged clients, against whom solicitors seek to obtain a taxation of certain bills of costs, disputes the retainer, the usual order for taxation should be made against the unresisting client, such taxation to be on notice to the other, with liberty to him to attend and intervene, and to be conclusive against him as to the quantum of liability in case he is ultimately found liable in the dispute as to the retainer. *In re Jones*, 36 Ch. D. 105 ; *In re Salaman*, [1894] 2 Ch. 201 ; and *In re Totten*, 27 U. C. R. 449, discussed.

Decision of Street, J., reversed ; Meredith, J., dissenting. *Re Macdonald et al., Solicitors*, 16 P. R. 498.

Certificate of Taxing Officer — *Report — Appeal.*]—The certificate of a taxing officer upon a reference to taxation of a solicitor's bill of costs, at the instance of a client, is a report ; and, under Rules 848, 849, and 850, the appeal therefrom should be to a Judge in Court upon seven clear days' notice. *Re Crothers, a Solicitor*, 15 P. R. 92.

Certificate of Taxing Officer — *Report — Appeal.*]—The report or certificate of an officer upon the taxation of the costs of a solicitor as against his client falls under the provision of Rule 1226 (*d*) as to its confirmation, and is, for the purposes of an appeal, a report within the meaning of Rules 848 and 849. *Ford* v. *Mason*, 16 P. R. 25. *See Re Robinson, a Solicitor*, 17 P. R. 137.

Interlocutory Costs—*Set-off—Discretion.*]—Decisions of the Master in Chambers and Rose, J., 15 P. R. 269, refusing to order a set off of certain interlocutory costs against the amount alleged to be due to the solicitors upon bills in course of taxation, affirmed on appeal :—

Held, that, as the taxation had never been completed, and the solicitors declined to proceed with it, they were not entitled to set off.

If the taxation had been completed, the fact of the interlocutory costs being ordered to be paid forthwith after taxation would not have prevented their being ordered to be set off ; but it raised an inference that it was not intended that they should be set off.

Whether the costs in question should be set off or not was in the Master's discretion, and, having regard to the fact that they had been assigned, and to the other circumstances before the Court, it could not be said that an improper discretion had been exercised. *Re Clarke and Holmes, Solicitors*, 16 P. R. 94.

Party Liable—*Costs of Taxation—Set-off.*]—The parties who initiate and intervene upon the taxation of a solicitor's bill of costs become personally liable to pay the costs of taxation.

And where solicitors rendered to the assignee of an insolvent their bill for services to the insolvent, and the assignee taxed the bill and had it reduced by more than one-sixth :—

Held, that he had a right personally to recover from the solicitors the costs of taxation, and that there should be no set-off against the amount coming to the solicitors from the estate of the insolvent as a dividend upon their bill. *Re Rogers and Farewell, Solicitors*, 14 P. R. 38.

Party Liable—*Præcipe Order—Account.*]—All *ex parte* orders are *periculo petentis*.

And where the defendants in an action had agreed with the plaintiff to pay the costs of his solicitors, and, being furnished with a bill of such costs, obtained on præcipe an order for the taxation thereof, which order was drawn up as an order to tax upon an application by the client, and directed that the taxing officer should take account of all sums of money received by the solicitors for or on account of the applicants, such order was vacated with costs.

The defendants were to be regarded as third persons liable to pay, and were entitled to an order for taxation ; but they should have disclosed all the facts and applied for a special order ; and the plaintiff should have been made a party to the proceeding under Rule 1229, for the purpose of taking an account between him and the solicitors. *Re McCarthy, Pepler, and McCarthy, Solicitors*, 15 P. R. 261.

Party Liable—*School Board—Ratepayer.*]—Held, by the Court of Appeal, reversing the decision of the Queen's Bench Division, 24 O. R. 289, that an individual ratepayer of a school section is not, merely by reason of his having to contribute as a ratepayer, entitled to obtain an order for taxation of a bill of costs delivered to and paid by the Board of Public School Trustees, either under R. S. O. 1887 ch. 147, secs. 32 and 42, or under Con. Rule 1229.

Upon appeal to the Supreme Court of Canada :—

Held, per Ritchie, C. J., Strong and Gwynne, JJ., that assuming the Court had jurisdiction to entertain the appeal, the subject-matter being one of taxation of costs, this Court should not interfere with the decision of the Provincial Courts, which are the most competent tribunals to deal with such matters.

Per Ritchie, C. J., Strong and Patterson, JJ., that a ratepayer is not entitled to an order for taxation under said section.

Per Taschereau, J.—The Court has no jurisdiction to entertain the appeal, as the judgment appealed from was not a final judgment within the meaning of the Supreme Court Act; the matter was one in the discretion of the Courts below; and the proceedings did not originate in a Superior Court.

Per Patterson, J.—The making or refusing to make the order applied for is a matter of discretion, and the case is, therefore, not appealable. *McGugan* v. *McGugan*, 19 A. R. 56, 21 S. C. R. 267.

Retaining Fee.]—The solicitor during the progress of the action in respect of which the costs in question were incurred made a contract in writing with his clients for the payment to him of a retaining fee of $100, explaining fully to them the effect of the bargain, and that, in case of their success in the action and costs being awarded to them, they would not be able to tax against or claim from the opposite party the amount of this fee. The officer allowed the retaining fee on taxation, and reported that the contract was a fair and reasonable one:—

Held, on appeal, that the contract could not be enforced against the clients.

Section 51 of the Act respecting solicitors, R. S. O. ch. 147, relates to matters of conveyancing, etc., and not to the conduct of an action in the ordinary way. *Ford* v. *Mason*, 16 P. R. 25.

Retaining Fee.]—By the judgment in an action the defendant was required to pay the plaintiffs' costs of a former action, as between solicitor and client, to be taxed:—

Held, that an unpaid retaining fee which the plaintiffs had agreed in writing to pay to their solicitors, over and above the costs of the action, could not be taxed against the defendant. *Re Geddes and Wilson*, 2 Ch. Chamb. R. 417, and *Ford* v. *Mason*, 16 P. R. 25, approved and followed. *Re Fraser*, 13 P. R. 409, distinguished. *McKee* v. *Hamlin*, *Hamlin* v. *Connelly*, 16 P. R. 207.

Review of Taxation—*Reference—Unnecessary Length—Counsel Fees—Brief—Copies of Depositions.*]—Upon appeal from the taxation between solicitor and client of a bill of costs for the defence of an action of redemption in which, before the beginning of the Sittings at which the action was entered for trial, an arrangement had been made between the parties that all the matters in question should be referred to a Master, and accordingly no witnesses were subpœnaed, and a reference was directed at the Sittings:—

Held, that the taxing officer had no discretion to allow an increased counsel fee with brief at the trial, as the action could not be said to be of a special and important character, nor to allow a fee for advising on evidence.

The reference lasted for 137 hours, 18 of which were occupied in argument. Nearly the whole of the time was devoted to the main matter in contest, viz., whether the defendants should be charged with an occupation rent, and if so, at what amount. The Master found that they were chargeable with a rent of $312.50. The taxing officer allowed the solicitor $302 for the time occupied in taking the evidence, and $47 for the argument:—

Held, that the allowance of counsel fees upon a reference, under clause 107 of the tariff, should be exceptional, and made only when matters of special importance or difficulty are involved at some particular sitting; and also that the taxing officer should have taken into consideration the unreasonable time occupied over so small a matter, and have exercised his discretion by confining the solicitor to the minimum allowance of $1 an hour, under clause 104 of the tariff, for the argument as well as for the taking of the evidence.

The taxing officer allowed the solicitor $77.50 for brief upon appeal from the Master's report; this amount included $67.80 paid to the Master for copies of the depositions:—

Held, that the solicitor had no *primâ facie* right to order and charge for these copies, and, in the absence of any authority from his clients, should not be allowed for them upon taxation.

The taxing officer allowed the solicitor $35 counsel fee upon the appeal, $12 for travelling expenses, and $10 counsel fee upon the plaintiff's motion for judgment, which came before the Court with the appeal:—

Held, that these allowances, though liberal, were not so clearly wrong as to justify the Court in interfering. *Re Robinson, a Solicitor*, 16 P. R. 423. *See S. C.* in appeal, 17 P. R. 137.

Services as Agent—*Notary—Conveyancing Charges.*]—A solicitor, who is also a notary, and acting in the latter capacity obtains for a client the allowance of a pension from the United States Government, is entitled to charge for his services such sum as may be agreed upon, and is not bound by the statutory regulations affecting solicitors' charges, or liable to have his charges taxed.

The right to tax a solicitor's bill of charges for conveyancing, in the absence of a special agreement, considered. *Ostrom* v. *Benjamin*, 20 A. R. 336.

Supplemental Bill—*Special Circumstances—Time.*]—A solicitor in delivering a bill of costs omitted to make any charges for "days employed in going to and returning from Ottawa" upon business for his clients. He stated that the omission was through inadvertence; and after taxation of his bill, but before the certificate was signed, applied for leave to deliver a supplemental bill, alleging that he would not have sought now to make these charges if the taxing officer had allowed him certain sums charged in the original bill for travelling expenses, but which were disallowed on the ground that he was travelling on a pass:—

Held, that there was no clear evidence that the omission arose from mere accident or mistake, and that the Court below could not be said to be wrong in holding that no special circumstances were disclosed for making the amendment.

Per Osler, J. A.—As a general rule, it is too late to make such an application after the result of the taxation is known.

Judgment of the Queen's Bench Divisional Court, 14 P. R. 571, affirmed. *Re O'Donohoe, a Solicitor*, 15 P. R. 93.

Unnecessary Proceedings—*Administration—Action.*]—The order and decision of Robertson, J., 13 P. R. 403, upon appeal from taxation of costs between solicitor and client, disallowing to the solicitors the additional costs occasioned by their bringing on their client's behalf an action for administration, where a summary application would have sufficed, was affirmed by the Court of Appeal; Burton, J. A., dissenting.

In the administration action the additional costs incurred by the defendants in that action were allowed to them by way of set-off against the costs awarded to the plaintiff:—

Held, that no relief could be obtained by the client, upon a proceeding for taxation of costs, in respect of the loss suffered by her in virtually paying these costs to the defendants. *Re Allenby and Weir, Solicitors*, 14 P. R. 227.

Unnecessary Proceedings—*Multiplicity of Actions.*]—A solicitor, acting on behalf of three clients, brought three separate actions for malicious prosecution against the same defendant. The three causes of action all arose out of an information for an assault laid by the defendant against the plaintiffs:—

Held, that under Rule 300 the three causes of action could have been joined in one action: that it was the duty of the solicitor to have so advised his clients; and that not having done so, he could not be heard to say that his clients had instructed him to bring three separate actions. And upon taxation of his bill between solicitor and client he was allowed costs as of one action only. *Booth* v. *Briscoe*, 2 Q. B. D. 496, and *Gort* v. *Rowney*, 17 Q. B. D. 625, followed. *Appleton* v. *Chapel Town Paper Co.*, 45 L. J. Ch. 276, not followed. *Re Butterfield, a Solicitor*, 14 P. R. 567.

Unnecessary Proceedings—*Special Agreement—Multiplicity of Actions—Affidavits—Motion for Judgment.*]—Two actions were brought by the same plaintiffs against different defendants to recover rent for different parcels of land, in which the defences were not identical. A compromise was effected, and it was agreed between the parties "that judgment shall be entered in each of the said actions for the amounts claimed therein by the plaintiffs, with costs of suit between solicitor and client;" and judgments were entered accordingly:—

Held, that the plaintiffs were entitled to tax a separate set of costs for each action.

The plaintiffs made six affidavits on production, either prompted by the action of the defence or by way of voluntary supplement to the original affidavit:—

Held, per Boyd, C., in Chambers, that they were entitled to tax the costs of one affidavit only, with extra folios for the additional matter contained in the subsequent affidavits:—

Held, also, per Boyd, C., that upon the taxation "between solicitor and client" of the plaintiffs' costs, they were not entitled to the costs of a motion for summary judgment under Rule 739, which was useless and not according to the practice, and was refused because the indorsement on the writ of summons claimed "interest on arrears of rent," and was, therefore, not a good special indorsement. *Baldwin* v. *Quinn*, *Baldwin* v. *McGuire*, 16 P. R. 248.

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2. Director of Company.

Profit Costs—*Contributory—Set-off.*]—Where a director, who was also president, of a company was appointed by the board of directors and acted as solicitor for the company:—

Held, in winding-up proceedings, that he was entitled to profit costs in respect of causes in Court conducted by him as solicitor for the company, but not in respect of business done out of Court, and was entitled to set off the amount of such costs against the amount of his liability as a shareholder. *Cradock* v. *Piper*, 1 Macn. & G. 664, followed. *Re Mimico Sewer Pipe and Brick Mfg. Co.—Pearson's Case*, 26 O. R. 289.

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3. Payment Out of Court.

Undertaking to Refund.]—*See Agricultural Ins. Co.* v. *Sargent*, 16 P. R. 397, *ante* 231.

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4. Recovery by Action.

Quantum Meruit.]—In proceedings before the Exchequer and Supreme Courts, there being no tariff as between attorney and client, an attorney has the right in an action for his costs to establish the *quantum meruit* of his services by oral evidence. *Paradis* v. *Bossé*, 21 S. C. R. 419.

Set-off—*Special Services.*]—In an action by a firm of attorneys for costs due from clients, the defendants were not allowed to set off against the plaintiff's claim a sum paid by one of them to one of the solicitors for special services to be rendered by him, there being no mutuality, and the payment not being for the general services covered by the retainer to the firm. *McDougall* v. *Cameron*, *Bickford* v. *Cameron*, 21 S. C. R. 379.

IV. Lien for Costs.

Fruits of Litigation—*Collusive Settlement—Notice.*]—Where a compromise of the action has been effected between the parties without the intervention of the solicitors, in order to entitle the plaintiff's solicitor to enforce his lien for costs upon the fruits of the litigation, by means of an order upon the defendant, collusion must be shewn, or the act complained of must have been done after notice from the solicitor complaining.

And where the parties made such a compromise, and the plaintiff's solicitor gave notice to the defendant's solicitor after the agreement but before payment of the money agreed upon:—

Held, that this was sufficient notice. *Sandridge* v. *Ireland*, 14 P. R. 29.

Fruits of Litigation—*Collusive Settlement—Notice.*]—It is competent for a client to settle his action behind the back of his solicitor, notwithstanding that the solicitor has given notice to the client and to the opposite party not to settle except with the solicitor's consent.

The equitable interference of the Court cannot be invoked on behalf of a solicitor in an action settled in such a manner, unless there are fruits arising from such settlement upon which the solicitor's lien can attach; for there is no lien on the action.

Upon such a settlement, unless where collusion between the parties to defraud the plaintiff's solicitor of his costs is clearly shewn, a defendant will not be ordered to pay the costs of the plaintiff's solicitors. *Bellamy* v. *Connolly*, 15 P. R. 87.

Fund in Court — *Change of Solicitors — Priorities.*]—In an action for an account against a trustee, the plaintiffs changed their solicitor during the course of the action. Before the change the first solicitor obtained a judgment of reference, and, on the defendant's consent, an order for payment into Court by the defendant of $250, which he paid in, after the change, subject to further order and to a claim for commission. Nothing was done by the second solicitor to procure the payment in. The second solicitor then conducted the reference and brought the action to an end, with the result that the $250 was freed from all claims for commission and left absolutely as money recovered for the plaintiffs:—

Held, per Boyd, C., in Chambers, that the fund in Court had been directly "created" by the exertions of the first solicitor, and that he had a first charge upon it for his costs.

Upon appeal to a Divisional Court:—

Held, per Ferguson and Meredith, JJ., that the general rule is that the solicitor who conducts the action to a successful termination is entitled to be paid first.

But per Ferguson, J., that the $250 should be considered as paid in immediately upon the order being made; and the general rule does not apply to a case like this, where the first solicitor has virtually preserved and recovered a fund by his exertions, and has not abandoned his right to a lien, or been paid.

Per Meredith, J., that the fund was not "created" by the first solicitor; and there was nothing in the circumstances to take this case out of the general rule.

Cormack v. *Beisly*, 3 De G. & J. 157, and *Re Knight*, [1892] 2 Ch. 368, discussed. *Ford* v. *Mason*, 15 P. R. 392.

Fund in Court—*Share of Party—Costs of Other Parties—Priorities—Reference.*—In a suit for construction of a will and administration of testator's estate, where the land of the estate had been sold and the proceeds paid into Court, J. J. B., a beneficiary under the will and entitled to a share in the fund, was ordered personally to pay certain costs to other beneficiaries:—

Held, reversing the decision of the Court of Appeal, 16 P. R. 335, that the solicitor of J. J. B. had a lien on the fund in Court for his costs as between solicitor and client, in priority to the parties who had been allowed costs against J. J. B. personally:—

Held, also, that the referee before whom the administration proceedings were pending had no authority to make an order depriving the solicitor of his lien, not having been so directed by the administration order, and there being no General Order permitting such an interference with the solicitor's *prima facie* right to the fund. *Bell* v. *Wright*, 24 S. C. R. 656.

Insolvent Estate—*Absence of Money Fund.*]—Two actions were brought by a trader, to restrain proceedings under a chattel mortgage against the trader's stock of goods, and interlocutory injunctions were granted, but the actions were not carried further. The chattel mortgagee brought an action to recover the mortgage money and to restrain the mortgagor from selling the goods, whereupon the latter made an assignment for creditors, and, by arrangement in that action, the goods were sold by the assignee, and payment was made in full to the mortgagee for debt, interest, and costs of that action, after notice and without objection on the part of any of the creditors or of the solicitor who conducted the actions brought by the trader.

The solicitor claimed that by his exertions in these actions he had saved the goods from being sacrificed by summary sale, and brought this action to have it declared that he was entitled to a preferential lien for costs upon the estate in the hands of the assignee:—

Held, that, even if it were shewn that stopping the sale under the mortgage was a benefit to the estate, there was no jurisdiction, without the direction of a statute, to charge the property recovered or preserved, and without a money fund there was no subject for a lien.

Costs as of a successful demurrer only were allowed to the defendant. *Tremeear* v. *Lawrence*, 20 O. R. 137.

Judgment — *Division Court—Garnishment.*]—Where solicitors claimed a lien for costs upon a judgment recovered, the amount of which was the subject of a garnishee suit in a Division Court:—

Held, that the Judge in the Division Court had power under sec. 197 of the Division Courts Act, R. S. O. ch. 51, to decide upon the proper sum to be allowed in respect of such lien, and was not bound to refer it elsewhere. *Davidson* v. *Taylor*, 14 P. R. 78.

Judgment — *Set-off — Prejudice.*]—Where judgment was given for payment by the plaintiff to the insolvent defendant of the costs of the action, and the defendant's solicitors were by an order of Court declared to have a lien upon such judgment, and to have the sole right to control the judgment and execution to the extent of their costs between solicitor and client and the plaintiff became entitled against the defendant to costs of garnishing proceedings upon the judgment, begun before the lien was declared:—

Held, reversing the decision of Boyd, C., 14 P. R. 34, that Rule 1205 did not apply to enable a set-off of the costs to be made. *Clarke* v. *Creighton*, 14 P. R. 100.

Judgment—*Set-off—Prejudice—Discretion.*]—By the judgment in the action costs were awarded to the plaintiff against the chief defendant, and to the other defendants against the

plaintiff, without any direction as to setting off costs, and the plaintiff's solicitor asserted a lien upon the costs awarded to his client against the chief defendant. The defendants all defended by the same solicitor:—

Held, that, under Rule 1204, the question of setting off costs was in the judicial discretion of the taxing officer, and that discretion was rightly exercised by the officer in refusing to set off the costs ordered to be paid to the plaintiff by the chief defendant against the costs ordered to be paid by the plaintiff to the other defendants.

Construction of Rules 1204 and 1205.

The older decisions as to set-off are not applicable since Rule 3. *Flett* v. *Way*, 14 P. R. 312.

Judgment—*Settlement—Garnishment.*]—It appeared that the solicitor for the execution creditor had a lien for his costs upon the judgment obtained by his client, and also an assignment of the judgment, whereof the garnishor and garnishee both had notice:—

Held, that the garnishor and garnishee should not have settled the amount garnished between themselves; and that the solicitor should have intervened, and had the attachment order set aside by disclosing the assignment to himself of the debt attached. *Genge* v. *Freeman*, 14 P. R. 330.

Papers and Documents—*Waiver—Replevin.*]—The plaintiff, a solicitor, claiming on the defendant's papers a lien for costs, settled with him, taking a note therefor payable on demand. He then went to the United States, leaving the note and papers with another solicitor as his agent. The defendant, stating that he required the papers, or some of them, for use in his business, brought replevin proceedings in the Division Court, giving a bond to prosecute the suit with effect and without delay, or to return the property replevied and to pay the damages sustained by the issuing of the writ, and there was a breach of the bond in not prosecuting the suit with effect. Under the replevin the defendant only procured some of the papers and which were tendered back to the plaintiff and refused, the defendant stating that they were of no value, the agent having retained the valuable ones. In an action on the bond by the plaintiff to recover the amount of the note as damages he had sustained by the replevin:—

Held, per Boyd, C., that even if any lien existed, which was questionable, by reason of the taking of the note and departure from the country, it was not displaced by the replevin suit; but, in any event, the plaintiff had failed to prove any actual damage; and though there might be judgment for nominal damages and costs, there would be a set-off of the defendant's costs of trial; and the action was dismissed without costs.

Under the Division Courts Act, R. S. O. ch. 51, sec. 266, the whole matter could have been litigated in the Division Court.

Quære as to the amount of damages recoverable.

The fact of the conditions of the bond being in the alternative instead of the conjunctive remarked on.

On appeal to a Divisional Court the judgment was affirmed. *Kennin* v. *Macdonald*, 22 O. R. 484.

V. Practising Without Certificate.

Member of Firm—*Holding-out—Estoppel.*]—M., a solicitor who had not taken out the certificate entitling him to practise in the Ontario Courts, allowed his name to appear in newspaper advertisements and on professional cards and letter heads as a member of a firm in active practice; he was not, in fact, a member of the firm, receiving none of its profits and paying none of its expenses, and the firm name did not appear as solicitors of record in any of the proceedings in their professional business. The Law Society took proceedings against M. to recover the penalties imposed on solicitors practising without certificate, in which it was shewn that the name of the firm was indorsed on certain papers filed of record in suits carried on by the firm:—

Held, reversing the judgment of the Court of Appeal, 15 A. R. 100, and of the Queen's Bench Division, 13 O. R. 104, that M. did not "practise as a solicitor" within the meaning of the Act imposing the penalties, R. S. O. 1877 ch. 140, and that he was not estopped, by permitting his name to appear as a member of a firm of practising solicitors, from shewing that he was not such a member in fact. *Macdougall* v. *Law Society of Upper Canada*, 18 S. C. R. 203.

VI. Privilege.

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

VII. Proceedings Against.

1. *Actions.*

Negligence—*Assignment of Claim for.*]—A claim by a client for negligence against a firm of solicitors in directing the distribution of moneys in the sheriff's hands was assigned by him to another, and by the latter to the plaintiff:—

Held, per Armour, C.J., at the trial, that the claim did not by virtue of R. S. O. ch. 122, sec. 7 (O.), pass to the plaintiff so as to enable him to maintain an action therefor in his own name; but in any event no negligence was proved.

On appeal to a Divisional Court the judgment was affirmed on the ground of the absence of any proof of negligence; but

Per MacMahon, J., that if negligence had been proved, the plaintiff could properly have maintained the action in his own name. *Laidlaw* v. *O'Connor*, 23 O. R. 696.

Negligence—*Registration of Judgment.*]—A solicitor is liable in damages to his client for neglecting to obey instructions to register a judgment and thereby precluding the client

from recovering the amount of his judgment debt. *Hett* v. *Pun Pong*, 18 S. C. R. 290.

Wrongfully Commencing Civil Action—*Malice—Special Damage.*]—Action for damages against solicitors for, as alleged in the statement of claim, "wrongfully and unlawfully without any instructions or retainer," issuing a writ of summons against the plaintiff in the name of a third party, by reason of which the plaintiff was injured in his occupation as a builder, suffered in his credit and reputation, and was hindered in the performance of his contracts, and had to borrow money at a higher interest than he would otherwise have had to do, and other creditors were induced to sue him, whose accounts he had to compromise and settle at great loss:—

Held, on demurrer, that neither malice and want of reasonable and probable cause, nor special damage, both of which are necessary in such an action, were sufficiently alleged.

Semble, that an allegation that by reason of the proceedings complained of the plaintiff was put into insolvency or bankruptcy, if such a thing were possible in this country, might be a sufficient allegation of special damage. *Mitchell* v. *McMurrich*, 22 O. R. 712.

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2. *Striking Name off Roll.*

Costs.]—Ordered that a solicitor should be struck off the roll unless by a named day he should pay an amount found by the report of a taxing officer to be in his hands, the moneys of a client, together with the costs of the taxation and of the motion to strike him off the roll. *Re James Knowles, a Solicitor*, 16 P. R. 408.

Procedure—*Costs.*]—Where a client applies to strike the name of a solicitor off the roll for misconduct in neglecting to pay over the client's money in his hands as solicitor, the first application should be made to a Judge in Court, whereupon, in a proper case, an order will be made requiring the solicitor to pay over the money by a named day, and in default that his name be struck off. Upon default, no further application is necessary, except an application to have the roll brought into Court for the purpose of having the name struck off, and this should be on notice to the solicitor.

Ruling of a taxing officer that costs of the first application should be taxed as of a Chambers motion only, reversed on appeal. *Re Bridgman, a Solicitor*, 16 P. R. 232.

Procedure—*Partnership—Misconduct—Disputed Account.*]—Upon a summary application by a client for an order for payment over by three solicitors of moneys of hers alleged to be in their hands as a firm, and in default for an order striking them off the roll:—

Held, that no professional misconduct being suggested against two of them, one of whom had left the firm before, and the other of whom was ignorant of, the receipt of a large sum of money by the third, the summary order asked for could not be made against the two, although they might be liable in an action. *Re Toms and Moore*, 3 Ch. Chamb. R. 41, and *Re McCaughey and Walsh*, 3 O. R. 425, followed:—

And, it appearing that the third solicitor had a sum of money in his hands against which he alleged that he had a claim for costs, an order was made for delivery and taxation of bills of costs and for an accounting, and for payment by him of the balance, if any, found due:—

But, as he denied that any balance was due:—

Held, that it would be unfair to add to the order a provision that in default of payment his name should be struck off the roll. *Re Bridgman*, 16 P. R. 232, distinguished. *Re Ross, Cameron, and Mallon, Solicitors*, 16 P. R. 482.

VIII. Retainer and Appointment.

Absence of.]—*See Scribner* v. *Parrells*, 20 O. R. 554, *ante* 899; *Dawson* v. *Dumont*, 20 S. C. R. 709, *ante* 900.

Termination of—*Judgment.*]—Per Strong, J.—A retainer to prosecute an action does not terminate when the judgment is obtained, but makes it the duty of the attorney or solicitor, without further instruction, to proceed after judgment and endeavour to obtain the fruits of the recovery, including the making it by registration a charge on the lands of the judgment debtor. *Hett* v. *Pun Pong*, 18 S. C. R. 290.

Winding-up—*Appointment by Court.*]—In a proceeding for the winding-up of a company, a solicitor who is acting for claimants whose claims must be contested by the liquidators, cannot obtain the sanction of the Court to his acting also as solicitor for the liquidators. Nor will the Court sanction the appointment of a special solicitor to act for the liquidators in the matter of the contested claim. The winding-up must be prosecuted by one disinterested solicitor, whose services will not be divided by the assertion of antagonistic claims. *Re Charles Stark Co.*, 15 P. R. 471.

See, also, *Re Drury Nickel Co.*, 16 P. R. 525, *ante* 158.

IX. Miscellaneous Cases.

Absconding Debtor—*Property in Hands of Solicitor—Delivery to Sheriff.*]—*See Buntin* v. *Williams*, 16 P. R. 43, *ante* 1.

Arbitrator—*Solicitor Acting as—Interest.*]—*See Township of Burford* v. *Chambers*, 25 O. R. 663, *ante* 33.

Employer's Liability Policy—*Condition as to Employment of Solicitor.*]—*See Wythe* v. *Manufacturers' Accident Ins. Co.*, 26 O. R. 153, *ante* 512.

SPECIAL DEPOSIT.

See Banks, II.

SPECIAL EXAMINER.

See Evidence, IV.

SPECIAL INDORSEMENT.

See JUDGMENT, IV., VIII.

SPECIAL VERDICT.

See TRIAL, I.

SPECIFIC PERFORMANCE.

See SALE OF LAND—VENDORS AND PURCHASERS' ACT.

I. GENERALLY.

Discretion—*Conduct.*]—The exercise of the jurisdiction to order specific performance of a contract is a matter of judicial discretion, to be governed, as far as possible, by fixed rules and principles, but more elastic than in the administration of other judicial remedies. In the exercise of the remedy much regard is shewn to the conduct of the person seeking relief. *Harris* v. *Robinson*, 21 S. C. R. 390.

Origin of Action—*Discretion*—*Conduct.*]—The origin both of the action for specific performance and of the action for relief against re-entry for non-payment of rent is in the equitable jurisdiction of the Court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the Court; and in each the Court has regard to the conduct of the party seeking to compel such performance or to obtain such relief. *Corentry* v. *McLean*, 22 O. R. 1.

II. AGREEMENTS TO BEQUEATH PROPERTY.

Grandchild—*Remuneration for Services.*]—S., a girl of fourteen, lived with her grandfather, who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was twenty-five, when she married. The grandfather died shortly after, leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for his daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses:—

Held, affirming the decision of the Court of Appeal, 21 A. R. 542, that the alleged agreement to provide for S. by will was not one of which the Court could decree specific performance; but:—

Held, further, that S. was entitled to remuneration for her services, and $1,000 was not too much to allow her. *McGugan* v. *Smith*, 21 S. C. R. 263.

See Murdoch v. *West*, 24 S. C. R. 305, *ante* 203

III. CONTRACTS FOR SALE OF LAND.

1. *Abatement of Purchase Money.*

See Crain v. *Rapple*, 22 O. R. 519, 20 A. R. 291, *post* 918.

2. *Exchange of Lands.*

Powers of Executor.]—An executor or administrator cannot, having regard to R. S. O. ch. 108, sec. 9, and 54 Vict. ch. 18, sec. 2 (O.), make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own.

The Court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted. *Tenute* v. *Walsh*, 24 O. R. 309.

See Cudney v. *Gires*, 20 O. R. 500, *post* 919; *Robinson* v. *Harris*, 21 O. R. 43, 19 A. R. 134, 21 S. C. R. 390, *post* 921; *St. Denis* v. *Higgins*, 24 O. R. 230, *post* 920; *Moorhouse* v. *Hewish*, 22 A. R. 172, *post* 921.

3. *Interest.*

Purchase Money—*Conveyance*—*Delay*—*Possession.*]—Under a contract of purchase of real estate providing that "if from any cause whatever" the purchase money was not paid at a specified time, interest should be paid from the date of the contract, the vendor is relieved from payment of such interest while the delay in payment is caused by the wilful default of the vendor in performing the obligations imposed upon him.

A contract containing such provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor. A conveyance was tendered which the vendee would not accept, whereupon the vendor brought suit for rescission of the contract, which the Court refused on the ground that the conveyance tendered was defective. He then refused to accept the purchase money unless interest from the date of the contract was paid. In an action by the vendee for specific performance :—

Held, affirming the decision of the Court of Appeal, 19 A. R. 291, and of the Chancery Division, 21 O. R. 562, that the vendee was not obliged to pay interest from the time the suit for rescission was begun, as until it was decided the vendor was asserting the failure of the contract, and insisting that he had ceased to be bound by it, and after the decision in that suit he was claiming interest to which he was not entitled, and in both cases the vendee was relieved from obligation to tender the purchase money.

By the terms of the contract the vendor was to remain in possession until the purchase money was paid and receive the rents and profits :—

Held, that up to the time the vendor became in default, the vendee, by his agreement, was precluded from claiming rents and profits, and was not entitled to them after that time, as he had been relieved from payment of interest, and the purchase money had not been paid. *Hayes* v. *Elmsley*, 23 S. C. R. 623.

Purchase Money—*Conveyance — Default—Delay.*]—A person in possession of land under a contract for purchase by which he agreed to pay the purchase money as soon as the conveyances were ready for delivery, and interest thereon from the date of the contract, is not relieved from liability for such interest unless the vendor is in wilful default in carrying out his part of the agreement, and the purchase money is deposited by the vendee in a bank or other place of deposit in an account separate from his general current account.

The vendor is not in wilful default where delay is caused by the necessity to perfect the title owing to some of the vendors being infants, nor by tendering a conveyance to which the vendee took exception but which was altered to his satisfaction while still in the hands of the vendors' agent as an escrow and before it was delivered ; Fournier and Taschereau, JJ., dissenting.

A provision that the purchase money is to be paid as soon as the conveyance is ready for delivery does not alter the rule that the conveyance should be prepared by the purchaser; Fournier and Taschereau, JJ., dissenting.

Judgment of the Court of Appeal, 19 A. R. 591, and of the Chancery Division, 21 O. R. 642, reversed. *Stevenson* v. *Davis*, 23 S. C. R. 629.

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4. *Partnership Land.*

Abatement.]—Where a contract is made by one partner for the sale of partnership lands, to which the other partner refuses to consent, the purchaser cannot insist upon taking the share in the lands of the contracting partner with a proportionate abatement in the price.

Judgment of the Common Pleas Division, 22 O. R. 519, reversed. *Crain* v. *Rapple*, 20 A. R. 291.

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5. *Practice.*

Costs.]—In an action for specific performance by a vendor, whose title was, to the knowledge of the purchaser, a possessory one of long standing, in conformity with a family arrangement, ample proof thereof having been offered before action, the vendor was held entitled to his costs of action and of proving his title in the Master's office. *Games* v. *Bonnor*, 33 W. R. 64, followed. *Brady* v. *Wells*, 17 Gr. 699, and *Re Bousfead and Warwick*, 12 O. R. 488, specially referred to. *Dame* v. *Slater*, 21 O. R. 375.

Costs.]—Costs withheld from the defendant because he had misled the plaintiff as to his power to make the exchange, and declined to perform his contract on grounds some of which were untenable, and also alleged fraud which he failed to prove. *Tenute* v. *Walsh*, 24 O. R. 309.

Costs.]—Although the plaintiff, the vendee, had not, by his conduct and delay, waived his right to object to the title, yet, as he had not raised the objection in the proper manner, he should have no costs of his action for specific performance or rescission. *Nason* v. *Armstrong*, 22 O. R. 542.

Third Parties — *Title.*]—In an action for specific performance by a vendor against a purchaser, the question raised by the defence, whether a third person has a title to the whole or part of the land, is not one which under Con. Rule 328 should be determined between the parties to the action, or either of them, and the third person ; and an order cannot properly be made under that Rule and Con. Rule 330 adding such third person as a defendant.

Neither do Con. Rules 329, 331, or 332, apply in such a case.

The Consolidated Rules as to third parties discussed.

Decision of the Queen's Bench Division reversed. *Begg* v. *Ellison*, 14 P. R. 384.

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6. *Statute of Frauds.*

Incomplete Written Agreement.] — L. signed a document by which he agreed to sell certain property to W. for $42,500, and W. signed an agreement to purchase the same. The document signed by W. stated that the property was to be purchased "subject to the incumbrances thereon." With this exception, the papers were, in substance, the same, and each contained at the end this clause "terms and deeds, etc., to be arranged by the 1st of May next." On the day that these papers were signed, L., on request of W.'s solicitor to have the terms of sale put in writing, added to the one signed by him the following : "Terms, $500 cash this

day, $500 on delivery of the deed of the Parker property, $800 with interest every three months until the $6,500 are paid, when the deed of the entire property will be executed." The property mentioned in these documents was, with other property of L., mortgaged for $36,000. W. paid two sums of $500, and demanded a deed of the Parker property, which was refused.

In an action against L. for specific performance of the above agreement, the defendant set up a verbal agreement that before a deed was given, the other property of L. was to be released from the mortgage, and also pleaded the Statute of Frauds:—

Held, affirming the judgment of the Court below, Patterson, J., doubting, that there was no completed agreement in writing to satisfy the Statute of Frauds.

Per Ritchie, C.J.—The agreement only provides for payment of $6,500, leaving the greater part of the purchase money unprovided for. If W. was to assume the mortgage, it was necessary to provide for the release of L.'s other property and for matters in relation to the leasehold property.

Per Strong, J.—The agreement was for sale of an equity of redemption only, and, as questions would arise in future as to release of L.'s other property from the mortgage and his indemnity from personal liability to the mortgagee, which should have formed part of the preliminary agreement, specific performance could not be decreed. *Williston* v. *Lawson*, 19 S. C. R. 673.

Parol Agreement.]—*See Barton* v. *McMillan*, 20 S. C. R. 201, *ante* 201.

Parol Agreement—*Possession.*]—*See Crain* v. *Rapple*, 22 O. R. 519. Reversed, 20 A. R. 291, *ante* 918.

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7. *Time.*

Date of Performance on Sunday.]—In an action for specific performance, even when time is of the essence of the agreement, if the party in default has done what in him lay to perform the contract, the Court may, in the exercise of its discretion, grant the relief claimed.

And where, by such agreement, the conveyance was to be tendered by the plaintiff to the defendant and the transaction closed on the "first day of June," which fell on Sunday, when no tender was made, and the conduct of the defendant on the following day was such as to exclude a tender on that day, in an action for specific performance the plaintiff was held entitled to judgment. *Cudney* v. *Gires*, 20 O. R. 500.

Delay in Carrying Out Contract.]—*See Hayes* v. *Elmsley*, 21 O. R. 562, 19 A. R. 291, 23 S. C. R. 623, *ante* 917; *Stevenson* v. *Davis*, 21 O. R. 642, 19 A. R. 591, 23 S. C. R. 629, *ante* 917.

Extension—*Waiver of Condition.*]—Held, by the Queen's Bench Division, that although, where the property in a contract for the sale or exchange of lands is of a speculative character, the presumption is that time is of the essence of the agreement, such presumption may, as when a time is expressly fixed, be rebutted by the parties treating the contract as still subsisting after the time fixed for its completion.

The Court of Appeal was divided in opinion.

Held, by the Supreme Court of Canada, affirming in this respect the judgments below, that time was originally of the essence of the contract, but there was a waiver by the defendant of a compliance with the provision as to time by entering into negotiations as to the title after its expiration. *Robinson* v. *Harris*, 21 O. R. 43, 19 A. R. 134, 21 S. C. R. 390.

Laches—*Possession.*]—In a suit for specific performance of an agreement by the devisee of land to convey to P., it appeared that the agreement of sale to P. was executed in 1884, and the suit was not instituted until four years later. P. was in possession of the land during the interval:—

Held, that as the evidence clearly shewed that P. was only in possession as agent of the trustees under the will and caretaker of the land, and as by the terms of the agreement time was to be of the essence of the contract, the delay was a sufficient answer to the suit. *Porter* v. *Hale*, 23 S. C. R. 265.

Objecting to Title.]—*See Nason* v. *Armstrong*, 22 O. R. 542, 21 A. R. 183, 25 S. C. R. 263, *ante* 878.

Repudiating Contract.]—*See Paisley* v. *Wills*, 18 A. R. 210, *post* 921; *St. Denis* v. *Higgins*, 24 O. R. 230, *post* 920; *Robinson* v. *Harris*, 21 O. R. 43, 19 A. R. 134, 21 S. C. R. 390, *post* 921.

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8. *Want of Title.*

Conditions of Sale—*Objection*—*Time.*]—*See Nason* v. *Armstrong*, 20 O. R. 542, 21 A. R. 183, 25 S. C. R. 263, *ante* 878.

Repudiation — *Knowledge*—*Time.*]—Where the plaintiff, at the time he entered into a contract with the defendant for the exchange of lands, had no title to the lands he proposed to exchange, which were, to the knowledge of the defendant at the time of the contract, vested in the plaintiff's wife:—

Held, in an action for specific performance, that the defendant could not withdraw on the ground that the plaintiff had no title, at any rate before the time fixed for the completion of the exchange; and the plaintiff, having tendered a conveyance from his wife before action, was entitled to succeed; for the defendant, having entered into the contract knowing that it did not bind the estate, but only the person, of the plaintiff, must be taken to have relied from the beginning upon the promise of the plaintiff to procure the concurrence of the owner, and could not set up that the plaintiff was not the owner. Dictum of Kekewich, J., in *Wylson* v. *Dunn*, 34 Ch. D. 569, not followed. *St. Denis* v. *Higgins*, 24 O. R. 230.

Repudiation — *Time* — *Reference.*]—A purchaser of land may, on discovering that the vendor has no title, repudiate on that ground; but attempted repudiation on another ground

does not keep this right alive, if the vendor at the proper time can make a good title.

Where a purchaser, who, in an action by the vendor to compel specific performance, set up in his defence that the contract was void because of fraudulent misrepresentations as to value, attempted at the trial to repudiate also on the ground of want of title in the vendor, he having known of this want of title for some time, and having because of it obtained an order for security for costs, it was held that there could not then be repudiation on that ground, and that it would be sufficient for the vendor to shew title on the reference.

Judgment of the Common Pleas Division, 19 O. R. 303, affirmed. *Paisley* v. *Wills*, 18 A. R. 210.

Rescission—*Notice — Time — Conduct.*]—H. and R. agreed to exchange land, and the agreement, which was in the form of a letter written by H. proposing the exchange, the terms of which R. accepted, provided that the matter was to be closed in ten days, if possible. R. at the time had no title to the property he was to transfer, but was negotiating for it. Nearly four months after the date of the agreement the matter was still unsettled, and a letter was written by H. to R.'s solicitor notifying him that unless something was done by the next morning the agreement would be null and void. Prior to this there had been several interviews between the parties and their solicitors, in which it was pointed out to R. that there were difficulties in the way of his getting a title to the land he proposed to transfer; that there was no registry of the contract which formed the title of the man who was to convey to him; and that the lands were subject to an annuity. R., however, took no active steps to get the difficulties removed until after the above letter was written, when he brought an action against the proposed vendor and obtained a decree declaring his title good. He then brought suit against H. for specific performance of the contract for exchange:—

Held, reversing the judgment of the Court of Appeal, 19 A. R. 134, and of the Queen's Bench Division, 21 O. R. 43, Taschereau, J., dissenting, that the action could not be maintained; that R. not having title when the agreement was made, H. could rescind the contract without giving reasonable notice of his intention, as he would be bound to do if the title were merely imperfect; that the letter to the solicitor was sufficient to put an end to the bargain; and that, even if there had been no rescission, the conduct of R. in relation to the completion of the contract was such as to disentitle him to relief by way of specific performance. *Harris* v. *Robinson*, 21 S. C. R. 390.

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9. *Other Cases.*

Description—"*More or Less.*"]—Where a city building lot was described in an agreement for exchange as having a depth of "130 feet more or less," and had in fact a depth of only 117 feet with a lane in the rear 12 feet wide, specific performance at the suit of the owner was, under the particular circumstances, refused. *Moorhouse* v. *Hewish*, 22 A. R. 172.

Expropriation by Crown—*Agreement for Compensation.*]—The defendants entered into a written agreement to sell and convey to the Crown, by a good and sufficient deed, a certain quantity of land, required for the purposes of the Cape Breton Railway, for the sum of $1,250. At the date of such agreement the centre line of the railway had been staked off through the defendants' property, and they were fully aware of the location of the right of way and the quantity of land to be taken from them for such purposes. Thereafter, and within one year from the date of such agreement, the land in dispute was set out and ascertained, and a plan and description thereof duly deposited of record, in pursuance of the provisions of R. S. C. ch. 39. Upon the defendants refusing to carry out their agreement on the ground that the damages were greater than they anticipated, and the matter being brought into Court on the information of the Attorney-General, the Court assessed the damages at the sum so agreed upon.

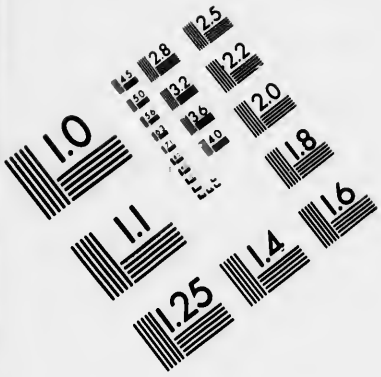
Quære: Is the Crown in such a case entitled to specific performance? *The Queen* v. *McKenzie*, 2 Ex. C. R. 198.

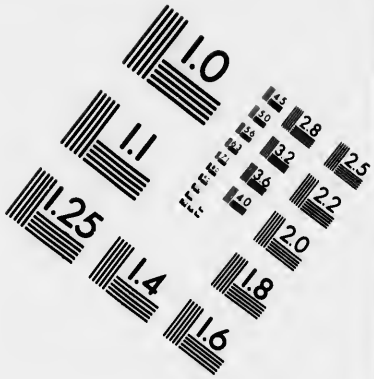
Restriction Against Selling—*Special Act—Compliance With.*]—Land was devised to N. with a provision that he should not sell or mortgage it during his life, but might devise it to his children. N. having agreed to sell the land to V., it was held upon a petition under the Vendors and Purchasers' Act that the will gave N. the land in fee with a valid restriction against selling or mortgaging: *Re Northcote*, 18 O. R. 107. N. then applied for a special Act, which was passed, giving him power, notwithstanding the restriction in the will, to sell the land, and directing that the purchase money should be paid to a trust company. Prior to the passing of this Act, N., in order to obtain a loan on the land, had made a lease of it to a third party, which lease was mortgaged, and N. afterwards assigned his reversion. In an action by V. for specific performance of the contract, N. set up that the contract was at an end when judgment was given upon the petition, and submitted that if performance were decreed, the amount due on the mortgage should be paid to him, and only the balance to the trust company:—

Held, affirming the decision of the Court of Appeal for Ontario, that it was not open to N. to attack the decision on the petition; but, even if it were, and that decision should be overruled, V. would be all the more entitled to specific performance; that the evidence shewed the lease granted by N. to have been merely colourable and an attempt to raise money on the land by indirect means; and that there should be a decree for specific performance with a direction that the whole of the purchase money should be paid to the trust company. *Northcote* v. *Vigeon*, 22 S. C. R. 740.

Sheriff's Sale—*Equitable Interest.*]—The equitable interest of an assignee from the purchaser of a contract for the sale of lands, is exigible under a writ of *fieri facias* against the lands of such assignee, and the purchaser at a sheriff's sale of such interest is entitled to specific performance of the contract.

Re Prittie and Cranford, 9 C. L. T. Occ. N. 45, declared to have been madvertently decided or reported. *Ward* v. *Archer*, 24 O. R. 659.





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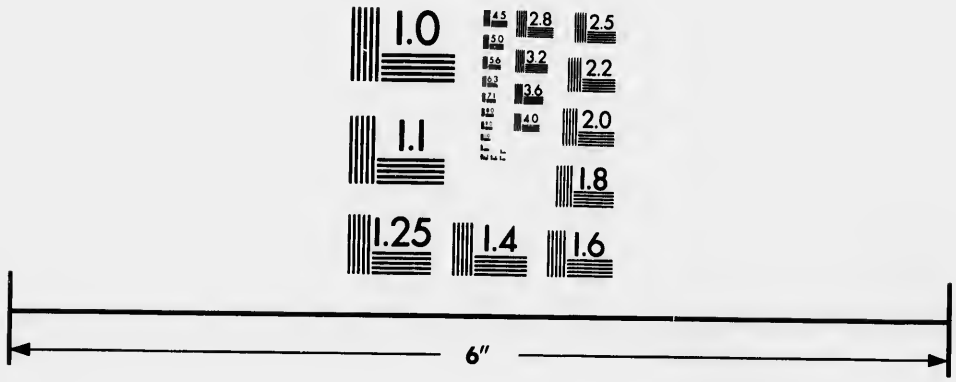

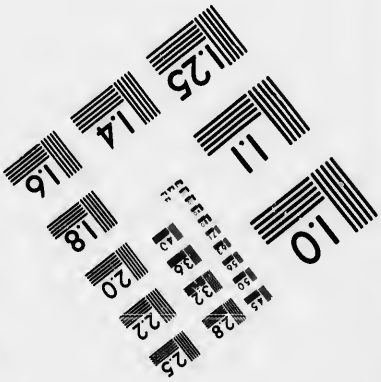

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SPEEDY TRIALS ACT.

See CRIMINAL LAW, III.

SPLITTING CAUSE OF ACTION.

See DIVISION COURT, IV.

STATEMENT OF CLAIM.

See PLEADING, VII.

STATEMENT OF DEFENCE.

See PLEADING, VIII.

STATUTE OF FRAUDS.

See CONTRACT, VI.—SPECIFIC PERFORMANCE, III.

STATUTES.

I. CONSTRUCTION OF, GENERALLY.

Code—*Reference to Earlier Law.*]—An appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory code, can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein. *Robinson* v. *Canadian Pacific R. W. Co.*, [1892] A. C. 481.

Ejectment—*Seigneurie—Recognition by Statute—Effect of—Prescription.*]—In an action of ejectment by the Crown, it appeared that the appellant company derived title through a grant made in 1661 by the French Government, which gave no seigneurie over the land in dispute, but only a right to make establishments for hunting and fishing within certain limits; that an Ordonnance in 1733, together with the action of the French Crown thereunder, did not create or recognize any title in the heirs of the grantee to such seigneurie; that down to 185[illegible] there was no evidence of either its creation or recognition by the British Crown; but that in 1854 the Canadian Act 18 Vict. ch. 3 (amended by subsequent Acts) recognized that there was a seigneurie of Mingan, being part of the disputed land, the boundaries whereof were conclusively established by a schedule authorized by this Act:—

Held, that the Court below was right in dismissing the suit as regards the scheduled lands. If a mistake had been made, the legislature alone could correct it; a court of law must give effect to the enactment as it stands. The law of prescription did not apply. *Labrador Co.* v. *The Queen*, [1893] A. C. 104.

Imperial Acts – *Decisions on.*]—Held, (1.) In so far as the Government Railways Act, 1881, re-enacts the provisions of the Lands Clauses Consolidation Act, 8 & 9 Vict. (Imp.) ch. 18, and the Railway Clauses Consolidation Act, 8 & 9 Vict. (Imp.) ch. 20, where the latter statutes have been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts in Canada. *Trimble* v. *Hill*, 5 App. Cas. 342, and *City Bank* v. *Barrow*, 5 App. Cas. 664, referred to. *Paradis* v. *The Queen*, 1 Ex. C. R. 191.

Imperial Acts—*Decisions on.*]—The phrase "injury done" in 31 Vict. (D.) ch. 12, sec. 40, is commensurate with and has the same intendment as the phrase "injuriously affected" in 8 & 9 Vict. ch. 18, sec. 68, the Imperial Lands Clauses Consolidation Act, and, in so far as the similarity extends, cases decided under the Imperial Act may be cited with authority in construing the Canadian statute. *McPherson* v. *The Queen*, 1 Ex. C. R. 53.

Intention—*Title.*]—In construing an Act of Parliament the title may be referred to in order to ascertain the intention of the legislature.

The Act of the Nova Scotia Legislature 50 Vict. ch. 23, vesting the title to highways and the lands over which the same pass in the Crown for a public highway, does not apply to the city of Halifax. *O'Connor* v. *Nova Scotia Telephone Co.*, 22 S. C. R. 276.

Municipal By-law—*Validating Act — Preamble.*]—In January, 1891, the defendants passed a by-law to raise $75,000 for street railway purposes, with a recital that it was necessary to raise that sum for the purpose of building a street railway connecting the municipality of Neebing with the municipality of Port Arthur. The by-law had been submitted to the electors, and had been carried by their votes, but no by-law had been passed under sec. 504 of the Municipal Act actually authorizing the construction of the railway, nor had the approval of the Lieutenant-Governor in Council been obtained; and the provisions of sec. 505 of the Municipal Act had not been observed. This action was brought to restrain the municipality from constructing the street railway under this by-law, and on the 4th May, 1891, while the action was pending, an Act, 54 Vict. ch. 78 (O.), was passed, the preamble of which recited, *inter alia*, that the corporation was desirous of constructing and operating an electric street railway at a cost estimated not to exceed $75,000. That they had, on the 5th January, 1891, passed a by-law authorizing the construction and operation of such a railway,

and had petitioned that it might be confirmed and legalized. The Act then declared that the by-law referred to in the preamble, and of which a copy was set forth in the schedule to the Act, and being the by-law in question, was legal and valid to all intents and purposes; and that, for all purposes affecting it, any and all amendments of the Municipal Act having force and effect on the 1st August, 1891, should be deemed and taken as having been complied with, and as having been made and being in full force and effect prior to the passing of the by-law. After the passing of the Act an injunction was granted by Street, J., restraining the defendants from acting under the by-law, on the ground that the Act in question did not go far enough. The action was afterwards brought down to trial, and MacMahon, J., following the judgment of Street, J., made the injunction perpetual:—

Held, by the Court of Appeal, reversing these judgments, that the validating Act had the effect of establishing the by-law as one not merely for raising money, but also as one for the construction of the road, and that it had made it valid for all purposes:—

Held, also, that the plaintiffs were entitled to the costs of the action down to the time of the passing of the Act, and, in addition, to the costs of a motion in Chambers for the disposal of the action, and that the defendants were entitled to the subsequent costs and to the costs of the appeal.

Observations on the course taken by the legislature in passing Acts to validate proceedings which are under attack in a pending action, leaving the costs of the action to be disposed of by the Court as if the Act had not passed.

Held, by the Supreme Court of Canada, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the Act did not dispense with the requirements of secs. 504 and 505 of the Municipal Act requiring a by-law providing for the construction of the railway to be passed, but only confirmed the one that was passed as a money by-law:—

Held, also, that an erroneous recital in the preamble to the Act that the town council had passed a construction by-law had no effect on the question to be decided. *Dwyer* v. *Town of Port Arthur*, 19 A. R. 555, 22 S. C. R. 241.

New Rights—*Specific Remedies.*]—Where new rights are given by a statute with specific remedies for their enforcement, the remedy is confined to those specifically given.

And where a wife obtained a magistrate's order under 51 Vict. ch. 23, sec. 2 (O.), for payment by her husband of a weekly sum for her support:—

Held, that her remedies were limited to those given by the statute, and that an action in the Division Court for arrears of payments under the order could not be maintained against the husband. *Re Sims* v. *Kelly*, 20 O. R. 291.

Seduction—*Enabling Act.*]—R. S. O. 1887 ch. 58, "An Act respecting the Action of Seduction," is only an enabling Act, enlarging the right to maintain the action, under circumstances which would not be sufficient at common law. *Gould* v. *Erskine*, 20 O. R. 317.

Tolls—*Timber—Regulations.*]—*See Merchants Bank of Canada* v. *The Queen*, 1 Ex. C. R. 1, *post*, TOLLS.

II. IMPERATIVE OR DIRECTORY.

Assessment Act—*Delivery of Roll to Collector.*]—By sec. 119 of the Ontario Assessment Act, 55 Vict. ch. 48, provision is made for the preparation every year by the clerk of the municipality of a "collector's roll," containing a statement of all assessments to be made for municipal purposes in the year, and sec. 120 provides for a similar roll with respect to taxes payable to the treasurer of the Province. At the end of sec. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first day of October;"—

Held, affirming the decision of the Court of Appeal, 21 A. R. 379, that the provision as to delivery of the roll to the collector was imperative, and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes:—

Held, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as to that for provincial taxes. *Town of Trenton* v. *Dyer*, 24 S. C. R. 474.

Assessment Act—*Entries on Roll—Copies—Certificates.*]—The provisions of sec. 121 of the Consolidated Assessment Act as to entering on the roll, by the clerk of the municipality, opposite to each lot or parcel all the rates or charges with which the same is chargeable, in separate columns for each rate, is imperative, and non-compliance therewith renders such roll a nullity. And where the amount of such rates or taxes for one year was entered on the roll in one sum, and the roll was so transmitted to the treasurer of the county, a tax sale founded thereon was held invalid.

The provision of sec. 141 of the said Act, which requires a true copy of the lists returned by the assessors to the clerk to be furnished to the county treasurer, certified to by the clerk under the seal of the corporation, and that of sec. 142, which requires an assessor's certificate to each list, are also imperative.

The principle of the decision in *Town of Trenton* v. *Dyer*, 21 A. R. 379, followed. *Love* v. *Webster*, 26 O. R. 453.

Assessment Act—*Time—"May."*]—*See Re Dwyer and Town of Port Arthur*, 21 O. R. 175, *ante* 49.

Ditches and Watercourses Act—*Award—Appeal.*]—The provisions of sub-sec. 6 of sec. 22 of 57 Vict. ch. 55 (O.), the Ditches and Watercourses Act, 1894, which require the Judge of the County Court to hear and determine an appeal from an award thereunder within two months after receiving notice thereof, are merely directory. *Re McFarlane* v. *Miller*, 26 O. R. 516.

Joint Stock Companies' Act—*Calls.*]—An otherwise valid transfer of shares allotted to the transferor upon which he has not paid anything, no calls having been made at the time of transfer, is not invalid because the ten per centum upon allotted stock, directed by sec. 45 of the Joint Stock Companies' Act, R. S. O. ch. 157, to be "called in and made payable within one year from the incorporation of the company," has not been paid.

The last mentioned section is directory merely. *Ontario Investment Association* v. *Sippi*, 20 O. R. 440.

Municipal Act — *By-law — Passing.*] — In sec. 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations *may* pass by-laws in relation to matters therein enumerated, the word "may" is permissive only, and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law; Ritchie, C.J., and Strong, J., dissenting. *Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581.

Municipal Act — *By-law — Registration.*]— The provisions of sec. 351 of the Municipal Act, R. S. O. ch. 184, are imperative, and not merely directory; and if a local improvement by-law is not registered within two weeks after its final passing, a ratepayer may shew that it is invalid, and successfully resist payment of the local improvement tax. *Sweeny* v. *Corporation of Smith's Falls*, 22 A. R. 429.

Railway Subsidy — *Crown — Discretion.*]— Where money is granted by the legislature, and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right.

The appellant railway company alleged by petition of right that, by virtue of 51 & 52 Vict. ch. 91, the Lieutenant-Governor in Council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway; that by an order-in-council dated 6th August, 1888, the land subsidy was converted into a money subsidy, the 9th section of said ch. 91, 51 & 52 Vict., enacting that "it shall be lawful," etc., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and order-in-council, and built the railway in accordance with the Act 51 & 52 Vict. ch. 91, and the provisions of the Railway Act of Canada, 51 Vict. ch. 29, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded, *inter alia*, that the money had been paid by order-in-council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties, and signed a receipt for the balance of $6,500 due on account of the first subsidy. The petition of right was dismissed:—

Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right; Taschereau and Sedgewick, JJ., dissenting; but assuming it did, the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the sub-contractors' claims out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy. *Hereford R. W. Co.* v. *The Queen*, 24 S. C. R. 1.

III. Interpretation Act.

R. S. C. ch. 1, sec. 7 — *Exception—Crown—Dominion Elections Act.*]—The information alleged an agreement with Her Majesty whereby in consideration of the conveyance by the Intercolonial Railway of certain passengers between certain stations, the defendants agreed to pay Her Majesty, through the proper officers of that railway, the fares or passage money of such passengers at the rate therein mentioned as agreed to between the defendants and such officers. The defendants, admitting the agreement as alleged, sought to avoid it by setting up as a defence that such passengers were carried on *bons* in blank signed by one of the defendants only:—

Held, on demurrer to the plea, to be no answer to the breach of contract alleged.

(2.) The Crown is not bound by secs. 100 and 122 of the Dominion Elections Act, 1874.

(3.) The 46th clause of the 7th section of the Interpretation Act, R. S. C. ch. 1, whereby it is provided that no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not limited or qualified by any exception such as that mentioned in *The Magdalen College Case*, 11 Rep. 70*b*, "that the King is impliedly bound by statutes passed for the general good [illegible] or to prevent fraud, injury, or wrong." *The Queen* v. *Pouliot*, 2 Ex. C. R. 49.

R. S. O. ch. 1, sec. 8, sub-sec. 13—"*Person*"—*Partnership.*]—*See Bickerton* v. *Dakin*, 20 O. R. 192, 695, *ante* 609.

R. S. O. ch. 1, sec. 8, sub-sec 43—*Repeal.*]—*See Township of Morris* v. *County of Huron*, 26 O. R. 689, 27 O. R. 341, *post* 931.

IV. Prospective or Retrospective.

Conditional Sales — *Act Respecting.*] — *See Sawyer* v. *Pringle*, 20 O. R. 111, *ante* 872.

Crown — *Negligence — Act Giving Right of Action.*]—Held, reversing the judgment of the Exchequer Court, that even assuming 50 & 51 Vict. ch. 16 gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the Court expressed no opinion), such Act is not retroactive in its effect, and gives no right of action for injuries received prior to the passing of the Act. *The Queen* v. *Martin*, 20 S. C. R. 240.

Drainage Trials Act, 1891.]—*See Township of Caradoc* v. *Township of Metcalfe*, 21 O. R. 309, *ante* 706.

Municipal By-law — *Validating Act—Subsequent Saving Pending Proceedings.*]—A motion to quash a municipal by-law was dismissed on the ground that it had been expressly validated by 54 Vict. ch. 82, sec. 14 (O.). While an appeal from the judgment was pending, 55 Vict. ch. 90 (O.) was passed, sec. 6 of which enacted that "nothing contained herein or in the Act passed in the 54th year of Her Majesty's reign, and chaptered 82, shall affect any action or proceeding now pending."

Per Osler, J. A.—The latter Act was declaratory or retrospective; its effect was to prevent the respondents from asserting that the by-law had been validated by the earlier Act, and therefore, the by-law being defective, the judgment must be reversed, though it was right when it was delivered. *Quilter* v. *Mapleson*, 47 L. T. N. S. 561, referred to. *In re Gillespie and City of Toronto*, 19 A. R. 718.

Ship—*Master's Lien—Admiralty Acts.*]—The master of a vessel registered at the port of Winnipeg, and trading upon Lake Winnipeg, had in 1888-1890 no lien upon the vessel for wages; and, even if such a lien were held to exist, there was in those years no Court in Manitoba in which it could have been enforced; and it could not now be enforced under the Colonial Courts of Admiralty Act, 53 & 54 Vict. ch. 27 (Imp.), or the Admiralty Act, 54 & 55 Vict. ch. 29 (D.), because to give these statutes a retroactive effect in such a case would be an interference with the rights of the parties. *Berryman* v. *The Aurora*, 3 Ex. C. R. 228.

Supreme Court of Canada—*Appeal—New Right—Pending Action—Judgment on Day of Passing of Amending Act.*]—A judgment was delivered by the Superior Court in review, in the Province of Quebec, on the same day on which the Act 54 & 55 Vict. ch. 25 came into force, sec. 3 of which provided for an appeal to the Supreme Court of Canada from such a judgment:—

Held, that the appellants not having shewn that the judgment was delivered subsequent to the passing of the Act, the Court had no jurisdiction.

Quære, whether an appeal would lie from a judgment pronounced after the passing of the Act in an action already pending. *Hurtubise* v. *Desmarteau*, 19 S. C. R. 562.

Supreme Court of Canada—*Appeal—New Right—Pending Action—Judgment After Passing of Amending Act.*]—In an action brought by the respondent against the appellant for $2,006, which was argued and taken *en délibéré* by the Superior Court in review on the 30th September, 1891, the day on which the Act 54 & 55 Vict. ch. 25 was sanctioned, sec. 3 of which gave a right of appeal to the Supreme Court of Canada, judgment was rendered a month later in favour of the respondent. On appeal to the Supreme Court of Canada:—

Held, per Strong, Fournier, and Taschereau, JJ., that the respondent's right could not be prejudiced by the delay of the Court in rendering the judgment, which should be treated as having been given on the 30th September; and therefore no appeal lay. *Hurtubise* v. *Desmarteau*, 19 S. C. R. 562, followed. *Couture* v. *Bouchard*, 21 S. C. R. 281.

Supreme Court of Canada—*Appeal—New Right—Pending Actions Standing for Judgment.*]—Held, per Strong, C. J., and Fournier and Sedgwick, JJ., that the right of appeal given by 54 & 55 Vict. ch. 25 does not extend to cases standing for judgment in the Superior Court prior to the passing of the said Act. *Couture* v. *Bouchard*, 21 S. C. R. 281, followed.

Per Fournier, J., that the statute is not applicable to cases already instituted or pending before the Courts, no special words to that effect being used. *Williams* v. *Irvine*, 22 S. C. R. 108.

Supreme Court of Canada—*Appeal—New Right—Pending Actions Standing for Judgment.*]—The statute 54 & 55 Vict. ch. 25, sec. 3, which provides that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different," does not apply to cases in which the Superior Court has rendered judgment or to cases argued and standing for judgment (*en délibéré*) before that Court, when the Act came into force. *Williams* v. *Irvine*, 22 S. C. R. 108, followed. *Cowen* v. *Evans*, *Mitchell* v. *Trenholme*, *Mills* v. *Limoges*, 22 S. C. R. 331.

Survey of Land—*Allowances for Streets.*]—Held, per Osler and Maclennan, JJ. A., [Hagarty, C.J.O., expressing no opinion], that sec. 62 of R. S. O. ch. 152, which provides that all allowances for streets surveyed in cities or any part thereof, which have been or may be surveyed and laid out and laid down on the plans thereof, and upon which lots of land fronting on such allowances for streets have been or may be sold to purchasers, shall be public highways and streets, is retroactive and applies to streets laid out on plans made and registered before the passing of the Act.

Held, per Burton, J.A., that though the section was retroactive, it applied only to the original or first survey of a city, etc., or part thereof, and not to a subdivision of lots or parcels within the city.

Judgment of the Common Pleas Division, 21 O. R. 120, affirming, by a division of opinion, that of Ferguson, J., affirmed. *Gooderham* v. *City of Toronto*, 19 A. R. 641.

Toll-gate—*Act Prohibiting — Provision for Non-retroactivity—Repeal of.*]—A turnpike road company had been in existence for a number of years and had erected toll-gates and collected tolls therefor, when an Act was passed by the Quebec Legislature, 52 Vict. ch 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of said Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 Vict. ch. 36. After 52 Vict. ch. 43 was passed, the company shifted one of its toll-gates to a point beyond the limits of the village, which limits were subsequently extended so as to bring said gate within them. The corporation took proceedings against the company, contending that the repeal of sec. 2 of 52 Vict. ch. 43 made that Act retroactive, and that the shifting of the toll-gate without the consent of the corporation was a violation of said Act:—

Held, affirming the decision of the Court of Queen's Bench, that as a statute is never retroactive unless made so in express terms, sec. 2 had no effect, and its repeal could not make it retroactive; that the shifting of the toll-gate was not a violation of the Act, which only applied to the erection of new gates; and that the extension of the limits of the village could not affect the pre-existing rights of the company. *Village of St. Joachim de la Point Claire* v. *Point Claire Turnpike Road Co.*, 24 S. C. R. 486.

V. Repealing Statutes.

Distribution of Estates.]—The Legislatnre of New Brunswick, by 26 Geo. III. ch. 11, secs. 14 and 17, re-enacted the Imperial Act 22 & 23 Car. II. ch. 10 (Statute of Distributions), as explained by sec. 25 of 29 Car. II. ch. 3 (Statute of Frauds), whic' provided that nothing in the former Act should be construed to extend to estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal estates as theretofore. When the statutes of New Brunswick were revised in 1854 the Act 26 Geo. III. ch. 11 was re-enacted, but sec. 17, corresponding to sec. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme covert*e, her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission :—

Held, that the personal property passed to the husband and not to the next of kin of the wife.

Per Strong, J.—The repeal, by the Revised Statutes, of 26 Geo. III. ch. 11, which was passed in the affirmance of the Imperial Acts, operated to restore sec. 25 of the Statute of Frauds as part of the common law of New Brunswick.

Per Gwynne, J.—When a colonial legislature re-enacts an Imperial Act, it enacts it as interpreted by the Imperial Courts, and *a fortiori* by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. III. ch. 11 (N.B.), it was not necessary to enact the interpreting section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole Act :—

Held, per Ritchie, C.J., Fournier, Gwynne, and Patterson, JJ., that the Married Woman's Property Act of New Brunswick, C. S. N. B. ch. 72, which exempts the separate property of a married woman from liability for her husband's debts, and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed

The Supreme Court of New Brunswick, while deciding against the next of kin on his claim to the residue of the estate of a *feme covert*e, directed that his costs should be paid out of the estate. On appeal the decree was varied by striking out such direction. *Lamb* v. *Clereland*, 19 S. C. R. 78.

Municipal Corporations — *Award.*] — The saving provisions of sec. 14 of the Municipal Amendment Act, 1894, 57 Viet. ch. 50 (O.), do not operate so as by implication necessarily to exclude the application of the Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 43 : and

A township corporation which had obtained an award against a county corporation under sec. 533*a* of the Consolidated Municipal Act, 1892, for part of the cost of the maintenance of certain bridges, were, notwithstanding the repeal of sec. 533*a* by sec. 14 of 57 Viet. ch. 50 (O.), held entitled to recover the amount expended on the same up to the date of the passing of the latter Act. *Township of Morris* v. *County of Huron*, 26 O. R. 689. Varied, 27 O. R. 341.

Municipal Corporations—*Board of Health.*] —Section 67 of the Act by which municipal corporations were established in Nova Scotia, 42 Viet. ch. 1, giving them "the appointment of health officers . . and a board of health" with the powers and authorities formerly vested in Courts of Sessions, does not repeal ch. 29 of R. S. N. S., 4th ser., providing for the appointment of boards of health by the Lieutenant-Governor in Council ; Ritchie, C.J., doubting the authority of the Lieutenant-Governor to appoint in incorporated counties. *County of Cape Breton* v. *McKay*, 18 S. C. R. 639.

Toll-gate — *Act Prohibiting — Provision for Non-retroactivity — Repeal of.*]—*See Village of St. Joachim de la Pointe Claire* v. *Pointe Claire Turnpike Road Co.*, 24 S. C. R. 486, *ante* 930.

Tort—*Action Against Crown—Public Works.*] —*See City of Quebec* v. *The Queen*, 24 S. C. R. 420, *ante* 299.

VI. Time of Passing.

Effect — *Portion of Day.*]—Acts of Parliament take effect in law from the earliest moment of the day on which they are passed, and the Act 54 Viet. ch. 20, amending the Assignments Act, R. S. O. ch. 124, to which the Royal Assent was given at three o'clock in the afternoon, was therefore held to apply to a chattel mortgage executed and registered before twelve o'clock on the same day. *Cole* v. *Porteous*, 19 A. R. 111.

Effect—*Portion of Day—Judgment Delivered on Same Day.*]—*See Hurtubise* v. *Desmarteau*, 19 S. C. R. 562, *ante* 929.

STATUTORY CONDITIONS.

See Insurance, III.

STAYING PROCEEDINGS.

See Practice, XVII.

STAYING TRIAL.

See Trial, V.

STOCK.

See Company.

STREET RAILWAYS.

I. Bonus.

By-law — *Petition* — *Voting.*] — Although under 54 Viet. ch. 42, sec. 36 (O.), it is necessary, when aid is sought to be granted to a street railway by a portion of a municipality, that a majority in number representing one-half in value of the persons shewn by the last assessment roll to be the owners of real property in such portion should petition for the passing of the by-law, it is sufficient if the by-law is carried at the poll by a majority of those voting upon it. *Adamson* v. *Township of Etobicoke*, 22 O. R. 341.

II. Contracts with Municipal Corporations.

Montreal Street Railway Company — *Taxes.*]—By a by-law of the city of Montreal a tax of $2.50 was imposed upon each working horse in the city. By sec. 16 of the appellants' charter it was stipulated that each car employed by the company should be licensed and numbered, etc., for which the company should pay "over and above all other taxes, the sum of $20 for each two-horse car, and $10 for each one-horse car;"—

Held, affirming the judgment of the Court below, that the company was liable for the tax of $2.50 on each and every one of its horses. *Montreal Street R. W. Co.* v. *City of Montreal*, 23 S. C. R. 259.

Toronto Street Railway Company — *Franchise—Property—Re-vested.*]—Held, by the Court of Appeal, that under the statutes and agreements affecting the Toronto Street Railway Company, the possibility of exercising the franchise beyond the period of thirty years therein mentioned, if the city should not take over the railway, is not "property" the value of which could be taken into consideration by the arbitrators in arriving at the amount payable by the city on assuming the ownership of the railway.

Nor was the company entitled to any allowance for permanent pavements constructed by the city under an agreement by which the company, in lieu of constructing and maintaining such pavements, as provided by former agreements, paid the city an annual allowance for the use thereof.

The company's rights in respect of the extensions of the railway made from time to time came to an end at the expiration of the thirty years mentioned in the original agreement.

Judgment of Robertson, J., 22 O. R. 374, affirmed, Burton, J.A., dissenting on the second point.

Held, by the Judicial Committee of the Privy Council, affirming the judgment of the Court of Appeal, that the Acts could not be construed as granting a perpetual privilege to use the streets for the purposes of the railway, but that the privilege thereby granted was limited to thirty years by the agreement and by-law. That limit of time applied, not merely to the original railway, but to the various extensions thereof authorized in pursuance of the same privilege. *In re City of Toronto and Toronto Street R. W. Co.*, 20 A. R. 125, [1893] A. C. 511.

Toronto Street Railway Company—*Permanent Pavements—Arbitration—Local Improvements—Assessment.*]—The Toronto Street Railway Company was incorporated in 1861, and its franchise was to last thirty years, at the expiration of which period the city corporation could assume the ownership of the railway and property of the company on payment of the value thereof, to be determined by arbitration. The company was to keep the roadway between the rails and for eighteen inches outside each rail paved and macadamized and in good repair, using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the corporation, the company was not bound to construct a like pavement between the rails, etc., but was only to pay the cost price of the same, not to exceed a specified sum per yard. The city corporation laid upon certain streets traversed by the company's railway permanent pavements of cedar blocks, and issued debentures for the whole cost of such works. A by-law was then passed, charging the company with its portion of such cost in the manner and for the period that adjacent owners were assessed under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1885, but refused to pay for subsequent years, on the ground that the cedar block pavement had proved to be by no means permanent, but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the city for these rates, it was held that the company was only liable to pay for permanent roadways, and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with, but an agreement was entered into by which all matters in dispute to the end of the year 1888 were settled, and thereafter the company was to pay a specific sum annually per mile in lieu of all claims on account of debentures maturing after that date, and "in lieu of the company's liability for construction, renewal, maintenance, and repair in respect of all the portions of streets occupied by the company's track so long as the franchise of the company to use the said streets *now* extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had, if the city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends." This agreement was ratified by an Act of the legislature passed in 1890, which also provided for the holding of the said arbitration, which having been entered upon, the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators

having refused to allow this claim, an action was brought by the city to recover the said amount :—

Held, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed ; that the said agreement discharged the company from all liability in respect to construction, renewal, maintenance, and repair of the said streets ; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration, etc., must be considered to have been inserted *ex majori cautelâ*, and could not do away with the express contract to relieve the company from liability :—

Held, further, that by an Act passed in 1877, and a by-law made in pursuance thereof, the company was only assessable as for local improvements which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon the owners or occupiers after they have ceased to be such ; therefore after the termination of the franchise the company would not be liable for these rates. *City of Toronto* v. *Toronto Street R. W. Co.*, 23 S. C. R. 198.

Winnipeg Street Railway Company—*Highways — Monopoly.*]—Where a municipal council granted to a railway company authority to construct, maintain, and operate railways in its streets, with the exclusive right to such portion of any street as should be occupied by the railway, but with the plain intent that the company should have no concern whatever with any portions of any street not in actual occupation by their rails :—

Held, that a subsequent clause in the deed of grant, giving to the company the refusal, on terms, of other streets in the city for railway purposes, was insufficient to constitute, contrary to the plain meaning of the previous stipulations, a right of monopoly in any of the streets of the city.

Quære, whether, if a monopoly had been conceded, it was *ultra vires* of the municipal council. *Winnipeg Street R. W. Co.* v. *Winnipeg Electric Street R. W. Co.*, [1894] A. C. 615.

III. Injury to Animals.

Height of Rails—*Statutory Obligation.*]—The charter of a street railway company required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail, and the caulk of his shoe caught in the groove, whereby he was injured. In an action by the owner against the company it appeared that the rail, at the place where the accident occurred, was above the level of the roadway :—

Held, affirming the judgment of the Supreme Court of Nova Scotia, that as the rail was above the road level, contrary to the requirements of the charter, it was a street obstruction unauthorized by statute, and, therefore, a nuisance, and the company was liable for the injury to the horse caused thereby. *Halifax Street R. W. Co.* v. *Joyce*, 22 S. C. R. 258.

IV. Injury to Persons.

Action—*Production of Documents—Privilege.*] In an action for damages for personal injuries received by the plaintiff in a tramway car accident, as to which the conductor of the car had made a report to the defendants :—

Held, that the portion of the report containing the names of the eye-witnesses of the accident was privileged from production. *Armstrong* v. *Toronto R. W. Co.*, 15 P. R. 208.

Motorman—*Coupling Cars—Defect in Plant.*]—Action by a motorman in the employment of a street railway company, under the Workmen's Compensation for Injuries Act, to recover damages for injuries sustained by the plaintiff while coupling together a motor-car and a trailer :—

Held, by the Court of Appeal, that having car buffers of different heights, so that in coupling the buffers overlap and afford no protection to the person effecting the coupling, is a "defect in the arrangement of the plant" within the meaning of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30, sec. 3 (O.).

Held, by the Supreme Court of Canada, that negligence on the part of the company in not having proper appliances to prevent injury was clearly proved, and a new trial properly refused. *Bond* v. *Toronto R. W. Co.*, 22 A. R. 78, 24 S. C. R. 715.

Passenger—*Attempting to Board Car—Contributory Negligence.*]—The plaintiff, in broad daylight, having hailed a westward bound tramway car, on the north track, crossed over from the south side of the street to get into it ; the eastward bound car at the time was coming along on the south track at a fast trot, but was some 300 feet away to the west. The plaintiff was somewhat intoxicated. As he took hold of the westward bound car to board it, he fell, and the eastward bound car passed over his foot, which was on the rail.

The jury found that there was no negligence on the part of the defendants, and that the plaintiff was guilty of contributory negligence, on which the trial Judge entered judgment for the defendants :—

Held, that the attendant or surrounding circumstances were, in the absence of any explanatory evidence by the defendants, sufficient to raise the presumption that there was negligence on the part of those in charge of the eastward bound car, the consequence of which was the happening of the accident, and that there must be a new trial. *Forrood* v. *City of Toronto*, 22 O. R. 351.

Passenger—*Expulsion from Car—Exposure to Cold—Consequent Illness—Damages—Remoteness—Evidence as to Operation of Railway by Defendants.*]—A passenger on a street railway having the right to be transferred from a car on one street line to that of another street line on the railway was refused such right by the conductor of the car to which he had the right to be transferred, and was forced to leave it :—

Held, that he was entitled to recover damages occasioned by an illness caused by exposure to the cold in leaving the car, such damages not being too remote.

The defendants, an incorporated company, were the successors of certain persons who had purchased the road, and, although no conveyance of the road to the defendants was proved, it was shewn that the persons working the railway at the time of the occurrence were in the defendants' employment, and that the car in question was in charge of their employees :—

Held, sufficient evidence that the defendants were operating the road so as to render them liable to the plaintiff. *Grinsted* v. *Toronto R. W. Co.*, 24 O. R. 683.

Affirmed by the Court of Appeal, 21 A. R. 578, and by the Supreme Court of Canada, 24 S. C. R. 570.

Traveller—*Obstruction of Street—Accumulation of Snow—Question of Fact — Finding of Jury.*]—An action was brought against the City of Toronto to recover damages for injuries sustained by the plaintiff, who was driving through the city, by reason of snow having been piled on the side of the street, and the street railway company was brought in as a third party. The evidence was that the snow from the sidewalks was placed on the roadway immediately adjoining by servants of the city, and snow from the railway tracks was placed by servants of the railway company upon the roadway immediately adjoining the track, without any permission from the city, thus raising the roadway next to the track, where the accident occurred, to a height of about twenty inches above the rails. The jury found that the disrepair of the street was the act of the railway company, which was therefore made liable over to the city for the damages assessed. The company contended on appeal that the verdict was perverse and contrary to evidence :—

Held, affirming the decision of the Court of Appeal, that under the evidence given of the manner in which the snow from the track had been placed on the roadway immediately adjoining, the jury might reasonably be of opinion that if it had not been so placed there the accident would not have happened, and that this was the sole cause of the accident. *Toronto R. W. Co.* v. *City of Toronto*, 24 S. C. R. 589.

Traveller—*Right of Way—Speed.*]—The right of way which street railway cars have over the portion of the street on which the rails are laid, is not an exclusive right or a right requiring vehicles or pedestrians at all hazards to get out of the way at their peril ; and, notwithstanding the absence of any regulations as to speed, the cars must be run at such a rate as may be reasonable under the circumstances of each particular case.

The plaintiff was sitting on a waggon which was being driven on that part of the street occupied by the rails, and while going down a steep incline, a motor-car and trailer coming along behind, by reason of the motorman not having proper control of the car, and of the excessive speed thereof, the waggon was run into and the plaintiff injured :—

Held, that the defendants were liable therefor. *Ewing* v. *Toronto R. W. Co.*, 24 O. R. 694.

Traveller—*Right of Way—Speed.*]—Held, by the Court of Appeal, that the Toronto Railway Company have not, under their charter and their agreement with the city of Toronto, an exclusive right of way upon their tracks or the right to run their cars at any rate of speed they please. Whilst their cars must not be wilfully impeded, they are bound to recognize the rights and necessities of public travel and so to regulate the speed that the cars may be quickly stopped, should occasion require it.

Where, therefore, there was some evidence that an accident was the result of a car running at excessive speed, the judgment of the Common Pleas Division, upholding a verdict against the company, was affirmed.

Held, by the Supreme Court of Canada, affirming the judgment of the Court of Appeal, that persons crossing the street railway tracks are entitled to assume that the cars running over them will be driven moderately and prudently, and if an accident happens through a car going at an excessive rate of speed, the street railway company is responsible. The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching, if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross. Gwynne, J., dissenting. *Gosnell* v. *Toronto R. W. Co.*, 21 A. R. 553, 24 S. C. R. 582.

Workman on Road—*Contributory Negligence.*]—A workman in the employment of a street railway company was injured by a car striking him while working on the track, and brought this action for damages. The company defended on the ground that he could have escaped if he had been reasonably careful in looking out for passing cars. The trial Judge dismissed the action, holding that the plaintiff was the cause of his own misfortune, and could not make the defendants liable. This judgment was affirmed by a Divisional Court, but reversed by the Court of Appeal, which ordered a new trial. The Supreme Court of Canada affirmed the decision of the Court of Appeal, Gwynne, J., dissenting, and, on counsel for the company stating that a new trial was not desired, ordered judgment to be entered for the plaintiff with $500 damages, the amount assessed by the jury at the trial. *Hamilton Street R. W. Co.* v. *Moran*, 24 S. C. R. 717.

Workman on Road—*Right of Way—Speed — Warning.*]—A car of the defendants' electric street railway was moving very quickly along a down grade on a street in a city, where the plaintiff, who was in the employment of the city corporation, was engaged in his duty of sweeping the road-bed. The motorman did not sound the gong on the car, as was customary, and ran into the plaintiff, injuring him :—

Held, that although the defendants had the right of way, the omission to sound the gong or give any warning of the approach of the car was actionable negligence. *Green* v. *Toronto R. W. Co.*, 26 O. R. 319.

V. Operation.

Evidence of.]—*See Grinsted* v. *Toronto R. W. Co.*, 24 O. R. 683, *ante* 937.

Sunday— *Injunction — Crown — Breach of Charter.*]—*See Attorney-General* v. *Niagara Falls, Wesley Park, and Clifton Tramway Co.*, 18 A. R. 453, *post* 940.

SUBPŒNA.

See EVIDENCE, IV.

SUBROGATION.

Conventional Subrogation — *Payment of Debts—Registration—Error.*]—No formal or express declaration of subrogation is required under Art. 1155, sec. 2, C. C., when the debtor borrowing the sum of money declares in his deed of loan that it is for the purpose of paying his debts, and in the acquittance he declares that the payment has been made with the moneys furnished by the new creditor for that purpose. Where subrogation is given by the terms of a deed, the erroneous noting of the deed by the registrar as a discharge, and the granting by him of erroneous certificates, cannot prejudice the party subrogated. *Owens* v. *Bedell*, 19 S. C. R. 137.

Mortgage.]—Held, that the defendants were not entitled to be subrogated to the rights of a mortgagee in whose mortgage the plaintiffs' ancestress had joined as a granting party, but which had been paid off and discharged. *Marsh* v. *Webb*, 21 O. R. 281.

Mortgage.]—The plaintiff paid off a first mortgage on certain lands, and procured its discharge, taking a new mortgage to himself for the amount of the advance in ignorance of the fact of the existence of a second mortgage. Shortly afterwards, on ascertaining this fact, he notified the defendant, the holder, that he would pay it off, and the defendant, relying thereon, took no steps to enforce his security. Subsequently, on the property becoming depreciated and the mortgagor insolvent, the plaintiff brought an action to have it declared that he was entitled to stand in the position of first mortgagee :—

Held, that the plaintiff by his acts and conduct had precluded himself from asserting such right. *Brown* v. *McLean*, 18 O. R. 533, and *Abell* v. *Morrison*, 19 O. R. 669, distinguished. *McLeod* v. *Wadland*, 25 O. R. 118.

SUCCESSION DUTY.

See REVENUE, III.

SUMMARY CONVICTION.

See JUSTICE OF THE PEACE.

SUMMARY JUDGMENT.

See JUDGMENT.

SUNDAY.

By-law—*Park Preaching.*]—It is provided by R. S. O. ch. 184, sec. 504, sub-sec. 10, that the council of every city and town may pass by-laws for the management of the farm, park, garden, etc. :—

Held, that the municipal council of a city had power under this enactment, to pass a by-law providing that no person shall on the Sabbath-day, in any public park, square, garden, etc., in the city, publicly preach, lecture, or declaim :—

Held, also, that the by-law violated no constitutional right, and was not unreasonable. *Bailey* v. *Williamson*, L. R. 8 Q. B. 118, followed :—

Held, also, that the by-law was not bad for uncertainty as to the day of the week intended, by reason of the use of the term "Sabbath-day." *Re Cribbin and City of Toronto*, 21 O. R. 325.

Contract— *Date of Performance.*]—In an action for specific performance, even when time is of the essence of the agreement, if the party in default has done what in him lay to perform the contract, the Court may, in the exercise of its discretion, grant the relief claimed.

And where, by such agreement, the conveyance was to be tendered by the plaintiff to the defendant and the transaction closed on the "first day of June," which fell on Sunday, when no tender was made, and the conduct of the defendant on the following day was such as to exclude a tender on that day, in an action for specific performance the plaintiff was held entitled to judgment. *Cudney* v. *Gives*, 20 O. R. 500.

Street Railways— *Injunction — Breach of Charter—Crown.*]—The defendants were incorporated by letters patent under the Street Railway Act, R. S. O. 1887 ch. 171, which authorized them to construct and operate (on all days except Sunday) a street railway :—

Held, Maclennan, J.A., dissenting, that an action would not lie by the Crown to restrain the defendants from operating the road on Sunday, the restriction against their doing so being at most an implied one, and no substantial injury to the public, or any interference with proprietary rights, being shewn.

Judgment of the Common Pleas Division, 19 O. R. 624, affirmed. *Attorney-General* v. *Niagara Falls, Wesley Park, and Clifton Tramway Co.*, 18 A. R. 453.

Summary Conviction— *Lord's Day Act—Cab-driver.*]—A cab-driver is not within any of the classes of persons enumerated in sec. 1 of the Lord's Day Act, R. S. O. ch. 203, and cannot be lawfully convicted thereunder for driving a cab on Sunday.

Conviction of the defendant under the Act for unlawfully exercising the worldly business of his ordinary calling as a cab-driver on the Lord's day :—

Held, bad for uncertainty. *Regina* v. *Somers*, 24 O. R. 244.

SUPERVISION.

See PRINCIPAL AND SURETY, I.

SUPREME COURT OF CANADA.

I. Acquiescence in Judgment.

Abandonment in Intermediate Court.]—In an action in which the constitutionality of 36 Vict. ch. 81 (Q.) was raised by the defendant, the Attorney-General for the Province of Quebec intervened, and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney-General's intervention, the defendant appealed to the Court of Queen's Bench (appeal side), but afterwards abandoned his appeal from the judgment on the intervention. On a further appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench in the principal action, the defendant asserted the right to have the judgment of the Superior Court on the intervention reviewed :—

Held, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned, the judgment on the intervention of the Attorney-General could not be the subject of an appeal to this Court. *Ball* v. *McCaffrey*, 20 S. C. R. 319.

Agreement of Solicitor.]—By a judgment of the Court of Queen's Bench, the defendant society was ordered to deliver up a certain number of its shares upon payment of a certain sum. Before the time for appealing expired, the attorney *ad litem* for the defendant delivered the shares to the plaintiff's attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before the plaintiff's attorney complied with the terms of the offer. On a motion to quash the appeal on the ground of acquiescence in the judgment :—

Held, that the appeal would lie.

Per Taschereau, J., that an attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken. *La Société Canadienne-Française de Construction de Montreal* v. *Darelay*, 20 S. C. R. 449.

II. Amending Acts Extending Jurisdiction.

Appeal from Superior Court, Quebec.]—By sec. 3 of the Supreme and Exchequer Courts Amending Act of 1891, an appeal may lie to the Supreme Court of Canada from the Superior Court in review, Province of Quebec, in cases which, by the law of that Province, are appealable direct to the Judicial Committee of the Privy Council. A judgment was delivered by the Superior Court in review at Montreal in favour of D., the respondent, on the same day on which the amending Act came into force. On an appeal to the Supreme Court of Canada taken by H. *et al.* :—

Held, that the appellants not having shewn that the judgment was delivered subsequent to the passing of the amending Act, the Court had no jurisdiction.

Quære, whether an appeal will lie from a judgment pronounced after the passing of the amending Act in an action pending before the change of the law. *Hurtubise* v. *Desmarteau*, 19 S. C. R. 562.

Appeal from Superior Court, Quebec.]—In an action brought by the respondents against the appellant for $2,006, which was argued and taken *en délibéré* by the Superior Court sitting in review on the 30th September, 1891, the day on which the Act 54 & 55 Vict. ch. 25, sec. 3, giving a right to appeal from the Superior Court in review to the Supreme Court of Canada, was sanctioned, the judgment was rendered a month later in favour of the respondents. On appeal to the Supreme Court of Canada :—

Held, per Strong, Fournier, and Taschereau, JJ., that the respondents' right could not be prejudiced by the delay of the Court in rendering judgment, which should be treated as having been given on the 30th September, when the case was taken *en délibéré*, and therefore the case was not appealable. *Hurtubise* v. *Desmarteau*, 19 S. C. R. 562, followed.

Per Gwynne and Patterson, JJ., that the case did not come within the words of section

3 of 54 & 55 Vict. ch. 25, inasmuch as the judgment, being for less than £500 sterling, was not a judgment from which the appellant had a right to appeal to the Privy Council in England: Arts. 1178, 1178*a*, C. C. P. *Couture* v. *Bouchard*, 21 S. C. R. 281.

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

Held, per Strong, C.J., and Fournier and Sedgewick, JJ., that the right of appeal given by 54 & 55 Vict. ch. 25 does not extend to cases standing for judgment in the Superior Court prior to the passing of the said Act. *Couture* v. *Bouchard*, 21 S. C. R. 281, followed. Taschereau and Gwynne, JJ., dissenting.

Per Fournier, J., that the statute is not applicable to cases already instituted or pending before the Courts, no special words to that effect being used. *Williams* v. *Irvine*, 22 S. C. R. 108.

Appeal from Superior Court, Quebec.]—*See Cowen* v. *Evans*, *Mitchell* v. *Trenholme*, *Mills* v. *Limoges*, 22 S. C. R. 331, *post* 944; *Kinghorn* v. *Larue*, 22 S. C. R. 347, *post* 946; *Laberge* v. *Equitable Life Assurance Society*, 24 S. C. R. 59, *post* 945.

Future Rights.]—*See Chamberland* v. *Fortier*, 23 S. C. R. 371, *post* 954; *O'Dell* v. *Gregory*, 24 S. C. R. 661, *post* 954.

III. Amount in Controversy.

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

Held, that the pecuniary interest of the defendants, affected by the judgment appealed from, was more than $2,000 over and above the plaintiff's claim, and therefore the case was appealable under R. S. C. ch. 135, sec. 29. *Hunt* v. *Taplin*, 24 S. C. R. 36.

Award—*Interest—Costs.*]—In an action to set aside an award of $1,974.25, Strong and Taschereau, JJ., doubted the jurisdiction of the Supreme Court of Canada to hear an appeal from a decision of the Court of Queen's Bench, Lower Canada, because, to make up the appealable amount, either interest accrued after date of award or the costs taxed on the arbitration proceedings would have to be added. *Quebec, Montmorency, and Charlevoix R. W. Co.* v. *Mathieu*, 19 S. C. R. 426.

Damages—*Court of First Instance.*]—Where the plaintiff in an action for $10,000 for damages obtains a judgment in the Superior Court for Lower Canada for $2,000, and the defendant appeals to the Court of Queen's Bench, where the judgment is reduced below said amount of $2,000, the case is appealable by the plaintiff to the Supreme Court, the value of the matter in controversy as regards him being the amount of the judgment of the Superior Court; Taschereau and Patterson, JJ., dissenting.

The amount of damages awarded in his discretion by the Judge who tries the case in the Court of first instance, should not be interfered with by a court of appeal, unless clearly unreasonable and unsupported by the evidence, or there be some error in law or fact, or partiality on the part of the Judge. *Levi* v. *Reed*, 6 S. C. R. 482, and *Gingras* v. *Desilets*, Cassels' Dig., 2nd ed., 212, followed. *Cossette* v. *Dun*, 18 S. C. R. 222.

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

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

Held, following *Monette* v. *Lefebvre*, 16 S. C. R. 387, that no appeal would lie to the Supreme Court, in these cases, by the defendants, from the judgment of the Court of Queen's Bench, under sec. 29 of ch. 135, R. S. C.; Gwynne, J., dissenting. *Cowen* v. *Evans*, *Mitchell* v. *Trenholme*, *Mills* v. *Limoges*, 22 S. C. R. 331.

Demand—*Amount of*—*Amending Act.*]—By virtue of sub-sec. 4 of sec. 3 of ch. 25 of 54 & 55 Vict., in determining the amount in dispute in cases in appeal to the Supreme Court of Canada, the proper course is to look at the amount demanded by the statement of claim, even though the actual amount in controversy in the Court appealed from was less than $2,000. Thus where the plaintiff obtained a judgment in the Court of original jurisdiction for less than $2,000, and did not take a cross-appeal upon the defendants appealing to the intermediate court of appeal, where such judgment was reversed, he was entitled to appeal to this Court. *Leri* v. *Reed*, 6 S. C. R. 482, affirmed and followed. Gwynne, J., dissenting. *Laberge* v. *Equitable Life Assurance Society*, 21 S. C. R. 59.

Disavowal of Attorney—*Petition—Amount of Judgment Against Petitioner.*]—In an action brought in 1866 for the sum of $800 and interest at twelve and a half per cent. against two brothers, S. J. D. and W. McD. D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of S. J. D. at Three Rivers, the other defendant, W. McD. D., then residing in the State of New York. On the return of the writ, the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken, and in December, 1880, upon the issue of an *alias* writ of execution, the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by S. J. D., and also prescription, ratification, and insufficiency of the allegations of the petition of disavowal. The petition in disavowal was dismissed. On appeal to the Supreme Court of Canada, the respondent moved to quash the appeal, on the ground that the matter in controversy did not amount to the sum of $2,000 :—

Held, that as the judgment obtained against the appellant in March, 1874, on the appearance filed by the respondent, exceeded the amount of $2,000, the judgment on the petition for disavowal was appealable. *Dawson* v. *Dumont*, 20 S. C. R. 709.

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

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

Held, also, that sec. 3 of 54 & 55 Vict. ch. 25, providing for an appeal where the amount demanded is $2,000 or over, had no application to the present case. *Kinghorn* v. *Larue*, 22 S. C. R. 347.

Fraudulent Conveyance—*Amount of Attacking Creditor's Claim.*]—E. F. F. sold to G. for $8,000 land mortgaged for $7,000, with a right of *remeré* for one year. A month later E. F. F. assigned, and J. F. *et al.*, creditors of E. F. F. in $1,880, brought an action against G. to have the deed of sale of the land, which was valued at over $11,000, set aside as made in fraud of creditors. Upon appeal by J. F. *et al.* to the Supreme Court of Canada from the judgment of the Court of Queen's Bench for Lower Canada affirming a judgment dismissing the action :—

Held, that, as the appellants' own claim was under $2,000, and they did not represent the creditors of E. F. F., the amount in controversy was insufficient to make the case appealable. *Flatt* v. *Ferland*, 21 S. C. R. 32.

Money Demand—*New Right of Appeal—Amending Act.*]—*See Couture* v. *Bouchard*, 21 S. C. R. 281, *ante* 943.

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

Held, that the building for which the contract had been entered into having been completed, there remained but the question of costs and the claim for $545 in dispute between the parties, and that amount was not sufficient to give jurisdiction to the Supreme Court under R. S. C. ch. 135, sec. 29. *Cowen* v. *Evans*, 22 S. C. R. 328.

Winding-up Act—*Several Contributories—Aggregate Liability.*]—An appeal by the liquidator from the decision of the Court of Appeal, 21 A. R. 646, reversing the order of Boyd, C., 24 O. R. 216, dismissing an appeal by several alleged contributories from the report of the Master in Ordinary placing them upon the list in winding-up proceedings. An appeal will lie to the Supreme Court of Canada in proceedings under the Winding-up Act only where the amount involved is $2,000 or over. In this case six persons were placed on the list, one for $1,000, and the others for $900 each, and all were released from liability by the decision of the Court of Appeal from which this appeal was brought :—

Held, that the fact that the aggregate amount for which the respondents were sought to be made liable exceeded $2,000 did not give the Court jurisdiction; but that the position was the same as if proceedings had been taken separately against each. *Stephens* v. *Gerth—In re Ontario Express and Transportation Co.*, 24 S. C. R. 716.

IV. Appeals in Criminal Proceedings.

Contempt of Court.]—Contempt of Court is a criminal proceeding, and unless it comes with-

In sec. 68 of the Supreme Court Act, an appeal does not lie to this Court from a judgment in proceedings therefor. *O'Shea* v. *O'Shea*, 15 P. D. 59, followed. *In re O'Brien*, 16 S. C. R. 197, referred to. *Ellis* v. *The Queen*, 22 S. C. R. 7.

Motion for Reserved Case.]—Where the Court appealed from has affirmed the refusal to reserve a case moved for at a criminal trial on two grounds, and is unanimous as to one of such grounds, but not as to the other, the Supreme Court on appeal can only take into consideration the ground of motion in which there was dissent. *McIntosh* v. *The Queen*, 23 S. C. R. 180.

V. Appeals in Election Cases.

Consent to Reversal of Judgment.]—The trial of two controverted Dominion election petitions was commenced more than six months after the filing of the petitions, no order having been made enlarging the time for the commencement of the trial. Upon the consent of the respondents, subject to their objection that the Court had no jurisdiction, judgments were given voiding the elections for corrupt practices by agents. Upon the respondents' appeal to the Supreme Court of Canada, the petitioners filed a consent to the reversal of the judgments appealed from without costs, admitting that the objection was well taken. Upon the filing of an affidavit as to the facts stated in the consent, the appeal was allowed and the petitions dismissed without costs. *Bagot Election Case, Rouville Election Case*, 21 S. C. R. 28.

Discontinuance.]—Upon the trial of a controverted Dominion election petition the respondent was unseated by the judgment of the Superior Court, by reason of corrupt practices by agents, and appealed to the Supreme Court of Canada. When the case was called, no one appearing for the appellant, counsel for the petitioner stated that he had been served with a notice of discontinuance. The Court ordered that the appeal be struck off the list. *L'Assomption Election Case*, 21 S. C. R. 29.

Ruling as to Mode of Trial.]—The ruling of the Court below on an objection in proceedings on an election petition, viz., that the trial Judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary, as directed by sec. 30 of ch. 9, R. S. C., is not an appealable judgment or decision: R. S. C. ch. 9, sec. 50; Sedgewick, J., doubting. *Vaudreuil Election Case*, 22 S. C. R. 1.

VI. Appeals in Matters of Discretion.

Costs.]—The making or refusing to make an order for the taxation of a bill of costs, upon the application of a third party, is a matter of discretion, and no appeal lies to this Court: per Patterson, J. *McGugan* v. *McGugan*, 21 S. C. R. 267.

Stay of Proceedings.]—An order perpetually restraining the plaintiffs from proceeding is one made in the exercise of judicial discretion, as to which sec. 27 of the Supreme Court Act does not allow an appeal: per Patterson, J., in *Maritime Bank of the Dominion of Canada* v. *Stewart*, 20 S. C. R. 105.

Summary Judgment.]—An order allowing judgment to be entered by the plaintiffs on a specially indorsed writ is one made in the exercise of judicial discretion, as to which sec. 27 of the Supreme Court Act does not allow an appeal: per Patterson, J., in *Rural Municipality of Morris* v. *London and Canadian L. & A. Co.*, 19 S. C. R. 434.

VII. Appeals in Matters of Practice and Procedure.

Costs.]—It is doubtful if a decision affirming the Master's ruling on taxation of a solicitor's bill of costs, which relates wholly to the practice and procedure of the High Court of Justice for Ontario, and of an officer of that Court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the Supreme Court. *O'Donohoe* v. *Beatty*, 19 S. C. R. 356.

Costs.]—After the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada:—

Held, that the only matter in dispute between the parties being a mere question of costs, the Court would not entertain the appeal: Supreme and Exchequer Courts Act, sec. 24. *Moir* v. *Village of Huntingdon*, 19 S. C. R. 363.

Costs.]—Held, per Ritchie, C.J., Strong and Gwynne, JJ., that, assuming this Court had jurisdiction to entertain an appeal with respect to an order for taxation of a bill of costs applied for by a third party, it should not interfere with the decision of the Provincial Courts, which were the most competent tribunals to deal with such matters. *McGugan* v. *McGugan*, 21 S. C. R. 267.

Costs—*Only Matter in Dispute.*]—*See McKay* v. *Township of Hinchinbrooke*, 24 S. C. R. 55, *post* 956.

Irregularity—*Execution.*]—A judgment of the Court of Queen's Bench for Lower Canada (appeal side) held that a *renditioni exponas* issued by the Superior Court of Montreal, to which Court the record in a contestation of an opposition had been removed from the Superior Court of the district of Iberville, under Art. 188, C. C. P., was regular. On an appeal to the Supreme Court of Canada:—

Held, that on a question of practice such as this the Court would not interfere. *Mayor of Montreal* v. *Brown*, 2 App. Cas. 168, followed. *Arpin* v. *Merchants Bank of Canada*, 24 S. C. R. 142.

Irregularity—*Judgment.*]—It appeared by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay

the amount of the judgment. Yet, as McD. had pleaded to the merits of the action, and had taken up *fait et cause* for C. with his knowledge, and both Courts below had held them jointly liable, the Supreme Court of Canada would not interfere in such a matter of practice and procedure. *Macdonald* v. *Ferdais*, 22 S. C. R. 260.

Refusal to Interfere.]—Decisions of Provincial Courts resting upon mere questions of procedure will not be interfered with on appeal to the Supreme Court of Canada except under special circumstances. *Ferrier* v. *Trépannier*, 24 S. C. R. 86.

VIII. Appeals on Questions of Fact.

Jury—*Court—Judge's Charge.*]—Per Strong, J.—Under Rule 476 of the Judicature Act of Nova Scotia the Court can take a case which has been passed upon by a jury into its own hands and dispose of it, if all the proper materials on which to decide are before it, but in this case the materials essential to the final disposition of the case were not before the Court, and there must be a new trial.

Per Ritchie, C.J.—The Supreme Court, as an appellate Court of the Dominion, should not approve of such strong observations being made by a Judge as were made in this case, in effect charging upon the defendants fraud not set out in the pleadings and not legitimately in issue in the cause. *Hardman* v. *Putnam*, 18 S. C. R. 714.

Jury—*Withdrawal—Disposition by Court—Consent.*]—On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing, whereby the plaintiff was struck by the engine and hurt, the case was withdrawn from the jury by consent of counsel for both parties and referred to the full Court, with power to draw inferences of fact, and on the law and facts either to assess damages to the plaintiff or enter a judgment of nonsuit. On appeal from the decision of the full Court assessing damages to the plaintiff:—

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

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

Held, per Gwynne and Patterson, JJ., that the case was properly before the Court, and as the evidence shewed that the servants of the company had complied with the statutory requirement as to giving notice of the approach of the train, the company was not liable. *Canadian Pacific R. W. Co.* v. *Fleming*, 22 S. C. R. 33.

Prior Decisions—*Interference.*]—The Supreme Court of Canada, on appeal from a decision affirming the report of a referee in a suit to remove executors and trustees, which report disallowed items in accounts previously passed by the Probate Court, will not reconsider the item so dealt with, two Courts having previously exercised a judicial discretion as to the amounts, and no question of principle being involved. *Grant* v. *Maclaren*, 23 S. C. R. 310.

Prior Decisions—*Interference.*]—Held, per Strong, C.J., that, though the case might properly have been left to the jury, as the judgment of nonsuit was affirmed by two Courts, it should not be interfered with. *Headford* v. *McClary Mfg. Co.*, 24 S. C. R. 291.

See Appeal, IV.

IX. Cross-appeals.

Rules—*Compliance With.*]—A cross-appeal will be disregarded by the Court when Rules 62 and 63 of the Supreme Court Rules have not been complied with. *Bulmer* v. *The Queen*, 23 S. C. R. 488.

See Laberge v. *Equitable Life Assurance Society*, 24 S. C. R. 59, *ante* 945.

X. Dismissal of Appeals.

Application to Reinstate.]—Motion to reinstate an appeal which had been dismissed because no counsel appeared for the appellant when the case was called. The only ground stated for asking the indulgence of the Court was that counsel had been present not long before the case was called, and had felt satisfied that it would not be reached that day, but that the cases before it had been unexpectedly disposed of. The Court refused to reinstate the appeal and refused the motion with costs. *Foran* v. *Handley*, 24 S. C. R. 706.

XI. Final Judgments.

Admission of Attorney.]—Held, by Taschereau and Patterson, JJ., that a judgment of the Supreme Court of Nova Scotia refusing to admit the appellant as an attorney was not a final judgment within the meaning of the Supreme Court Act. *In re Cahan*, 21 S. C. R. 100.

Contempt of Court.]—In proceedings for contempt of Court by attachment, until sentence is pronounced there is no "final judgment" from which an appeal can be brought. *Ellis* v. *The Queen*, 22 S. C. R. 7.

Costs—*Taxation—Order for.*]—Held, per Taschereau, J., that the Court had no jurisdiction to entertain an appeal from a decision of the Court of Appeal upon appeal from an order for taxation of a solicitor's bill of costs, at the instance of a third party, such decision not being

a final judgment within the meaning of the Supreme Court Act. *McGugan* v. *McGugan*, 21 S. C. R. 267.

Costs—*Taxation—Set-off.*]—In an action by a firm of solicitors to recover costs from clients, a reference was directed to a taxing officer, and upon appeal from his report to the High Court a set-off claimed by one of the defendants of a sum paid by him to one of the plaintiffs for special services was disallowed. This decision was affirmed by the Court of Appeal:—

Held, per Taschereau, J., that the decision of the Court of Appeal was not a final judgment from which an appeal would lie to the Supreme Court of Canada. Strong, J., also expressed doubt as to the jurisdiction. *McDougall* v. *Cameron*, *Bickford* v. *Cameron*, 21 S. C. R. 379.

New Trial.]—Where a new trial has been ordered upon the ground that the answer given by the jury to one of the questions is insufficient to enable the Court to dispose of the interest of the parties on the findings of the jury as a whole, no appeal will lie from such order, which is not a final judgment, and cannot be held to come within the exceptions provided for by the Supreme and Exchequer Courts Act in relation to appeals in cases of new trials. See Supreme and Exchequer Courts Act, secs. 24 (*g*), 30, and 61. *Barrington* v. *Scottish Union and National Insurance Co.*, 18 S. C. R. 615.

New Trial.]—In an action tried by a Judge and jury, the judgment of the Superior Court in review dismissed the plaintiffs' motion for judgment and granted the defendants' motion to dismiss the action. On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reversed, and the Court set aside the assignment of facts to the jury and all subsequent proceedings, and, *suo motu*, ordered a *venire de novo*, on the ground that the assignment of facts was defective and insufficient and the answers of the jury were insufficient and contradictory:—

Held, that the order of the Court of Queen's Bench was not a final judgment, and did not come within the exceptions allowing an appeal in cases of new trials; and therefore the appeal would not lie. *Accident Insurance Co. of North America* v. *McLachlan*, 18 S. C. R. 627.

New Trial.]—In an action brought to recover damages for the loss of certain glass delivered to the defendants for carriage, the Judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. The defendants then moved the Divisional Court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the Court allowing them to amend the statement of claim by charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial, but was not tried before the Divisional Court pronounced judgment on the motion, dismissing the plaintiffs' action. On appeal to the Court of Appeal from the judgment of the Divisional Court, it was reversed and a new trial ordered. On appeal to the Supreme Court:—

Held, that the judgment of the Court of Appeal ordering a new trial in this case was not a final judgment, nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final. *Canadian Pacific R. W. Co.* v. *Cobban Mfg. Co.*, 22 S. C. R. 132.

Petition to Quash Seizure.]—A judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing a judgment of the Superior Court, which quashed on petition a seizure before judgment, and ordering that the hearing of the petition contesting the seizure should be proceeded with in the Superior Court at the same time as the hearing of the main action, is not a final judgment appealable to the Supreme Court: R. S. C. ch. 135, secs. 24-28: Strong, J., dissenting. *Molson* v. *Barnard*, 18 S. C. R. 622.

Revivor—*Legatee — Dispute as to Will.*]—The plaintiff in an action brought to set aside a deed of assignment died before the case was ready for judgment, and the respondent having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated the 17th November, 1869, the appellant contested the continuance on the ground that this will had been revoked by a later will dated 17th January, 1885. The respondent replied that the last will was null and void, and upon that issue the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court, declared null and void the will of 17th January, 1885, and held the continuance of the original suit by the respondent to be admitted. On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the judgment appealed from was an interlocutory judgment, and it was:—

Held, that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit, and therefore appealable to this Court: R. S. C. ch. 135, secs. 2 and 28. *Shaw* v. *St. Louis*, 8 S. C. R. 385, followed. *Baptist* v. *Baptist*, 21 S. C. R. 425.

Stay of Proceedings.]—The defendants to an action in the High Court of Justice for Ontario were made bankrupt in England, and the plaintiffs filed a claim with the assignee in bankruptcy. The High Court of Justice in England made an order restraining the plaintiffs from proceeding with their action, and a like order was made by a High Court Judge in Ontario, perpetually restraining the plaintiffs from proceeding, but reserving liberty to apply. This latter order was affirmed by a Divisional Court and the Court of Appeal, and the plaintiffs sought an appeal to the Supreme Court of Canada:—

Held, that the judgment from which the appeal was sought was not a final judgment within the meaning of the Supreme Court Act. *Maritime Bank of the Dominion of Canada* v. *Stewart*, 20 S. C. R. 105.

Summary Judgment.]—An appeal does not lie from a decision of the Court of Queen's Bench (Man.) affirming the order of a Judge, made on the return of a summons to shew cause, allowing judgment to be entered by the

plaintiffs on a specially indorsed writ, which is not a "final judgment" within the meaning of the Supreme Court Act. *Rural Municipality of Morris* v. *London and Canadian L. & A. Co.*, 19 S. C. R. 434.

Writ of Summons—*Setting Aside.*]—Application was made to a Judge to set aside a writ of summons served out of the jurisdiction of the Court, on the grounds that the cause of action arose in England and the defendant was not subject to the process of the Court, and if the Court had jurisdiction that the writ was not in proper form. The Judge refused the application, and his decision was affirmed by the full Court:—

Held, Gwynne, J., *hesitante*, that the decision of the full Court was not a final judgment in an action, suit, matter, or other judicial proceeding within the meaning of the Supreme Court Act, and no appeal would lie from such decision to the Supreme Court of Canada. *Martin* v. *Moore*, 18 S. C. R. 634.

See Scath v. *Hagar*, 18 S. C. R. 715, *post* 956; *Langevin* v. *Les Commissaires d'Ecole pour la Municipalité de St. Marc*, 18 S. C. R. 599, *post* 957.

XII. Future Rights.

Annuity.]—B. R. claimed, under the will of C. S. R. and an Act of the Legislature of the Province of Quebec, 54 Vict. ch. 96, from A. L., testamentary executrix of the estate, the sum of $200, being for an instalment of the monthly allowance which A. L. was authorized to pay to each of the testator's daughters out of the revenues of his estate. The action was dismissed by the Court of Queen's Bench for Lower Canada; and on an appeal to the Supreme Court:—

Held, that the amount in controversy being only $200, and there being no "future rights" of B. R. which might be bound within the meaning of those words in sec. 29 (*b*) of the Supreme and Exchequer Courts Act, the case was not appealable. Annual rents in sub-sec. (*b*) mean "ground rents" (*rentes foncières*) and not an annuity or any other like charges or obligations. *Rodier* v. *Lapierre*, 21 S. C. R. 69.

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

Held, that the words "other matters or things" mean rights of property analogous to title to lands, etc., which are specifically mentioned, and not personal rights; that "title" means a vested right or title already acquired, though the enjoyment may be postponed; and that the right of a married woman to an annuity provided by her marriage contract in case she should become a widow, is not a right in future which would authorize an appeal in an action by her husband against her for *séparation de corps*, in which, if judgment went against her, the right to the annuity would be forfeited. *O'Dell* v. *Gregory*, 24 S. C. R. 661.

Calls.]—A joint stock company sued the defendant B. for $1,000, being a call of ten per cent. on 100 shares of $100 each, alleged to have been subscribed by B. in the capital stock of the company, and prayed that the defendant be condemned to pay the said sum of $1,000 with costs. The defendant denied any liability, and prayed for the dismissal of the action. During the pendency of the suit, the company's business was ordered to be wound up under the Winding-up Act, 45 Vict. ch. 23 (D.), and the liquidator was authorized to continue the suit. The Superior Court condemned the defendant to pay the amount claimed, but on appeal to the Court of Queen's Bench (appeal side) the action of the plaintiff company was dismissed. On appeal to the Supreme Court of Canada:—

Held, Gwynne, J., dissenting, that the appeal would not lie, the amount in controversy being under $2,000, and there being no future rights as specified in sub-sec. (*b*) of sec. 27, ch. 135, R. S. C., which might be bound by the judgment. *Gilbert* v. *Gilman*, 16 S. C. R. 189, followed. *Dominion Salvage & Wrecking Co.* v. *Brown*, 20 S. C. R. 203.

Easement.]—By a judgment of the Court of Queen's Bench for Lower Canada (appeal side) the defendants in the action were condemned to build and complete certain works and drains within a certain delay, in a lane separating the defendant's and plaintiff's properties on the west side of Peel street, Montreal, to prevent water from entering the plaintiff's house, which was on the slope below. The question of damages was reserved. On appeal to the Supreme Court of Canada:—

Held, that the case was not appealable, there being no controversy as to $2,000 or over, and no title to lands or future rights in question within the meaning of sec. 29, sub-sec. (*b*), of the Supreme Court Act. The words "title to lands" in this sub-section are only applicable to a case where a title to the property or a right to the title may be in question. The fact that a question of the right of servitude arises would not give jurisdiction. *Wheeler* v. *Black*, 14 S. C. R. 242, referred to. *Gilbert* v. *Gilman*, 16 S. C. R. 189, approved. *Winebery* v. *Hampson*, 19 S. C. R. 369.

Easement—*Amending Act.*]—In an *action négatoire* the plaintiff sought to have a servitude claimed by the defendant declared non-existent, and claimed $30 damages:—

Held, that under 56 Vict. ch. 29, sec. 1, amending R. S. C. ch. 135, sec. 29 (*b*), the case was appealable, the question in controversy relating to matters where the rights in future might be bound. *Winebery* v. *Hampson*, 19 S. C. R. 369, distinguished. *Chamberland* v. *Fortier*, 23 S. C. R. 371.

Fee of Office—*School-mistress.*]—E. Larivière, a school-mistress, by her action claimed $1,243 as fees due to her in virtue of sec. 68, ch. 15, C. S. L. C., which was collected by the school commissioners of the city of Three Rivers while she was employed by them. At the time of the action the plaintiff had ceased to be in their employ. The Court of Queen's

Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court, dismissed the action. On a motion to the Supreme Court of Canada to allow a bond in appeal, the same having been refused by a Judge of the Court below, the registrar of the Supreme Court, and a Judge in Chambers, on the ground that the case was not appealable:—

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

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

3. The words "where the rights in future might be bound" in sub-sec. (*b*) of sec. 29 govern all the preceding words "any fee of office, etc." *Chagnon* v. *Normand*, 16 S. C. R. 661; *Gilbert* v. *Gilman*, 16 S. C. R. 189; *Bank of Toronto* v. *Le Curé, etc., de Ste. Vierge*, 12 S. C. R. 25, referred to. *Larivière* v. *School Commissioners for Three Rivers*, 23 S. C. R. 723.

Sheriff's Sale—*Vacating.*]—An appeal will lie to the Supreme Court under sec. 29 (*b*) of the Supreme Court Act from the judgment in an action to vacate the sheriff's sale of an immovable. *Dufresne* v. *Dixon*, 16 S. C. R. 596, followed. *Lefeuntun* v. *Véronneau*, 22 S. C. R. 203.

Taxes.]—*See City of Sherbrooke* v. *McManamy*, 18 S. C. R. 594, *post* 960.

Title to Land.]—In an action brought before the Superior Court with seizure in reception under Arts. 857 and 887, C. C. P., and Art. 1624, C. C., the defendant pleaded that he had held the property (valued at over $2,000) since the expiration of his lease, under some verbal agreement of sale. The judgment appealed from, reversing the judgment of the Court of Review, held that the action ought to have been instituted in the Circuit Court.

On appeal to the Supreme Court:—

Held, that as the case was originally instituted in the Superior Court, and upon the face of the proceedings the right to the possession and property of an immovable property was involved, an appeal lay: Supreme and Exchequer Courts Act, sec. 29 (*b*) and secs. 28 and 24: Strong, J., dissenting. *Blackford* v. *McBain*, 19 S. C. R. 42. *See*, also, *S. C.*, 20 S. C. R. 269.

Title to Land.]—In a case of a dispute between adjoining proprietors of mining lands, where an encroachment was complained of, and it appeared that the limits of the respective properties had not been legally determined by a *bornage*, the Court of Queen's Bench (appeal side) held that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*.

On appeal to the Supreme Court of Canada:—

Held, that as the matter in controversy did not put in issue any title to land where the rights in future might be bound, the case was not appealable: R. S. C. ch. 135, sec. 29 (*b*). *Emerald Phosphate Co.* v. *Anglo-Continental Guano Works*, 21 S. C. R. 422.

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

Held, also, that as the valuation roll sought to be set aside in this case had been duly homologated and not appealed against within the delay provided in Art. 1061, M. C., the only matter in dispute between the parties was a mere question of costs, and therefore the Court would not entertain the appeal. *Moir* v. *Village of Huntingdon*, 19 S. C. R. 363, followed. *Webster* v. *City of Sherbrooke*, 24 S. C. R. 52, distinguished. *McKay* v. *Township of Hinchinbrooke*, 24 S. C. R. 55.

Way—*Obligation to Repair*—*By-law.*]—In an action brought by the respondent corporation for the recovery of the sum of $262.14 paid out by it for macadam work on a piece of road fronting the appellants' lands, the work of macadamizing the road and keeping it in repair being imposed by a by-law of the municipal council of the respondents, the appellants pleaded the nullity of the by-law. On appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) dismissing the appellants' plea:—

Held, that the appellants' obligation to keep the road in repair under the by-law not being "future rights" within the meaning of sec. 29 (*b*), the case was not appealable. *County of Verchères* v. *Village of Varennes*, 19 S. C. R. 365, followed, and *Reburn* v. *Ste. Anne*, 15 S. C. R. 92, distinguished. Gwynne, J., dissenting. *Dubois* v. *Corporation of Ste. Rose*, 21 S. C. R. 65.

XIII. Insolvency.

Final Judgment.]—A final judgment of the Court of Queen's Bench for Lower Canada (appeal side), upon a claim of a creditor filed with the assignee of an estate under the Insolvent Act of 1875, is not appealable to the Supreme Court of Canada, the right of appeal having been taken away by 40 Vict. ch 41, sec. 28 (D.). *Cushing* v. *Dupuy*, 5 App. Cas. 409, followed. *Seath* v. *Hagar*, 18 S. C. R. 715.

XIV. Leave to Appeal.

Per Saltum.]—Action to replevy from the defendant books which were in his possession as clerk of the plaintiffs, a municipal corporation, he having been dismissed from the office. He refused to give up the books on the ground that his dismissal was illegal. Judgment was given for the plaintiffs at the trial, and affirmed by a Divisional Court, and an application by the defendant for special leave to appeal was refused by the Court of Appeal. The defendant then applied for leave to appeal *per saltum* to the Supreme Court of Canada. The motion was made to the registrar, who dismissed it;

the defendant then appealed without success to a Judge in Chambers; and finally to the full Court:—

Held, that he had failed to shew sufficient cause to justify the Court in granting leave. *Bartram* v. *Village of London West*, 24 S. C. R. 705.

Winding-up Act—*Consent—Time.*]—After a case under the Winding-up Act was argued, the appellant, with the consent of the respondent, obtained from a Judge of the Court below an order to extend the time for bringing the appeal, and subsequently, before the time expired, he got an order from the registrar of the Supreme Court, sitting as a Judge in Chambers, giving him leave to appeal in accordance with sec. 76 of the Winding-up Act, and the order declared that all the proceedings had upon the appeal should be considered as taken subsequent to the order granting leave to appeal. *Ontario Bank* v. *Chaplin*, 20 S. C. R. 152.

XV. Mandamus.

Interlocutory Judgment.]—Interlocutory judgments upon proceedings for and upon a writ of mandamus are not appealable to the Supreme Court under sec. 24 (*g*) of the Supreme and Exchequer Courts Act. The word "judgment" in that sub-section means the final judgment in the case. Strong and Patterson, JJ., dissenting. *Langevin* v. *Les Commissaires d'Ecole pour la Municipalité de St. Marc*, 18 S. C. R. 599.

XVI. Municipal By-laws.

Action for Taxes—*Plea of Invalidity of By-law.*]—*See City of Sherbrooke* v. *McManamy*, 18 S. C. R. 594, *post* 960.

Action to Set Aside.]—The municipality of the county of Verchères passed a by-law or *procès-verbal* defining who were to be liable for the rebuilding and maintenance of a certain bridge. The municipality of Varennes by their action prayed to have the by-law or *procès-verbal* in question set aside on the ground of certain irregularities. The above was maintained and the by-law set aside. On appeal to the Supreme Court of Canada:—

Held, that the case was not appealable and did not come within sec. 29 or sec. 24 (*g*) of the Supreme and Exchequer Courts Act, no future rights within the meaning of the former section being in question, and the appeal not being from a rule or order of a Court quashing or refusing to quash a by-law of a municipal corporation. *County of Verchères* v. *Village of Varennes*, 19 S. C. R. 365.

Action to Set Aside.]—In virtue of a by-law passed at a meeting of the corporation of the city of Quebec, in the absence of the mayor, but presided over by a councillor elected to the chair, an annual tax of $800 was imposed on the Bell Telephone Company of Canada, and a tax of $1,000 on the Quebec Gas Company. In actions instituted by the appellants for the purpose of annulling the by-law, the Court of Queen's Bench for Lower Canada (appeal side) reversed the judgment of the Superior Court and dismissed the actions, holding the tax valid. On appeal to the Supreme Court of Canada:—

Held, that the cases were not appealable, the appellants not having taken out or been refused, after argument, a rule or order quashing the by-law in question within the terms of sec. 24 (*g*) of the Supreme and Exchequer Courts Act providing for appeals in cases of municipal by-laws. *County of Verchères* v. *Village of Varennes*, 19 S. C. R. 365, and *City of Sherbrooke* v. *McManamy*, 18 S. C. R. 594, followed. *Bell Telephone Co.* v. *City of Quebec*, *Quebec Gas Co.* v. *City of Quebec*, 20 S. C. R. 230.

Petition to Quash.]—Proceedings were commenced in the Superior Court by petition to quash a by-law passed by the corporation of the city of Sherbrooke under sec. 4389, R. S. P. Q., which gives the right to petition the Superior Court to annul a municipal by-law. The judgment appealed from, reversing the judgment of the Superior Court, held that the by-law was *intra vires*. On motion to quash an appeal to the Supreme Court of Canada:—

Held, that the proceedings, being in the interest of the public, are equivalent to the motion or rule to quash of the English practice, and therefore the Court had jurisdiction to entertain the appeal, under sub-sec. (*g*) of sec. 24, ch. 135, R. S. C. *City of Sherbrooke* v. *McManamy*, 18 S. C. R. 594, and *County of Verchères* v. *Village of Varennes*, 19 S. C. R. 365, distinguished. *Webster* v. *City of Sherbrooke*, 24 S. C. R. 52.

XVII. Notice of Appeal.

Special Case.]—The judgment upon a "special case" intended by sec. 41 of the Supreme and Exchequer Courts Act, R. S. C. ch. 135, is a judgment on the kind of case well known by that name, and has no reference to the case which, by the Con. Rule 413, is prepared for the purpose of the appeal to the Court of Appeal for Ontario.

An objection to a bond on appeal from the Court of Appeal to the Supreme Court, in an action tried upon pleadings and oral evidence, and which came before the Court of Appeal in the usual way, that notice of appeal was not given within twenty days pursuant to sec. 41, upon the ground that every appeal from the Court of Appeal is "upon a special case," was therefore overruled. *Draper* v. *Badenhurst*, 14 P. R. 376.

XVIII. Parties to Appeal.

Petition in Disavowal.]—Where a petition in disavowal has been served on all parties to the suit, and is only contested by the attorney whose authority is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the appeal. *Dawson* v. *Dumont*, 20 S. C. R. 709.

XIX. Security on Appeal.

Bond—*Action on—Taxation—Ascertainment.*] *See Hager* v. *Jackson*, 16 P. R. 485, *ante* 213.

Bond—*Parties—Condition.*]—In an appeal to the Supreme Court of Canada, although it is not necessary that the appellant should be a party to the appeal bond, if he is made a party and does not execute the bond, the respondent is entitled to have it disallowed.

In an appeal bond, where the object was not only to secure payment of the costs which might be awarded by the Supreme Court of Canada under sec. 46 of R. S. C. ch. 135, but also under sec. 47 (*e*) to procure a stay of execution of the judgment appealed from as to the costs thereby awarded against the appellant, the condition was "shall effectually prosecute the said appeal and pay such costs and damages as may be awarded against the appellant by the Supreme Court of Canada, and shall pay the amount *by the said mentioned judgment* directed to be paid, either as a debt or for damages or costs," etc. :—

Held, that this did not cover the costs awarded against the appellant by the judgment appealed from. *Robinson* v. *Harris*, 14 P. R. 373.

Execution—*Stay—Money in Court—Payment Out.*]—The plaintiffs appealed to the Court of Appeal from a judgment of the High Court dismissing their action with costs, and gave the security for the costs of appeal required by sec. 71 of the Judicature Act, by paying $460 into Court, and also gave the security required by Rule 804 (4), in order to stay the execution of the judgment below for taxed costs, by paying $322.14 into Court. Their appeal was dismissed with costs. Desiring to appeal to the Supreme Court of Canada, they paid $500 more into Court, and this was allowed by a Judge of the Court of Appeal as security for the costs of the further appeal :—

Held, that execution was stayed upon the judgments of the High Court and Court of Appeal until the decision of the Supreme Court.

Construction of secs. 46, 47 (*e*), and 48 of the Supreme and Exchequer Courts Act, R. S. C. ch. 135.

Semble, that payment out of the moneys in Court to the defendant of his costs of the High Court and Court of Appeal, upon the undertaking of his solicitors to repay in the event of the further appeal succeeding, could not properly be ordered. *Kelly* v. *Imperial Loan Co.*, 10 P. R. 499, commented on. *Agricultural Insurance Co. of Watertown, N. Y.* v. *Sargent*, 16 P. R. 397.

Ex Parte Appeal.]—An appeal was sought from the refusal of the Supreme Court of Nova Scotia to admit the appellant as an attorney of the Court. There being no person interested in opposing the application or the appeal, no security for costs was given :—

Held, Gwynne, J., dissenting, that the Court had no jurisdiction to hear the appeal.

Per Ritchie, C.J., and Taschereau, J.—Except in cases specially provided for, no appeal can be heard by this Court unless security for costs has been given as provided for by sec. 46 of the Supreme and Exchequer Courts Act, R. S. C. ch. 135. *In re Cahan*, 21 S. C. R. 100.

See Marsh v. *Webb*, 15 P. R. 64, *ante* 223.

XX. Time for Appealing.

Judgment—*Reference—Judgment on Report—Extension of Time.*]—On the trial in the Exchequer Court in 1887 of an action against the Crown for breach of a contract to purchase paper from the suppliant, no defence was offered, and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the Court, and judgment was given against the Crown for the amount thereby found due. The Crown appealed to the Supreme Court, having obtained from the Exchequer Court an extension of the time for appeal limited by statute, and sought to impugn on such appeal the judgment pronounced in 1887 :—

Held, Gwynne and Patterson, JJ., dissenting, that the appeal must be restricted to the final judgment pronounced in 1891 ; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter unless the time was extended as provided by the statute, and the extension of time granted by the Exchequer Court on its face only referred to an appeal from the judgment pronounced in 1891 :—

Held, per Gwynne and Patterson, JJ., that the judgment given in 1891 was the only judgment given in the suit in respect to the matters put in issue by the pleadings, and on appeal therefrom all matters in issue were necessarily open. *The Queen* v. *Clark*, 21 S. C. R. 656.

See Ontario Bank v. *Chaplin*, 20 S. C. R. 152, *ante* 957.

XXI. Validity of Statutes.

Taxes—*Act of Quebec Legislature.*]—The plaintiffs sued the defendants to recover the sum of $150, being the amount of two business taxes, one of $100 as compounders and the other of $50 as wholesale dealers, under the authority of a municipal by-law. The defendants pleaded that the by-law was illegal and *ultra vires* of the municipal council, and also that the statute 47 Viet. ch. 84 (Q.) was *ultra vires* of the Legislature of the Province of Quebec. The Superior Court held that both the statute and by-law were *intra vires*, and condemned the defendants to pay the amount claimed. On an appeal to the Court of Queen's Bench by the defendants, that Court confirmed the judgment of the Superior Court as regards the validity of the statute, but set aside the tax of $100 as not being authorized. The plaintiffs thereupon appealed to the Supreme Court, complaining of that part of the judgment which declared the business tax of $100 invalid. There was no cross-appeal. On motion to quash for want of jurisdiction :—

Held, that the appeal would not lie, sec. 24 (*g*) of the Supreme and Exchequer Courts Act not being applicable, and the case not coming within sec. 29 of the Act, the amount being under $2,000, no future rights within the meaning of sec. 29 being in controversy, nor any question as to the constitutionality of the Act of the legislature being raised. Strong, J., dissented, on the ground that the judgment appealed from involved the question of the validity of the Provincial Act. *City of Sherbrooke* v. *McManamy*, 18 S. C. R. 594.

XXII. Other Cases.

Court Equally Divided—*Effect of.*]—When the Supreme Court of Canada in a case in

appeal is equally divided, so that the decision appealed against stands unreversed, the result of the case in the Supreme Court affects the actual parties to the litigation only, and the Court, when a similar case is brought before it, is not bound by the result of the previous case. *Stanstead Election Case*, 20 S. C. R. 12.

Judge in Chambers—*Petition—Appeal.*]—By sect. 454 of the charter of the city of Halifax, any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the city engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained, the Supreme Court, or a Judge thereof, may, on petition of the recorder, cause it to be removed.

On appeal from the decision of the Supreme Court of Nova Scotia reversing the judgment of a Judge under this section, an objection was taken to the jurisdiction of the Supreme Court of Canada, on the ground that the petition having been presented to a Judge in Chambers, the matter did not originate in a Superior Court:—

Held, Taschereau, J., dissenting, that the Court had jurisdiction. *Canadian Pacific R. W. Co.* v. *Ste. Thérèse*, 16 S. C. R. 606, and *Virtue* v. *Hayes*, 16 S. C. R. 721, distinguished. *City of Halifax* v. *Reeves*, 23 S. C. R. 340.

Local Judge in Admiralty — *Appeal.*] — *Quære*, per Taschereau, J., as to the jurisdiction of the Court to hear an appeal from the decision of a local Judge in Admiralty. *Churchill* v. *McKay—The Quebec*, 20 S. C. R. 472.

"Proceedings" — *Appeal — Agreement — Money in Court.*]—*See City of Toronto* v. *Toronto Street R. W. Co.*, 15 P. R. 358, *ante* 29.

SURROGATE COURT.

Ancillary Probate.]—A will executed by a person when domiciled in the Province of Quebec, before two notaries there, in accordance with the law of that Province, not acted upon or proved in any way before any Court there, is not within the Act respecting Ancillary Probates and Letters of Administration, 51 Vict. ch. 9 (O.) *In re Maclaren*, 22 A. R. 18.

Removal of Cause.]—Upon an application by certain of the next of kin of an intestate, under sec. 31 of the Surrogate Courts Act, R. S. O. ch. 50, to remove from a Surrogate Court into the High Court a cause in which a contention arose as to the grant of administration, it appeared that the widow and a trust company had petitioned for joint administration of the estate, which was a large one; that the next of kin opposed the petition; that neither widow nor next of kin could, unaided, supply the necessary security; and that there were no creditors:—

Held, that the jurisdiction to award grant, being of a discretionary kind, could be better exercised by the Surrogate Judge, and the cause should not be removed.

The personal disqualification of a Surrogate Judge to pass upon an application, by reason of his interest as a shareholder in a company applicant, is not a ground for removal to the High Court; for he can call in the aid of a neighbouring County Judge.

Where the assets are separable, administration may be granted *quoad, i.e.*, to the widow as to one part, and to the next of kin as to another part, or there may be a joint grant to the widow and next of kin. *Re McLeod*, 16 P. R. 261.

Revocation of Letters of Administration.]—The High Court of Justice for Ontario has no jurisdiction to revoke the grant by a Surrogate Court of letters of administration. *McPherson* v. *Irvine*, 26 O. R. 438.

See EXECUTORS AND ADMINISTRATORS — PROBATE COURT.

TACKING.

See MORTGAGE, XVIII.

TAXATION OF COSTS.

See COSTS, V.—SOLICITOR, III.

TAXES.

See ASSESSMENT AND TAXES.

TELEGRAPH.

Lease of Telegraph Lines—*Disturbance of Lessee's Use—Claim for Reduction of Rent—Quebec Law—Trespass—Trouble de Droit.*]—*See Great North-Western Telegraph Co.* v. *Montreal Telegraph Co.*, 20 S. C. R. 170.

TELEPHONE.

Monopoly.]—A by-law passed by the city council ratified an agreement between the city and a telephone company, providing that no other person, firm or company should, for five years, have any license or permission to use any of the public streets, etc., of the city for the purpose of carrying on any telephone business:—

Held, that this by-law was in contravention of sec. 286 of the Municipal Act, 55 Viet. ch. 42, and was *ultra vires* of the council. *Re Robinson and City of St. Thomas*, 23 O. R. 489.

Service — *Contract.*] — The Bell Telephone Company carried on the business of executing orders by telephone for messenger boys, cabs, etc., which it sold to the Electric Despatch Company, agreeing among other things not to transmit or give, in any manner, directly or indirectly, any orders for messengers, cabs, etc., to any person or persons, company or corporation, except to the Electric Despatch Company. The Great North-Western Telegraph

Company afterwards established a messenger service for the purposes of which the wires of the Telephone Company were used. In an action for breach of the agreement with the Electric Despatch Company and for an injunction to restrain the Telephone Company from allowing their wires to be used for giving orders for messengers, etc.:—

Held, Ritchie, C. J., doubting, that the Telephone Company, being ignorant of the nature of communications sent over their wires by subscribers, did not "transmit" such orders within the meaning of the agreement; that the use of the wires by subscribers could not be restricted, and that the Telephone Company was under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all communications with a view to preventing such orders being given. *Electric Despatch Co. of Toronto* v. *Bell Telephone Co. of Canada*, 20 S. C. R. 83.

See TIMBER AND TREES, II.

TENDER.

See SALE OF LAND, III.

THIRD PARTY.

See PARTIES, VI.

THREATENING LETTER.

See CRIMINAL LAW, IV.

TIMBER AND TREES.

I. CONTRACT FOR SALE.

Crown Timber.]—*See* CROWN LANDS, VI.

Delivery — *Time for Payment.*]—By agreement in writing I. agreed to sell and the V. H. L. Co. to purchase timber to be delivered "free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour, so that the timber may be counted. . . . Settlement to be finally made inside of thirty days in cash, less two per cent. for the dimension timber which is at John's Island:"—

Held, affirming the decision of the Court of Appeal, that the last clause did not give the purchasers thirty days after delivery for payment; that it provided for delivery by vendor and payment by purchasers within thirty days from the date of the contract; and that if purchasers accepted the timber after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance. *Victoria Harbour Lumber Co.* v. *Irwin*, 24 S. C. R. 697.

Standing Timber—*Parol Sale.*]—As a general rule, a contract for the sale of standing timber which is not to be severed immediately is a sale of an interest in land.

Upon a parol sale of timber for valuable consideration, with a parol license to enter upon the land during such time as should be necessary for the purpose of cutting and removing the timber, the defendant during the period allowed by the contract continued to cut and remove, notwithstanding he was notified not to do so:—

Held, in an action of trespass and for damages for timber cut after the notice, that he was at liberty to shew the existence of the parol agreement in justification of what he had done, and under which no right of revocation existed, and to shew the part performance as an answer to the objection founded on the Statute of Frauds. *Handy* v. *Carruthers*, 25 O. R. 279.

Standing Timber—*Removal—Way—"Necessary."*]—The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land, under an agreement which provided among other things that the purchaser should at all times within three years have full liberty to enter upon the lands and to remove the trees and timber in such manner as he might think proper, not interfering with the enjoyment of the plaintiff save in so far as might be necessary. To take timber from the centre of the wooded belt through the woodland to the roads instead of passing over the cleared land would have cost more than the timber was worth:—

Held, that the word "necessary" was to be reasonably construed, and that this timber might be taken across the cleared land. *Stephens* v. *Gordon*, 19 A. R. 176. Affirmed, 22 S. C. R. 61.

Tolls—*Statutory Regulations.*]—*See* TOLLS.

II. PROPERTY IN TREES.

Highway—*Telephone.*]—The plaintiff was the owner of land in the city of Toronto fronting on a street which was an original road allowance. The defendants the Bell Telephone Company, with the assent, but without any express resolution or by-law of the city, or any notice or compensation to the plaintiff, cut off branches overhanging the street from trees growing within the plaintiff's grounds, and also branches of trees growing in the street in front of the plaintiff's ground, alleging that the branches interfered with the use of the wires of a telephone system for police purposes, which they had contracted with the city to maintain. Section 3 of the Tree Planting Act, R. S. O. ch. 201, had not been brought into force in Toronto:—

Held, per Osler and Maclennan, JJ.A., Hagarty, C.J.O., dissenting, that sec. 479 (20) of the Municipal Act, R. S. O. ch. 184, applies only when sec. 3 of the Tree Planting Act, R. S. O. ch. 201, is in force, and that the plain-

tiff had no interest in or title to the trees growing in the street sufficient to enable him to complain of the cutting; but:—

Held, also, per Hagarty, C.J.O., and Osler, J.A., Maclennan, J.A., dissenting, that as the overhanging branches of the trees growing within the plaintiff's grounds were not a nuisance, and in no way interfered with the use of the highway, the defendants had no right to cut them.

In the result, therefore, the judgment of the junior Judge of the county of York was in part affirmed, the damages being reduced by $10. *Hodgins* v. *City of Toronto*, 19 A. R. 537.

Highway—*Telephone.*]—That the ownership of lands adjoining a highway extends *ad medium filum viæ* is a presumption of law only, which may be rebutted, but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway; Gwynne, J., contra.

In construing an Act of Parliament, the title may be referred to in order to ascertain the intention of the legislature.

The Act of the Nova Scotia Legislature, 50 Viet. ch. 23, vesting the title to highways and the lands over which the same pass in the Crown for a public highway, does not apply to the city of Halifax.

The charter of the Nova Scotia Telephone Company authorizing the construction and working of lines of telephone along the sides of, and across and under, any public highway or street of the city of Halifax, provided that in working such lines the company should not cut down nor mutilate any trees:—

Held, Taschereau and Gwynne, JJ., dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees in the street in front of his property while constructing or working the telephone line, there being nothing in the evidence to rebut the presumption of ownership *ad medium* or to shew that the street had been laid out under a statute of the Province or dedicated to the public before the passing of any expropriation Act. *O'Connor* v. *Nova Scotia Telephone Co.*, 22 S. C. R. 276.

TIME.

For Appealing—*See* Appeal, VI.—Company, VIII.—County Court, II.

For Filing Chattel Mortgage—*See* Bills of Sale, VI.

For Making Assessment—*See* Assessment and Taxes, II.

For Moving Against Award—*See* Arbitration and Award, V.

For Payment for Timber—*See* Contract, III.

For Payment of Chattel Mortgage—*See* Bills of Sale, I.

For Performance of Contract—*See* Contract, V.—Specific Performance, III.

For Taking Proceedings under Mechanics' Lien Act—*See* Liens, III.

Day—*Fraction of.*]—Subsequently to the coming into force of the Married Woman's Property Act, R. S. O. ch. 132, a married woman, on the day of entering into a money bond, deposited in her own name in a savings bank a sum of money, which the evidence shewed had been given to her by her husband, but of which, as against him, she had the absolute disposal by his consent and wish:—

Held, that this was sufficient on which to found a proprietary judgment against her, though it was not shewn that the bond was not executed at an earlier hour than that at which the money was deposited. *Sweetland* v. *Neville*, 21 O. R. 412.

Day—*Fraction of.*]—*See* Statutes, VI.

Day—*Non-juridical.*]—It was enacted by sec. 12 of 42 & 43 Viet. ch. 53 (O.) that any municipal elector might demand the annulment of the corporate appropriation for expenditure within three months from the date thereof, on the ground of illegality, but that thereafter the right was prescribed and the appropriation valid:—

Held, that on the expiration of the three months (the last day being non-juridical) the elector's statutory right was at an end, and could not be extended by any procedure clause (*see* sec. 3 of the Civil Procedure Code) which presupposed an existing right of action and regulated its exercise. *Dechêne* v. *City of Montreal*, [1891] A. C. 640.

Day—*Non-juridical*—*Publication of Local Option By-law.*]—*See Brunker* v. *Township of Mariposa*, 22 O. R. 120, *ante* 558.

Year—*School By-law.*]—Sub-section 3 of sec. 81 of the Public Schools Act, 51 Viet. ch. 55 (O.), provides that by-laws passed under the said section for altering, etc., school sections, shall not be passed later than 1st May in the year, and shall not take effect before the 25th December next thereafter:—

Held, that the word "year" as used therein means the calendar year commencing 1st January and ending 31st December, and that a by-law altering certain school sections passed on the 25th September was invalid. *In re Trustees of School Section No. 5 of Township of Asphodel and Humphries*, 24 O. R. 682.

TOLLS.

See Way, IX.

Tim *Regulations—Statute.*]—Inasmuch as the provisions and enactments relating to tolls in 31 Viet. ch. 12 are, in substance and effect, the same as those contained in C. S. C. ch. 28, under which the present regulations relating to timber passing through the slides were made, in virtue of the provisions of sec. 71 of 31 Viet. ch. 12, such regulations are in effect

to be construed as having been made under the later statute. *Merchants' Bank of Canada* v. *The Queen*, 1 Ex. C. R. 1.

Toll Bridge—*Franchise of—Free Bridge—Interference by—Injunction.*]—By 44 & 45 Vict. (Q.) ch. 90, sec. 3, granting to the respondent a statutory privilege to construct a toll-bridge across the Chaudière river in the parish of St. George, it was enacted that "so soon as the bridge shall be open to the use of the public as aforesaid, during thirty years no person shall erect, or cause to be erected, any bridge or bridges or works, or use or cause to be used any means of passage for the conveyance of any persons, vehicles, or cattle, for lucre or gain, across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll bridge or toll bridges, or who shall use or cause to be used, for lucre or gain, any other means of passage across the said river for the conveyance of persons, vehicles, or cattle, within such limits, shall pay to the said David Roy three times the amount of the tolls imposed by the present Act, for the persons, cattle, or vehicles which shall thus pass over such bridge or bridges; and if any person or persons shall, at any time, for lucre or gain, convey across the river any person or persons, cattle or vehicles, within the above mentioned limits, such offender shall incur a penalty not exceeding ten dollars for each person, animal, or vehicle which shall have thus passed the said river; provided always, that nothing contained in the present Act shall be of a nature to prevent any persons, cattle, vehicles, or loads from crossing such river within the said limits by a ford or in a canoe or other vessel, without charge." After the bridge had been used for several years, the appellant municipality passed a by-law to erect a free bridge across the Chaudière river in close proximity to the toll bridge in existence; the respondent thereupon by petition for injunction prayed that the appellant municipality be restrained from proceeding to the erection of a free bridge:—

Held, affirming the judgment of the Court below, that the erection of the free bridge would be an infringement of the respondent's franchise of a toll bridge, and the injunction should be granted. *Corporation of Aubert-Gallion* v. *Roy*, 21 S. C. R. 456.

TORONTO STREET RAILWAY.

See STREET RAILWAYS, II.

TORT.

See CROWN, II.

TOWAGE.

See SHIP, V.

TRADE MARK.

Jurisdiction of Exchequer Court—*Rectification of Register—Infringement.*]—The Court has jurisdiction to rectify the register of trade-marks in respect of entries made therein without sufficient cause either before or subsequent to the 10th day of July, 1891, the date on which the Act 54 & 55 Vict. ch. 35 came into force.

Quære, whether the Court has jurisdiction to give relief for the infringement of a trade mark where the cause of action arose out of acts done prior to the passage of 54 & 55 Vict. ch. 26. *De Kuyper* v. *Van Dulken*, 3 Ex. C. R. 88.

Jurisdiction of Exchequer Court—*Rights of Property—Registration.*]—The questions which the Court has jurisdiction to determine under the Act 53 Vict. ch. 14 are such as relate to rights of property in trade marks, and not questions as to whether or not a trade mark ought not to be registered, or continued on the registry, because it is calculated to deceive the public or for such other reasons as are mentioned in R. S. C. ch. 63, sec. 12. *The Queen* v. *Van Dulken*, 2 Ex. C. R. 304.

Right to Use—*Assignment — Registration—Cancellation.*]—The essential elements of a legal trade mark are (1) the universality of right to its use, *i.e.*, the right to use it the world over as a representation of, or substitute for, the owner's signature; (2) exclusiveness of the right to use it.

2. Where the respondents had obtained the right to use a certain trade mark in the Dominion of Canada only, and had registered the same, and claimants subsequently applied to register it as assignees under an unlimited assignment thereof, made before the date of the instrument under which the respondents claimed title, the prior registration was cancelled. *J. P. Bush Mfg. Co.* v. *Hanson*, 2 Ex. C. R. 557.

Right to Use—*Prior User—Rectification of Register.*]—In the certificate of registration the plaintiffs' trade mark was described as consisting of "the representation of an anchor, with the letters 'J. D. K. & Z.' or, the words 'John DeKuyper & Son, Rotterdam,' etc., as per the annexed drawings and application." In the application the trade mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the letters "J. D. K. & Z." or the words "John DeKuyper, etc., Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels, and other packages containing geneva sold by the plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *fac-simile* of which was attached to the application, but there was no express claim of the label itself as a trade mark. This label was white and in the shape of a heart with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor with the letters "J. D. K. & Z." and the words "John DeKuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva," which it was admitted were common to the trade. The defendants' trade mark was, in the certificate of registration, described as consisting of an eagle having at the feet "V. D. W. & Co.," above the

hequer Court — *Rectifringement.*]—The Court fy the register of traderies made therein with her before or subsequent , 1891, the date on which . 35 came into force. Court has jurisdiction to gement of a trade mark on arose out of acts done 54 & 55 Vict. ch. 26. *De*3 Ex. C. R. 88.

hequer Court — *Rights of*]—The questions which on to determine under 4 are such as relate to trade marks, and not er or not a trade mark ed, or continued on the alculated to deceive the reasons as are mentioned 2. *The Queen* v. *Van*

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· *User—Rectification of* eate of registration the s described as consisting f an anchor, with the letthe words 'John DeKuyete., as per the annexed n." In the application aimed to consist of a n of an anchor inclined bination with the letters ords "John DeKuyper, , it was stated, might be on barrels, kegs, cases, hels, and other packages y the plaintiffs. It was tion that on bottles was bel, a copy or *fac-simile* to the application, but in of the label itself as el was white and in the rnamental border of the label was printed the of the anchor with the and the words "John terdam," and also the nds Geneva," which it non to the trade. The was, in the certificate of s consisting of an eagle D. W. & Co.," above the

eagle being written the words "Finest Hollands Geneva;" on each side were the two faces of a medal, underneath on a scroll the name of the firm "Van Dulken, Weiland, & Co." and the word "Schiedam," and lastly, at the bottom, the two faces of a third medal, the whole on a label in the shape of a heart (le tout sur une étiquette en forme de cœur). The colour of the label was white:—

Held, affirming the judgment of the Exchequer Court, 4 Ex. C. R. 71, that the label did not form an essential feature of the plaintiffs' trade mark as registered, but that, in view of the plaintiffs' prior use of the white heart-shaped label in Canada, the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade mark should be so rectified as to make it clear that the heart-shaped label formed no part of such trade mark; Taschereau and Gwynne, JJ., dissenting on the ground that the white heart shaped label with the scroll and its constituents was the trade mark which was protected by registration, and that the defendants' trade mark was an infringment of such trade mark. *DeKuyper* v. *Van Dulken*, *Van Dulken* v. *DeKuyper*, 24 S. C. R. 114.

Right to Use — *Prior User—Registration—Cancellation.*]—First use is the prime essential of a trade mark, and a transferee must, at his peril, be sure of his title.

(2.) In the year 1885 the respondents, by their corporate title, registered a trade mark, consisting of a label with the name "Snow Flake Baking Powder" printed thereon, in the Department of Agriculture. Some four years after such registration by the respondents, the claimant applied to register the word-symbol "Snow Flake" as a trade mark for the same class of merchandize—stating that he knew of the respondents' registration, and alleging that it was invalid by reason of prior use by him and his predecessors in title. The evidence sustained the claimant's allegation:—

Held, that the word-symbol in question had become the specific trade mark of the claimant by the virtue of first use, and that the registration by the respondents must be cancelled. *Graff* v. *Snow Drift Baking Powder Co.*, 2 Ex. C. R. 568.

See COPYRIGHT.

TRAFFIC ARRANGEMENTS.

See RAILWAYS AND RAILWAY COMPANIES, XV.

TRANSFER OF SHARES.

See COLLATERAL SECURITY—COMPANY, VII.

TREES.

See TIMBER AND TREES, II.

TRESPASS.

I. TO LAND.

Expropriation of Land — *Non-compliance with Statute.*]—Held, per Fournier and Patterson, JJ., that the compulsory powers given to the Government of Canada to expropriate lands required for any public work can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds, and a plan or description filed; if these provisions are not complied with, and there is no order in council authorizing land to be taken when an order in council is necessary, a contractor with the Crown who enters upon the land to construct such public work thereon is liable to the owner in trespass for such entry. *Kearney* v. *Oakes*, 18 S. C. R. 148.

Mortgaged Land — *Estoppel.*]—Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold, though after the trespass and before action brought he has parted with his equity; Gwynne, J., dissenting.

Mortgagees out of possession cannot, after their interest has ceased to exist, maintain an action for such trespass and injury committed while they held the title.

Per Gwynne, J.—A mortgagee in possession at the time the trespass and injury is committed is the only person damnified thereby, and can maintain an action therefor after he has parted with his interest, nor is he estopped therefrom by having consented to a sale to one of the trespassers of the personal property as to which the trespass was committed. The tort-feasors could not set up such estoppel, even though the amount recovered from them with the sum received by such mortgagee for his interest should exceed his mortgage debt. *Brookfield* v. *Brown*, 22 S. C. R. 398.

II. TO PERSON.

Arrest before Indorsement of Warrant—*Subsequent Detention.*]—A warrant for the arrest of the plaintiff, who had made default in paying a fine on conviction for an infraction of the liquor license law, was sent from an outlying county to a city. Before it was indorsed by a magistrate in the city, the plaintiff was arrested there by two of the defendants, the chief constable and a detective, and confined. Some hours after the arrest the warrant was properly indorsed and the detention of the plaintiff was continued until payment of the fine:—

Held, that the only damages recoverable by the plaintiff were for the trespass, up to the time of the backing of the warrant:—

Held, also, that the plaintiff being illegally in custody under a criminal charge, his subsequent detention on a similar charge under a proper warrant was lawful.

Distinction between subsequent civil and criminal proceedings in such cases pointed out. *Shattuck* v. *Hart*, 24 O. R. 528.

Arrest *Malicious Prosecution—Information—Warrant.*] The defendant laid an information charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars, purporting to be made against J. M. in favour of T. A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was under it apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted:—

Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and an action of trespass was not maintainable against the defendant, even upon evidence of his interference with the arrest.

Semble, that if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, an action for malicious prosecution would nevertheless lie. *Anderson* v. *Wilson*, 25 O. R. 91.

Witness—*Arrest—Imprisonment—Assault—Magistrate—Constable.*]—The plaintiff, a barrister, having been subpœnaed to give evidence for the prosecution in a criminal case before a police magistrate, attended at the time named; but, on the case being adjourned, did not then attend, and the case was further adjourned; the prosecutor forthwith laid an information on oath before the magistrate, that the witness was a material one, and that it was probable he would not attend to give evidence: upon which the magistrate issued a warrant under sec. 62, R. S. C. ch. 174, addressed to the chief constable or other police officers, etc., and to the keeper of the common gaol of the county and city, directing them to bring the witness before him on the date of the adjournment, some five days distant. The witness was forthwith arrested by two police officers, and brought to the office of one of the police inspectors, and on his refusing to answer the questions usually put to criminals, except those as to his name and address, the inspector ordered him to be searched, which was done, and his personal property and private memorandum book were taken from him, the latter being opened and read by the inspector. He was then taken to the [illegible] where he remained some twenty minutes, when he was brought before the magistrate, and upon giving his personal undertaking to appear on the day named, he was liberated. In an action against the police magistrate and police inspector:—

Held, by the Common Pleas Division, reversing the judgment of Rose, J., at the trial, that the magistrate, having jurisdiction by virtue of sec. 62 of R. S. C. ch. 174 to issue the warrant, incurred no liability, even though he might have erred as to the sufficiency of the evidence brought before him, and on which he acted.

As to the liability of the inspector the Court was evenly divided, Galt, C.J., being of opinion that his acts, however unreasonable, were done in the execution of his office, and that under sub-sec. 2 of sec. 1, R. S. O. ch. 73, he was protected. MacMahon, J., agreeing with Rose, J., at the trial, was of opinion that there being no authority in the warrant to search and confine, he could not justify thereunder for the excess.

Quære, whether sec. 62 authorizes the issue of the warrant or its enforcement an unreasonable length of time before the day named for the attendance of the witness.

Held, by the Court of Appeal, that where a police magistrate, acting within his jurisdiction under R. S. C. ch. 174, sec. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not, in the absence of malice, liable to damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest.

Judgment of the Common Pleas Division on this point affirmed.

In an action for false imprisonment judgment cannot be entered upon answers to questions submitted to the jury, and a finding, in answer to a question, of a certain amount of damages, is not equivalent to the general verdict, which must be given by them.

The right of police to search or handcuff a person arrested on a warrant to compel attendance as a witness, and the duty of a constable on making the arrest, considered.

Judgment of the Common Pleas Division on this point reversed, Maclennan, J.A., dissenting. *Gordon* v. *Denison*, 24 O. R. 576, 22 A. R. 315.

See Malicious Arrest and Prosecution.

TRIAL.

See New Trial.

I. Jury.

Addresses of Counsel.] — In an action brought against a city corporation for damages for injuries resulting from a defective sidewalk, O. was added as a party defendant, under R. S. O. ch. 184, sec. 531, sub-sec. 4, at the instance of the corporation, who asked a remedy over against him. O. delivered a defence denying

the cause of action, and alleging that if there was any, it was through the neglect of the corporation.

At the trial the Judge ruled that counsel for O. should address the jury before the counsel for the corporation, thus giving the latter the reply as against O.:—

Held, that this ruling was correct.

Per Robertson, J.—As regards the corporation and O., the former stood in the relation of plaintiff, and under these circumstances, evidence having been given by O. to shew that the injury complained of was not caused by his negligence, but by the negligence of the corporation, the latter had the right to address the jury in reply. *Stillaway* v. *City of Toronto*, 20 O. R. 98.

Answers to Questions.]—In an action for false imprisonment, judgment cannot be entered upon answers to questions submitted to the jury, and a finding, in answer to a question, of a certain amount of damages is not equivalent to the general verdict which must be given by them. *Gordon* v. *Denison*, 22 A. R. 315.

Answers to Questions—*Inconsistency.*]—Held, per Robertson, J., that the trial Judge was within his right and duty in sending the jury back to reconsider their findings after pointing out their inconsistency. *Peuchen* v. *Imperial Bank*, 20 O. R. 325.

Answers to Questions—*Inconclusive Findings—Effect of.*]—In an action for slander the jury returned a finding of no damage, but said they could not agree as to whether their verdict should be for the plaintiff or defendant; upon which the trial Judge directed judgment to be entered for the defendant, dismissing the action:—

Held, that the finding of no damage did not dispose of the action, but that there should have been a finding on the charge of guilt; and a new trial was directed. *Wills* v. *Carman*, 14 A. R. 656, considered. *Bush* v. *McCormack*, 20 O. R. 497.

Answers to Questions—*Inconclusive Findings—Effect of.*]—At the trial of an action for malicious prosecution, the jury, in answer to questions, made two findings in favour of the plaintiff, but found that he was entitled to no damages. The trial Judge expressed the opinion that no verdict could be entered for either party, and refused motions for judgment made by both. The plaintiff, treating the trial as void, gave a new notice of trial for a later sittings. A motion by the defendant to set aside this notice was refused by a local Judge and by a Judge of the High Court on appeal. The plaintiff then entered the action for trial, but the presiding Judge refused to try it, holding that it was not properly before him.

Upon appeal by the defendant from the order in Chambers refusing to set aside the notice of trial, and upon motion by the plaintiff by way of appeal from the ruling of the Judge at the second trial, or for leave to move against the finding of no damages at the first trial, notwithstanding that two sittings of the Divisional Court had passed since that finding:—

Held, by the Queen's Bench Division, that, although no judgment could be entered for either party, the findings of fact remained, and neither party could ignore them and proceed to trial again as if they did not exist; the trial Judge could do nothing but order or refuse judgment upon them; it was for the Divisional Court to deal with the action and the findings, either by sending it down for a new trial or by ordering judgment for either party under Rule 755; and, under all the circumstances of this case, the proper course was to give leave to move for a new trial notwithstanding the lapse of time, and upon that motion to set aside the whole of the findings and order a new trial.

R. S. O. ch. 44, sec. 84, and Rules 789 and 792, considered. *Wills* v. *Carman*, 14 A. R. 656, specially referred to. *Stevens* v. *Grout*, 16 P. R. 210. *See* the next case.

Answers to Questions—*Inconclusive Findings—Effect of.*]—This action was tried with *Stevens* v. *Grout*, *supra*, and came before the Common Pleas Division upon the same state of facts as that upon which that action came before the Queen's Bench Division:—

Held, that the judgment of the trial Judge at the first trial was a judgment of the High Court, and, as neither party moved against it, it was a binding adjudication that no verdict could be entered on the findings of the jury, and the Judge at the second trial should have proceeded to try the action; and a motion to the Divisional Court was not necessary. *McDermott* v. *Grout*, 16 P. R. 215.

Answers to Questions—*Inconclusive Findings—Effect of.*]—*See Manitoba Free Press Co.* v. *Martin*, 21 S. C. R. 518, *ante* 742.

Challenge.]—The defendants, having delivered separate defences and being separately represented at the trial, claimed to be entitled under the Jurors Act, R. S. O. ch. 52, sec. 110, to four peremptory challenges each, which, though objected to by the plaintiff, was conceded by the Judge, and the defendants challenged six jurors between them, and the trial proceeded, resulting in a verdict for the defendants:—

Held, upon motion by the plaintiff, that there had been mistrial, and the plaintiff was entitled to a new trial.

Under the above section the defendants were only entitled to four peremptory challenges between them, and, inasmuch as the plaintiff took the objection at the time, he had not waived his right to complain by proceeding with the trial. *Empey* v. *Carscallen*, 24 O. R. 658.

Influencing — *Newspaper Article.*]—During the trial of an action for libel the defendants published in their newspaper a sensational article with reference thereto. The plaintiffs' solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the Court, or take any action with respect to it, and proceeded with the trial to its close, when the jury brought in verdicts for the defendants.

Upon a motion for a new trial upon the ground of improper conduct towards and undue influence upon the jury:—

Held, that the objection was too late. *Tiffany* v. *McNee*, *Metcalf* v. *McNee*, 24 O. R. 551.

Verdict—*Dispersal—Waiver.*]—Where a jury were allowed to disperse without arriving at a verdict, but on reassembling in the jury box next morning were treated by Judge and counsel as the same jury, and being interrogated declared themselves agreed upon one of several issues in the action, but not upon the others, and the Judge recorded their verdict on the one issue, and discharged them :—

Held, that all irregularities in regard to the dispersal over night had been waived, and the issue upon which the jury had agreed must upon any further prosecution of the litigation be regarded as having been fully disposed of by the verdict. *Coleman* v. *City of Toronto*, 23 O. R. 345.

Withdrawal of Case from Jury—*Division Court—Question of Law.*]—When an issue arises on the plea of *res judicata*, the identity of the facts in the former case with those in the existing case is a matter for the jury when the trial is by a jury in a Division Court. In a case in a Division Court where the defence of *res judicata* had been raised, and in which a jury notice had been given, the Judge determined the case himself, and refused to allow it to be tried by a jury :—

Held, that he had no jurisdiction to do so, and that a mandatory order must go to compel him to try the case in accordance with the practice of the Court. *In re Cowan* v. *Affie*, 24 O. R. 358.

Withdrawal of Case from Jury—*Malicious Prosecution—Part of Charge.*]—In an action for malicious prosecution of a charge of theft of several articles, the trial Judge held that there was no reasonable and probable cause for charging the theft of some of the articles, and withdrew the case as to them from the jury, but held otherwise as to the other articles, and directed the jury that the fact that there was reasonable and probable cause to charge the theft of some of the articles only bore upon the question of damages ; and the jury found a verdict for the plaintiff :—

Held, that there was no misdirection.

Per Meredith, J., dissenting, that if the ruling of the trial Judge were right, the damages were excessive, and apparently assessed under a misunderstanding of the effect of such ruling ; that the trial Judge could not in any case rightly have ruled as he did without first having findings of the jury upon certain material facts ; that there had been a mistrial, and that there ought to be a new trial.

Johnstone v. *Sutton*, 1 T. R. 547, considered and distinguished. *Reed* v. *Taylor*, 4 Taunt. 616, followed. *Wilson* v. *Tennant*, 25 O. R. 339.

Withdrawal of Case from Jury—*Negligence—Consent—Reference to Court.*]—On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing, whereby the plaintiff was struck by the engine and hurt, the case was withdrawn from the jury by consent of counsel for both parties and referred to the full Court with power to draw inferences of fact, and on the law and facts either to assess damages to the plaintiff or enter a judgment of nonsuit. On appeal from the decision of the full Court assessing damages to the plaintiff :—

Held, Gwynne and Patterson, JJ., dissenting, that as by the practice in the Supreme Court of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the Court by consent of parties, the full Court in considering the case pursuant to the agreement at the trial acted as a quasi-arbitrator, and its decision was not open to review on appeal as it would have been if the judgment had been given in the regular course of judicial procedure in the Court. *Canadian Pacific R. W. Co.* v. *Fleming*, 22 S. C. R. 33.

II. Jury Notice.

Filing—*Time — Allowance.*] — Where a jury notice is served in due time, but by inadvertence is filed too late to comply with R. S. O. ch. 44, sec. 78 (2), there is power to make an order allowing it to stand as a good notice ; and such an order should be made if the case is one proper to be tried by a jury. *Macrae* v. *News Printing Co.*, 16 P. R. 364.

Service—*Time—Striking Out.*] — The plaintiffs having on the 31st October, 1890, served notice of trial for a non-jury sittings to be held on the 17th November, 1890, the defendant, on the 10th November, 1890, served a jury notice :—

Held, that this notice was bad ; for it was not served at least eight days before the sittings at which the action was to be tried, as required by R. S. O. ch. 44, sec. 78, sub-sec. (2). *McBride* v. *Carroll*, 14 P. R. 70.

Striking Out — *Discretion.*] — A Judge in Chambers or the Master in Chambers has jurisdiction under sec. 80 of the Judicature Act, R. S. O. ch. 44, to strike out a jury notice where it has been regularly served ; but the jurisdiction should not be exercised, because the exercise of it will hamper the discretion of the trial Judge. *Bristol and West of England Loan Co.* v. *Taylor*, 15 P. R. 310.

Striking Out — *Discretion — Irregularity — Service—Time.*]—Since the passing of the Rules of 4th January, 1894, providing for the holding of separate jury and non-jury sittings for the trial of actions, it is desirable to have the question whether an action is to be tried with or without a jury settled at as early a stage as possible.

A Judge in Chambers has full discretion under sec. 80 of the Judicature Act, R. S. O. ch. 44, to order that an action shall be tried without a jury, and that discretion is not lightly to be interfered with.

And where a Judge in Chambers reversed an order of a local Judge, and struck out a jury notice in an action for an injunction to abate a nuisance and for damages, his order was affirmed on appeal :—

Held, per Robertson, J., in Chambers, that the action was one within the exclusive jurisdiction of the Court of Chancery before the Administration of Justice Act, 1873, and could also be more conveniently tried without a jury.

Quære, also per Robertson, J., whether a defendant can properly give a jury notice before delivery of his statement of defence. *Lander* v. *Didmon*, 16 P. R. 74.

Striking Out—*Irregularity.*]—An action for an injunction and to establish a will and for the construction of the will and an account is one that was peculiarly within the exclusive jurisdiction of the Court of Chancery prior to the Administration of Justice Act of 1873, and should, therefore, be tried without a jury, unless otherwise ordered, by virtue of sec. 77 of the Judicature Act, R. S. O. ch. 44; and a jury notice given in such an action will be struck out. *Re Lewis, Jackson* v. *Scott*, 11 P. R. 107, followed. *McGill* v. *McDonell*, 14 P. R. 483.

Striking Out—*Irregularity.*]—Where equitable issues are raised in a common law action, a jury notice is irregular under the Ontario Judicature Act, R. S. O. ch. 44, sec. 77, and Rules 677 and 678, and will be struck out. *Baldwin* v. *McGuire*, 15 P. R. 305.

III. Notice of Trial.

Abandonment—*Costs.*]—Where one of several defendants gives notice of trial, and afterwards, becoming aware that the action is not at issue against the other defendants, abandons his notice, he cannot tax the costs of it against the opposite party. *Strachan* v. *Rattan*, 15 P. R. 109.

Close of Pleadings.]—On the last day for delivering the statement of defence, which was also the last day for giving notice of trial for a sittings of the Court at which the plaintiff wished to go down, the plaintiff, without waiting for the statement of defence, delivered a joinder of issue and served notice of trial before two o'clock in the afternoon. Before three o'clock the same day the defendants delivered their defence. The defendants were in no default:—

Held, that the notice of trial, being delivered before the close of the pleadings, was irregular under Rule 654, and should be set aside. *Broderick* v. *Broatch*, 12 P. R. 561, distinguished. *McIlroy* v. *McIlroy*, 14 P. R. 264.

Close of Pleadings.]—A defendant by simply taking issue upon the statement of claim closes the pleadings, and may then serve notice of trial. *Hare* v. *Cawthrope*, 11 P. R. 353, followed. *Malcolm* v. *Race*, 16 P. R. 330.

Close of Pleadings.]—A pleading delivered by the defendant to a counterclaim, in answer thereto, whether by the original plaintiff or by added defendants, which denies the allegations in the counterclaim, puts the plaintiff to the proof thereof, and submits that the counterclaim should be dismissed, is not a joinder of issue, but a statement of defence to the counterclaim; the plaintiff by counterclaim has by the Rules three weeks to reply thereto; and the pleadings, at least *quoad* the counterclaim, are not closed until after the lapse of three weeks, or until the plaintiff by counterclaim has joined issue.

Notice of trial set aside where given by the original plaintiffs after the lapse of four days from the delivery of such a pleading, no subsequent pleading having been delivered.

Construction of Rules 379-383. *Hare* v. *Carthrope*, 11 P. R. 353, distinguished. *Irwin* v. *Brown*, 12 P. R. 639, overruled.

Quære, whether "plaintiff" in Rule 381 does not include a plaintiff by counterclaim. *Irwin* v. *Turner*, 16 P. R. 349.

Close of Pleadings—*Vacation.*]—A party to an action has the right, notwithstanding the insertion in Rule 484, by Rule 1331, of the words "or of the Christmas vacation," to deliver a pleading during such vacation; and a notice of trial given therein is regular.

Where a pleading is amended under an order giving leave to amend, Rule 427 does not apply; and, under Rule 392, when the amendments allowed by the order have been made or the time thereby limited for making them has elasped, the pleadings are in the same position as to their being closed as they were in when the order was made. *Thompson* v. *Howson*, 16 P. R. 378.

Indemnity—*Question between Co-defendants.*]—Rule 328 is applicable where a defendant claims indemnity or relief over against a co-defendant. And where such a claim was made against a co-defendant who had not appeared or defended the plaintiff's claim:—

Held, that an order was properly made for the trial of the question between the co-defendants at the same time and place as the plaintiff's claim, notwithstanding that the time for pleading to the claim for relief over had not expired, and that it was at the date of the order too late to give the usual ten days' notice of trial. *Walker* v. *Dickson*, 14 P. R. 343.

Mistake in Date.]—The plaintiffs on the 31st October, 1890, served notice of trial in these words: "Take notice of trial of this action at Osgoode Hall, at the Chancery Sittings, for the 17th day of October, 1890." A sittings of the High Court for trials, to be held by a Judge of the Chancery Division, at Osgoode Hall, had been fixed for the 17th November, 1890:—

Held, that the notice was sufficient; for it gave such notice as imparted knowledge. *McBride* v. *Carroll*, 14 P. R. 70.

Next Sitting of the Court.]—The plaintiff gave notice of trial for the Toronto Assizes, which was earlier than the Chancery Sittings, and the defendants gave notice of trial for the Chancery Sittings. The actions could properly have been tried at either. In consequence of the state of the Assize docket it seemed probable that the actions would really be sooner tried if set down for the Chancery Sittings:—

Held, that the Assizes was, and the Chancery Sittings was not, "the next sitting of the Court," and the defendants were, therefore, not within their right, under Rule 654, in giving notice of trial for the latter. *Hogaboom* v. *Lunt*, *Hogaboom* v. *McDonald*, 14 P. R. 480.

Next Sitting of the Court—*Duty of Defendant Giving Notice.*]—Under Rule 654 the defendant has a right to give notice of trial for the next sitting of the Court, and, if such notice is regular, the plaintiff cannot interfere with such right by giving notice for a more distant sitting.

It is the duty of a defendant, setting a case down for trial, to give notice of trial to all the other parties; and if some of them are defendants who have not appeared, and it is necessary to give them notice of motion for judgment,

such notice should be for the same time and place as the notice of trial. *McGill* v. *McDonell*, 14 P. R. 483.

Setting Aside—*Application of One Defendant—Notice to the Other—Costs.*]—Where there were two defendants and notice of trial was given by the plaintiff to both, and set aside upon the application of one without notice to or knowledge of the other, who attended with his witnesses at the time and place named in the notice:—

Held, that the defendant who moved against the notice of trial was not bound to give the other defendant notice of the motion; that it was the duty of the plaintiff, if he desired to protect himself, to notify that defendant that the notice had been set aside; and, therefore, the plaintiff should pay the costs of the day. *Knight* v. *Town of Ridgetown*, 14 P. R. 81.

IV. Separate Questions in Same Action.

Account—*Preliminary Trial of Right to.*]—Where the plaintiff claimed a declaration of the right of himself and all other persons insured in the temperance section of the defendant company to the profits earned by that section, payment thereof, and an account and apportionment thereof:—

Held, that upon the mere statement of the plaintiff in pleading that he was the holder of a policy entitling him to share in certain profits of the company, and without any proof of the statement, the Court, in its discretion, should not require the company to produce and lay open to him all their books of account and the papers relating to them; but it was a proper case in which to permit the defendants to apply under Rule 655 for an order for a preliminary trial of the plaintiff's right to require an account, and to postpone discovery of the books until after such trial. *Graham qui tam* v. *Temperance and General Life Assurance Co. of North America*, 16 P. R. 536.

Indemnity—*Question between Co-defendants.*]—*See Walker* v. *Dickson*, 14 P. R. 343, *ante* 978.

Settlement—*Validity.*]—The validity of a settlement of a pending action may be tried in such action, if pleaded in bar. In this case the Judge tried the question as to the settlement without the assistance of the jury, although the other questions in the action were left to the jury. *Johnson* v. *Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408.

Settlement—*Validity.*]—In an action for damages for negligence, whereby the plaintiff was injured in alighting from a train, the defendants denied negligence and pleaded contributory negligence, and also a payment of $10 to the plaintiff before action and a receipt in writing signed by him therefor, "in lieu of all claims I might have against said company on account of an injury received . . by reason of my stepping off a train . . ; such act being of my own account, and not in consequence of any negligence or otherwise on behalf of such railway company or any of its employees." The plaintiff replied that if he signed the receipt, he was induced to do so by fraud and undue influence:—

Held, by the Queen's Bench Division, that the issue raised by the document was not a distinct issue, but rather a matter of evidence upon the issues of negligence and contributory negligence, and should have been submitted to the jury, and not separately tried by the Judge:—

Held, by the Court of Appeal, reversing this decision, that the issue might properly be tried by the Judge, and need not necessarily be left to the jury. *Haist* v. *Grand Trunk R. W. Co.*, 26 O. R. 19, 22 A. R. 504.

See Parties, VI.

V. Stay of Trial.

Appeal from Order Directing New Trial.—The Court may in a proper case stay the trial of an action pending an appeal to the Court of Appeal from an order directing a new trial, but only under special circumstances.

It is not a ground for a stay that in the event of an appeal being successful the costs of the new trial will be thrown away, and that one party will be in danger of losing such costs, the other not being a person of means; and it is not desirable that the trial should be delayed, to the possible prejudice of a party by the loss of testimony. *Arnold* v. *Toronto R. W. Co.*, 16 P. R. 394.

Appeal from Order Directing New Trial.]—A second trial of an action was stayed pending an appeal to the Court of Appeal from the order directing such trial, where the principal question upon the appeal was as to the proper method of trial, and the appellants had been diligent in prosecuting the appeal and there was no suggestion of any possible loss of testimony. *Arnold* v. *Toronto R. W. Co.*, 16 P. R. 394, distinguished. *Haist* v. *Grand Trunk R. W. Co.*, 16 P. R. 448.

VI. Trial Judge.

Consulting Experts.]—An action for damages caused by collision between two vessels was tried without a jury, and after the evidence had been taken, the trial Judge, with the consent of both parties, consulted two master mariners, and adopted as his own their opinion, based on a consideration of conflicting testimony as to the responsibility for the collision:—

Held, that this was a delegation of the judicial functions; and a new trial was ordered.

The scope of Con. Rule 207, as to calling in the assistance of experts, considered. *Wright* v. *Collier*, 19 A. R. 298.

Observations to Jury.]—Per Ritchie, C.J.—The Supreme Court of Canada, as an appellate Court for the Dominion, should not approve of such strong observations being made by a Judge as were made in this case, in effect charging upon the defendants fraud not set out in the pleadings, and not legitimately in issue in the cause. *Hardman* v. *Putnam*, 18 S. C. R. 714.

Power to Refer.]—The right of the trial Judge to refer the question of damages as a question arising in the action, under sec. 101 of the Judicature Act, is indisputable, at all events as a matter of discretion and subject to review; and it is for the party objecting to the reference to shew that the discretion has been wrongly exercised.

And, where, in an action for damages for injury to the plaintiff's land, on the bank of a navigable river, and to his business as a boatman, by the acts of the three several defendants, who owned saw-mills higher up on the stream, in throwing refuse into it, it appeared that the plaintiff's title to relief and the liability of the defendants had been established in a former action, and the trial Judge heard the case only so far as to satisfy himself that the plaintiff had established a *primâ facie* case on the question of damages, and directed a reference to assess and apportion them among the defendants, reserving further directions and costs:—

Held, that there was no miscarriage, and the discretion of the trial Judge should not be overruled. *Ratté* v. *Booth*, 16 P. R. 185.

Refusal to Try Action—*State of Pleadings.*] By their statement of claim the plaintiffs alleged themselves to be creditors for wages of two of the defendants, and they sought relief against the third defendant only as having obtained certain assets from the other two, either fraudulently or upon a trust to pay the plaintiffs' claims. In their reply they set up that they were creditors of the third defendant himself, upon the ground that he was really the person who hired them. There was no subsequent pleading:—

Held, that the reply was a direct violation of Rule 419; and that the trial Judge was within his right in refusing, in his discretion, to try the action until the issues were properly presented upon the pleadings, and in directing that the costs of the postponement should be borne by the plaintiffs.

No opinion expressed as to whether a Divisional Court had power to review such a ruling. *Hurd* v. *Bostwick*, 16 P. R. 121.

VII. Venue.

1. *Application to Change.*

Convenience—*Cause of Action.*]—In an action to establish a right of way over land in the county of Wentworth, the venue was changed from Brantford to Hamilton, it appearing that there was a slight preponderance of convenience in favour of Hamilton:—

Held, that the facts that the subject matter of the litigation was situate in the county of Wentworth, and that a view by the jury might be necessary, were facts to be considered in fixing the place of trial. *Odell* v. *Mulholland*, 14 P. R. 180.

Convenience—*Cause of Action.*]—Where the balance of convenience was in favour of a trial of an action at Pembroke rather than at Cornwall, where the plaintiffs laid the venue, it was changed to Pembroke:—

Held, that had the scales been more evenly balanced than they were, the fact that the cause of action arose in the county of Renfrew should decide the question in favour of Pembroke, the county town of Renfrew. *Croil* v. *Russell*, 14 P. R. 185.

Convenience—*Fair Trial — Jury — Trial Judge.*]—The plaintiff was a settler in the district of Muskoka, and the defendant a timber licensee. The question of fact between them was whether certain timber was the property of the plaintiff or of the defendant. The defendant applied to have the venue changed from Muskoka on the ground that the jury would be largely drawn from the settler class, and that he believed he would not have a fair trial:—

Held, that this was not a ground for change of venue, and any possible injustice to the defendant would be prevented by the trial Judge, who would have a discretion as to the mode of trial. *Unger* v. *Brennan*, 14 P. R. 294.

Convenience—*Preponderance—Leave to Appeal.*]—The question of changing the venue is to a great extent a matter of discretion. The present Rule 653 has not made any substantial change in the practice; and an overwhelming preponderance of convenience in favour of a change is still necessary. *Shroder* v. *Myers*, 34 W. R. 261; *Power* v. *Moore*, 5 Times L. R. 586; and *Bridcut* v. *Duncan*, 7 Times L. R. 514, referred to.

But where the venue had been changed by an order of the Master in Chambers, affirmed by a Judge in Chambers and a Divisional Court, the Court of Appeal, though not satisfied that there was an overwhelming preponderance of convenience in favour of a change, refused to interfere with the discretion exercised, by granting leave to appeal. *Peer & Co.* v. *North-West Transportation Co.*, 14 P. R. 381.

Convenience — *Preponderance — Witnesses.*] —Upon a motion to change the venue it is necessary to shew an overwhelming preponderance of convenience in favour of the change. *Peer* v. *North-West Transportation Co.*, 14 P. R. 381, followed.

Where the defendant moved to change the place of trial from Berlin to Belleville, shewing that the saving of expense to him, if the case was tried at Belleville, would be about $40, and that there were two or three more witnesses at Belleville than at Berlin, and the cause of action arose at Belleville, the motion was refused:—

Held, that the question whether it would be personally more inconvenient for the plaintiffs' witnesses to go to Belleville than for the defendant's witnesses to go to Berlin, was not one that could be considered. *Berlin Piano Co.* v. *Truaisch*, 15 P. R. 68.

Convenience—*Refusal to Interfere—Apportionment of Costs.*]—Having regard to the difficulty of deciding upon contradictory affidavits whether it is proper in any case to order a change of the place of trial, and to the unsatisfactory nature of the practice and the conflicting decisions upon the question of change of venue, it is better to refuse applications for change of venue, and to leave the trial Judge to apportion the costs so as to do justice, if it appears to him that the expense has been in-

creased by the plaintiff's choice of a place of trial. *Roberts* v. *Jones* and *Willey* v. *Great Northern R. W. Co.*, [1891] 2 Q. B. 194, followed. *McArthur* v. *Michigan Central R. W. Co.*, 15 P. R. 77.

Expense—*Convenience — Preponderance.*]—The decided cases have not yet entirely forbidden a change of the place of trial.

And where the cause of action arose in the county of Brant, the plaintiff and defendants resided therein, the defendants swore to thirteen material and necessary witnesses all residing in the county of Brant and convenient to Brantford, the county town, and it was not disputed by the plaintiff that, if he had to call any witnesses at all, they would be persons residing at or near Brantford; the place of trial was changed by order from Hamilton, which was named by the plaintiff, to Brantford:—

Held, that, although the difference in expense was not considerable, the great preponderance of convenience to witnesses and parties was in favour of Brantford. *Brethour* v. *Brooke*, 15 P. R. 205.

Expense—*Injury—Convenience.*]—The place of trial of an action will not be changed unless the defendant shews that some serious injury and injustice to his case will arise by trying it where the plaintiff proposes to have it tried. The question of injury is one of degree, in which the elements of expense and convenience are to be considered.

And where the extra expense could not exceed $15, and the place proposed by the plaintiffs was not far from that proposed by the defendant, a motion to change the venue was refused. *Dowie* v. *Partlo*, 15 P. R. 313.

Illness of Witness—*Expediting Trial—Costs.*]—The place of trial of an action may be changed for the purpose of expediting the trial.

And where the plaintiffs named Barrie as the place of trial, and the defendants had it changed to Toronto, and, through no fault of the parties, the action was not tried at the spring Sittings there, nor at Barrie under an alternative order, it was, on the application of the plaintiffs, changed to Bracebridge, where a summer Sittings had been appointed, a witness for the plaintiffs being so dangerously ill that he might die at any moment, and there being no summer Sittings at Toronto or Barrie.

Costs were not given against the plaintiffs, as they were not in fault.

Bleakley v. *Easton*, 9 U. C. L. J. O. S. 23; *Mercer* v. *Voght*, 4 U. C. L. J. O. S. 47; and *McDonell* v. *Provincial Ins. Co.*, 5 U. C. L. J. O. S. 186, specially referred to. *Mercer Co. (Limited)* v. *Massey-Harris Co. (Limited)*, 16 P. R. 171.

Onus as to Convenience—*Witnesses.*]—The plaintiff has the right to select the place of trial of the action, and the onus is upon the defendant to shew that the preponderance of convenience is against the place so selected.

Per Meredith, C. J.—It would be more satisfactory if the practice were that *primâ facie* the action should be tried in the county where the cause of action arose, leaving the onus upon the plaintiff to shew a preponderance in favour of the place selected by him; but the contrary practice is well settled.

Per Rose, J.—The Court will not, upon an application to change the venue, enter into an inquiry as to the personal inconvenience of witnesses. *Standard Drain Pipe Co. of St. John's, P.Q.*, v. *Town of Fort William*, 16 P. R. 404.

Preponderance of Convenience—*Appeal—New Material—Change of Circumstances.*]—The plaintiff's right to select the place of trial is not lightly to be interfered with, where it has not been vexatiously chosen.

And where the defendants in moving to change the venue to the county where the cause of action arose did not shew considerable preponderance of convenience in favour of the change, their application was refused; and the refusal was affirmed on appeal to a Divisional Court:—

Held, also, that the appeal must be dealt with on the facts as they were exhibited before the Master and Judge in Chambers, although since their orders the trial had been postponed from the spring to the autumn; the Court ought not to look at new material, nor listen to suggestions of possible changes, unless, in a proper case, to allow a new substantive application to be made. *Halliday* v. *Township of Stanley*, 16 P. R. 493.

Residence of Parties—*Cause of Action—"Good Cause."*]—By sec. 21 of 58 Vict. ch. 13 (O.), it is provided that every action in the High Court shall be tried in the county in which the cause of action arises, in case all the parties reside in that county, provided that, "for good cause shewn," a Judge may order the action to be tried in another county:—

Held, that this applied to an action pending before it was passed; and that where the cause of action arose and all the parties resided in one county, a very strong case, which had not been made out, would have to be made before a trial in another county could be ordered. *Pollard* v. *Wright*, 16 P. R. 505.

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2. *Local Venue.*

Ejectment.]—The indorsement on a writ of summons, issued in the district of Thunder Bay after the passing of 57 Vict. ch. 32 (O.), shewed that the claim was for cancellation of a lease of a mining location in the district of Rainy River, for possession of the location, and for an injunction restraining the defendant from entering thereon:—

Held, that the action was not one of ejectment within the meaning of Rule 653, and therefore the venue was not local, and it was not necessary that the writ should be issued by the local Registrar at Rat Portage under sec. 3 of the Act. *Kendell* v. *Ernst*, 16 P. R. 167.

Replevin—*Tax Collector—County Court.*]—*See Howard* v. *Herrington*, 20 A. R. 175, *post* 985.

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3. *Venue in County Court Actions.*

Application to Change—*Cause of Action—Convenience—Appeal.*]—Where an application is made to the Master in Chambers, under Rule

1260, to change the place of trial in a County Court action, no appeal lies from his order thereon to a Judge in Chambers; and no appeal lies from the decision of a Judge in Chambers to a Divisional Court.

The action was for damages for breach of contract, and the breach was at Pembroke, which the plaintiff named as the place of trial. The defendant moved to change it to Toronto:—

Held, that the action would be more conveniently tried at Pembroke, and the plaintiff should be allowed to retain the venue there, although the defendant swore that he had a much larger number of witnesses at Toronto than the plaintiff had at Pembroke. *McAllister* v. *Cole*, 16 P. R. 105.

Application to Change — *Intituling of Papers.*]—Where a motion is made to a Judge of the High Court or the Master in Chambers under Rule 1260 to change the venue in a County Court action, the papers should not be intituled in the High Court of Justice, but in the County Court. *Ferguson* v. *Golding*, 15 P. R. 43.

Local Venue—*Replevin—Tax Collector.*]—A tax collector sued for damages in respect of acts done by him in the execution of his duty is entitled to the benefit of R. S. O. ch. 73, and under sec. 15 of that Act, and sec. 4 of R. S. O. ch. 55, a County Court action against him for replevin of goods seized by him, and for damages for malicious seizure, must be brought in the county where the seizure and alleged trespass took place.

The Consolidated Rules as to venue do not override these statutory provisions. *Legacy* v. *Pitcher*, 10 O. R. 620, distinguished. *Arscott* v. *Lilley*, 14 A. R. 283, applied. *Howard* v. *Herrington*, 20 A. R. 175.

TRUSTS AND TRUSTEES.

See Costs, VI.—Executors and Administrators — Fraudulent Conveyance—Guaranty and Indemnity.

I. Accounts.

Jurisdiction of Probate Court.]—A Court of Probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other Court, and a Court of Equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court. *Grant* v. *MacLaren*, 23 S. C. R. 310.

II. Advice of Court.

Litigation.]—Where it is plain that a dispute can be settled only by litigation, it is not necessary for a trustee to ask the advice of the Court before defending. *In re Williams*, 22 A. R. 196.

III. Appointment of Trustees.

Security—*Guardian of Infant—Insurance Moneys.*]—An infant was entitled to share in certain insurance moneys accruing under a policy upon the life of her deceased father. The infant lived with her mother in a foreign state, and the mother had there been appointed by a Surrogate Court guardian of the infant, and had given security to the satisfaction of that Court. The mother petitioned the High Court to be appointed trustee under R. S. O. ch. 136, sec. 12, to receive the infant's share of the insurance moneys without security:—

Held, that the security given by the petitioner in the foreign Court would not attach to her appointment as trustee under the Act; and the Court declined to appoint her unless she furnished the necessary security here. *Re Thin*, 10 P. R. 490, followed. *Re Andrews*, 11 P. R. 199, not followed. *Re Slosson*, 15 P. R. 156.

Security—*New Trustee.*]—A new trustee appointed by the Court in the place of one appointed by will is not required to give security for the due performance of the trusts. *O'Hara* v. *Cuthbert*, 1 Ch. Chamb. R. 304, followed. *Re Helps Estate*, 15 P. R. 7.

Vesting of Estate—*New Trustees.*]—Where an appointment of new trustees is duly made under R. S. O. 1887 ch. 110, the legal estate, by virtue of sec. 4, vests in the new trustees so appointed, even though it was not vested in the parties making the appointment. *In re Hunter* v. *Patterson*, 22 O. R. 571.

See Dodds v. *Ancient Order of United Workmen*, 25 O. R. 570, *ante* 528.

IV. Compensation to Trustees for Services.

Will—*Appointment.*]—*Semble*, that the limitation of a will as to the amount to be paid for the services of the original trustees under it does not apply to a trustee afterwards appointed by the Court, at the instance of the *cestui que trust*. *Williams* v. *Roy*, 9 O. R. 534, distinguished. *Freeborn* v. *Vandusen*, 15 P. R. 264.

V. Evidence of Trust.

Deed—*Undisclosed Trust—Parol Evidence—Finding of Fact—Appeal.*] Suit to enforce an alleged trust in a deed absolute on its face, or, in the alternative, to have the property reconveyed or sold according to the terms of the alleged agreement.

Parol evidence was given at the trial to establish the trust, and its existence was found as a fact by the trial Judge, who made a decree ordering the property to be sold and the proceeds applied according to the agreement set up by the plaintiff. The decree was affirmed by the Supreme Court of British Columbia *in banco*:—

Held, that the fact of the existence of the trust having been found by the trial Judge, and his finding affirmed by the full Court, it should not be disturbed on this further appeal. *Bowker* v. *Laumeister*, 20 S. C. R. 175.

Deed—*Undisclosed Trust—Statute of Frauds.*]—The property of M. having been advertized for sale under power in a mortgage, his wife arranged with the mortgagee to redeem it by making a cash payment and giving another mortgage for the balance. To enable her to pay the amount, B. agreed to lend it for a year, taking an absolute deed of the property as security and holding it in trust for that time. A contract was drawn up by the mortgagee's solicitor for a purchase by B. of the property at the agreed price, which B. signed, and he told the solicitor that he would advise him by telephone whether the deed would be taken in his own name or his daughter's. The next day a telephone message came from B.'s house to the solicitor, instructing him to make the deed in the name of B.'s daughter, which was done, and the deed was executed by M. and his wife, and the arrangement with the mortgagee carried out. Subsequently B.'s daughter claimed that she had purchased the property absolutely, and for her own benefit, and an action was brought by M.'s wife against her and B. to have the daughter declared a trustee of the property, subject to repayment of the loan from B., and for specific performance of the agreement. The plaintiff in the action charged collusion and conspiracy on the part of the defendants to deprive her of the property, and, in addition to denying that charge, the defendants pleaded the Statute of Frauds:—

Held, affirming the decision of the Court of Appeal, 19 A. R. 602, Strong, J., dissenting, that the evidence proved that his daughter was aware of the agreement made with B., and the deed having been executed in pursuance of such agreement, she must be held to have taken the property in trust, as B. would have been if the deed had been taken in his name, and the Statute of Frauds did not prevent parol evidence being given of the agreement with the plaintiff. *Barton* v. *McMillan*, 20 S. C. R. 404.

Insurance Moneys—*Declaration of Trust—Incompleteness.*]—*See Kech* v. *Moses*, 22 O. R. 307, *ante* 525.

VI. Liability of Trustees for Negligence.

Building—*Want of Repair—Personal Liability.*]—Dame A. T. sued J. F. and M. W. F. personally, as well as in their quality of testamentary executors and trustees of the will of the late J. F., claiming $4,000 damages for the death of her husband, who was killed by a window falling on him from the third storey of a building, which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F., and his children, for whom the said J. F. and M. W. F. were also trustees. The judgment of the Courts below held the appellants liable in their capacity of executors of the general estate and trustees under the wills:—

Held, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair, as well personally as in their quality of trustees (*héritiers fiduciaires*) for the benefit of G. F.'s children, but were not liable as executors of the general estate. *Ferrier* v. *Trépannier*, 24 S. C. R. 86.

VII. Mortgage of Trust Estate.

Covenant for Payment—*Personal Liability of Trustee.*]—Where a party holding land as a trustee, at the request of the beneficial owners, and without any consideration to him therefor, or intention to become personally liable for the benefit of such owners, executed a mortgage on the land, the mortgage, without his knowledge, containing a covenant to pay the mortgage debt:—

Held, that the covenant was not enforceable against the mortgagor personally, by the assignee of the mortgage for value without notice; and that his remedy was restricted to foreclosure proceedings against the lands. *Patterson* v. *McLean*, 21 O. R. 221.

Power of Sale—*Prior Incumbrance.*]—Held, that trustees of real estate, with a power of sale, had power to mortgage for the purpose of paying a part of a prior incumbrance thereon with a view to saving the property from foreclosure. *Re Vansickle and Moore*, 22 O. R. 560.

Promise to Exercise Power to Mortgage.]—*See Connor* v. *Vroom*, 24 S. C. R. 701, *post* 994.

VIII. Notice of Trust.

Constructive Notice—*Pledge of Bank Shares—Breach of Trust — Redemption — Following Moneys.*]—The curator to the substitution of W. Petry paid to the respondents the sum of $8,632, to redeem 34 shares of the capital stock of the Bank of Montreal entered in the books of

the bank in the name of W. G. P., in trust, and which the said W. G. P., one of the *grevés* and manager of the estate, had pledged to the respondents for advances made to him personally. J. H. P. *et al.*, appellants, representing the substitution, by their action demanded to be refunded the money which they alleged H. J. P., one of them, had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to shew they formed part of the estate, and no *acte d' emploi* or *remploi* to shew that they were acquired with the assets of the estate:—

Held, per Ritchie, C.J., and Fournier and Taschereau, JJ., affirming the judgment of the Court below, that the debt of W. G. P. having been paid by the curator with full knowledge of the facts, the appellants could not recover: Arts. 1047, 1048, C. C.

Per Strong and Fournier, JJ., that bank stock cannot be held, as regards third parties in good faith, to form part of substituted property on the ground that it has been purchased with the moneys belonging to the substitution, without an act of investment in the name of the substitution and a due registration thereof: Arts. 931, 938, 939, C. C.; Patterson, J., dissenting. *Petry* v. *La Caisse d'Economie de Notre Dame de Québec*, 19 S. C. R. 713.

Constructive Notice—*Pledge of Securities—Breach of Trust—Following Securities.*]—After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of the several executors and trustees dealing with assets is so dealing *qua* trustee and not as executor, to shift the burden of proof. *Ewart* v. *Gordon*, 13 Gr. 40, discussed.

W. and C. were executors and trustees of an estate, under a will. W., without the concurrence of C., lent money of the estate on mortgage, and afterwards assigned the mortgages, which were executed in favour of himself, described as "trustee of the estate and effects of" (the testator.) In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship, and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same:—

Held, reversing the judgment of the Court of Appeal, 19 A. R. 447, that in taking and assigning the mortgages W. acted as a trustee and not as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts, which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees, inasmuch as the breach of trust consisted in the dealing with the securities themselves and not in the use made of the proceeds.

Judgment of Boyd, C., 19 O. R. 426, affirmed by the Queen's Bench Division, 20 O. R. 382, restored. *Cumming* v. *Landed Banking and Loan Co.*, 22 S. C. R. 246.

Constructive Notice—*Shares Held "in Trust" for Infant.*]—Where a father, acting generally in the interest of his minor child, but without having been appointed tutor, and being indebted to the estate of his deceased wife, of whom the minor was sole heir, subscribed for certain shares in a commercial or joint stock company on behalf of the minor, and caused the shares to be entered in the books of the company as held "in trust," this created a valid trust in favour of the minor without any acceptance by or on behalf of the minor, being necessary. Such shares could not be sold or disposed of without complying with the requirements of Arts. 297, 298, and 299 of the Civil Code; and a purchaser of the shares having full knowledge of the trust upon which the shares were held, although paying valuable consideration, was bound to account to the tutor subsequently appointed for the value of such shares. The fact of the shares being entered in the books of the company and in the transfer as held "in trust" was sufficient of itself to shew that the title of the seller was not absolute and to put the purchaser on inquiry as to the right to sell the shares. *Sweeny* v. *Bank of Montreal*, 12 S. C. R. 661, 12 App. Cas. 617, referred to and followed. Taschereau, J., dissenting. *Raphael* v. *McFarlane*, 18 S. C. R. 183.

Constructive Notice—*Transfer of Bank Shares—Trust—Provisions of Will—Bank Charter.*]—Where the respondent bank (incorporated by 18 Viet. ch. 202) registered an absolute transfer of its shares, which had been executed by trustees and executors under a will to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatee's lawful issue at his death, and the transferee disposed of the shares so as to defeat the rights of the issue:—

Held, that such registration, unless with actual knowledge of a breach of trust, was not wrongful, having regard to sec. 36 of the Act, which enacts that the bank is not bound to see to the execution of any trusts, express, implied, or constructive, to which any of its shares may be subject.

Notice that the shares were held by the trustees and executors in trust; possession by the bank of a copy of the will; the facts that transfers of others of its shares by the same trustees to other residuary legatees contained notice of substitution, that the president of the bank was also an executor of the will, and that the law agent of the bank was also law agent of the executors:—

Held, to be insufficient to affect the bank with knowledge of the particular trusts sought to be enforced. *Simpson* v. *Molsons Bank*, [1895] A. C. 270.

Constructive Notice—*Transfer of Shares—"In Trust."*]—Where the respondent had transferred shares as security for a loan:—

Held, that the appellants, as derivative transferees from the lender, were not affected by a trust in favour of the respondent, unless such trust was clearly disclosed on the face of their author's title, or was otherwise notified to them.

The words "manager in trust," appended to the signature of a bank manager, import that he held and transferred the shares in trust for his employers, the bank; and are not calculated to suggest that he stood in a fiduciary relation to

some third person, so as to affect a transferee for value with constructive notice of such relationship.

Judgment of the Supreme Court of Canada, 20 S. C. R. 481, reversed, and judgment of the Court of Appeal, 18 A. R. 305, restored. *London and Canadian L. & A. Co.* v. *Duggan*, [1893] A. C. 506.

IX. Particular Trusts.

Covenant—*Education of Infant—Breach—Damages.*]—The defendants' mother having conveyed her farm to them, they mortgaged it to her in consideration of the conveyance and of $2,500, and covenanted in the mortgage, *inter alia*, to educate their younger brother. The latter was not a party to the covenant, nor was there anything in the mortgage giving him a right to maintain an action upon it, but there was a stipulation that if the defendants failed to educate him, the mother or her executors might distrain upon them for such sums as might be required from time to time to secure the due performance of the agreement. After the death of the mother, this action was brought by her executors and the younger brother for damages for breach of the covenant:—

Held, that there was no trust in favour of the younger brother, and that the action was not maintainable by him:—

Held, however, that it was maintainable by the executors to the extent that they might recover such sum as would enable them to perform the covenant to educate their co-plaintiff. *West* v. *Houghton*, 4 C. P. D. 197, distinguished. *Faulkner* v. *Faulkner*, 23 O. R. 252.

Sale of Land by Promoter to Company.]—There is a distinction between a trust for a company of property acquired by promoters and afterwards sold to the company, and the fiduciary relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed.

A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a fiduciary relation to the latter, and if he sells to them must not violate any of the duties devolving upon him in respect to such relationship. If he sells, for instance, through the medium of a board of directors who are not independent of him, the contract may be rescinded, provided the property remains in such a position that the parties may be restored to their original status.

There may be cases in which the property itself may be regarded as being bound by a trust, either *ab initio* or in consequence of *ex post facto* events; if a promoter purchases property for the company from a vendor who is to be paid by the company when formed, and, by a secret arrangement with the vendor, a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of the property, such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promoter may be made a contributory.

Judgment of the Court of Appeal, 21 A. R. 66, affirmed. *In re Hess Mfg. Co.—Edgar* v. *Sloan*, 23 S. C. R. 644.

Will—*Maintenance of Infants—Income—Setting apart Share.*]—Under a devise of land to a father "during his life, for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from and independently of their father, but the children, being in needy circumstances, will be entitled as against the father's execution creditor who has been appointed receiver of his interest to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. *Allen* v. *Furness*, 20 A. R. 34.

X. Payment Into Court.

Insurance Moneys—*Conflicting Claims.*]—On an application by a benevolent society for leave to pay insurance money into Court, claimed by different parties:—

Held, that sub-sec. 5 of sec. 53 of the Judicature Act extends the benefit of the Act for the relief of trustees to such cases, and that the society was entitled to pay the money in. *Re Bajus*, 24 O. R. 397.

See Re Contts, 15 P. R. 162, *ante* 445.

XI. Proceedings Against Trustees.

Action—*Bar—Following Securities.*]—Held, that the recovery of judgment by the plaintiffs against a defaulting trustee for the amount of trust moneys advanced by him upon certain mortgages did not bar the plaintiffs' right of action against the defendants, to whom the trustee had, in breach of trust, assigned the mortgages, to compel a reassignment thereof, or an account of the moneys paid thereon. *Cumming* v. *Landed Banking and Loan Co.*, 20 O. R. 382. *See S. C.*, 19 A. R. 447, 22 S. C. R. 246. *ante* 989.

XII. Purchase of Trust Property by Trustees.

Assignee for Creditors—*Inspectors.*]—A purchase by the assignee for the benefit of creditors of the assets of the estate, made by him at the request of the inspectors of the estate after futile efforts to sell at auction and by private tender, and after a circular letter had been sent by the inspectors to each creditor stating that the sale would be made unless objection were taken, was set aside, there being evidence that at the time of the purchase the assignee knew of and was negotiating with a possible purchaser, to whom he afterwards resold at a large profit, and had not disclosed this information to the inspectors.

The inspectors of an insolvent estate have no power, unless specially authorized by the creditors, to bind the latter by anything they do in disposing of the estate. The disposal of it is in the hands of the creditors, and, in default of directions by them, in the hands of the Judge of the County Court.

Judgment of Armour, C. J., affirmed, Burton, J.A., dissenting. *Morrison* v. *Watts*, 19 A. R. 622.

See, also, *Segsworth* v. *Anderson*, 23 O. R. 573, 21 A. R. 242, 24 S. C. R. 699, *ante* 78; and *Thompson* v. *Clarkson*, 21 O. R. 421, *ante* 79.

Directors.]—*See Chatham National Bank* v. *McKeen*, 24 S. C. R. 348, *ante* 140.

Executor—*Sale Under Execution.*]—Judgment was recovered against executors in an action on a note made by one of them, and indorsed by the testator for his accommodation. Property devised to a son of the testator was sold under execution issued on said judgment, and purchased by the executor who had made the note and conveyed by him to another son of the testator. The property was again sold under execution against the last mentioned grantee, and again purchased by the said executor. The original devisee having taken forcible possession of the property, the executor brought an action to recover it:—

Held, Strong, J., dissenting, that the first sale being for his own debt, the executor on purchasing did not acquire title for his own benefit, but became a trustee for the devisee, and the trust continued when he purchased the second time. *McDonald* v. *McDonald*, 21 S. C. R. 201.

XIII. Removal of Trustee.

Misconduct.]—A letter written by a trustee under a will to the *cestuis que trust*, threatening in case proceedings were taken against him to make disclosures as to malpractices by the testator, which might result in heavy penalties being exacted from the estate, is such an improper act as to call for his immediate removal from the trusteeship. *Grant* v. *MacLaren*, 23 S. C. R. 310.

XIV. Revocation of Trust.

Conditions—*Failure to Perform.*]—By deed between B., grantor of the first part, certain named persons, trustees, of the second part, and P., grantee of the third part, B. conveyed his property to the trustees, the trusts declared being that if P. survived B. and performed certain conditions intended for the support or advantage and security of B., which by the deed he covenanted to perform, the trustees should convey the property to P., and it should be reconveyed to B. in case he survived. No trust was declared in the event of P. surviving and failing to perform the conditions or of failure in the lifetime of both parties. In an action by B. to have this deed set aside, the trial Judge held that B. when he executed it was ignorant of its nature and effect, and set it aside on that ground. The full Court, on appeal, dissented from this finding of fact, and varied the judgment by directing that the trustees should reconvey the property to B. on the ground that P. had failed to perform the conditions he had agreed to by the deed. On appeal to the Supreme Court:—

Held, affirming the decision of the Court below, that the conditions to be performed by P. were conditions precedent to his right to a conveyance of the property; that by failure to perform them the trust in his favour lapsed; and B., the grantor, being the only person to be benefited by the trust, could revoke it at any time, and demand a reconveyance of the property. *Poirier* v. *Brulé*, 20 S. C. R. 97.

XV. Miscellaneous Cases.

Criminal Breach of Trust—*Larceny.*]—*See McIntosh* v. *The Queen*, 23 S. C. R. 180, *ante* 272.

Money Lent to Trustee—*Liability of Trust Estate.*]—Action against the trustee of an estate to recover money lent to a former trustee. The trust deed gave the trustee power to borrow money on mortgage. The trustee represented to the plaintiff that the money lent was for the use of the estate, and gave him a promissory note signed "G. H. L., trustee of E. I. S.," and indorsed by G. H. L. The Judge in Equity gave judgment for the plaintiff, holding that the trustee was acting within his powers, or, if not, that he got the money on the promise that he would exercise the power, and that the trust estate was liable.

The Supreme Court of New Brunswick reversed this judgment, holding that there was no evidence of such a promise, and, the estate not having had the benefit of the money, the trustee would not have been entitled to indemnity, and the plaintiff's right was only to be placed in the same position as the trustee.

This was affirmed by the Supreme Court of Canada. *Connor* v. *Vroom*, 24 S. C. R. 701.

Money Paid for First Claim—*Legal Estate—Distribution—Title.*]—J. R. died leaving his estate to his widow and children. The estate having become involved, an absolute deed of all the realty was executed in favour of one of the testator's children, by the widow and other children, the grantee undertaking to pay off the liabilities and reconvey the lands on repayment of the amounts advanced to her. A portion of the land was sold for taxes, and the purchaser, to perfect his title, obtained quit claim deeds from all the heirs of the testator. Similar deeds had previously been given for other portions of the estate, and the moneys paid for the same equally distributed among the children and grandchildren of the testator. Before the distribution of the money paid by the purchaser at the tax sale in the last case, as the consideration for the quit claim deeds, the trust deed, which had been mislaid, was discovered, and the grantee having died, her children claimed the whole of the money. The other heirs of the testator brought this action for their respective shares:—

Held, affirming the judgment of the Court of Appeal, Gwynne, J., dissenting, that the purchaser at the tax sale paid the money to obtain a perfect title, and as the defendants, the chil-

dren of the trustee, were the only persons who could give such title, the legal estate being in them, the plaintiffs could not claim any part of the money, and that no agreement to apportion the money was proved, any agreement made by the plaintiffs with the purchaser not binding the defendants. *Draper* v. *Radenhurst*, 21 S. C. R. 714.

Release — *Rescission — Breach of Trust — Laches — Account.*]—E. M. died intestate in 1871, and his brother and business partner, H. M., obtained from his widow and his father, as next of kin, a release of their respective interests in all real and personal property of the deceased. In getting this, he represented that the estate would be sacrificed if sold at auction and that the most could be made out of it by letting him have full control. He then took out letters of administration, but took no further proceedings in the Probate Court, and managed the property as his own until he died in 1888. During that time he wrote several letters to the widow, in most of which he stated that he was dealing with the property for her benefit, and would see that she lost nothing by giving him control of it. After his death, the widow brought an action against his executors for an account of the partnership and of his dealings with the property since her husband's death; also to obtain payment of her share; and to set aside the release. The defendants relied on the release as valid, and also pleaded the plaintiff's laches:—

Held, affirming the decision of the Supreme Court of Nova Scotia, that the release should be set aside; that it was given in ignorance of the state of the partnership business and E. M.'s affairs, and the plaintiff was dominated by the stronger will of H. M.; that the latter had divested himself of his legal title by admitting in his letters a liability to the plaintiff, and must be treated as a trustee; that, as a trustee, lapse of time would not bar the plaintiff from proceeding against him for breach of trust; and that the delay in pressing the plaintiff's claim was due to H. M. himself, who postponed from time to time the giving of a statement of the business, when demanded by the plaintiff. *Mack* v. *Mack*, 23 S. C. R. 146.

UNDUE INFLUENCE.

Excessive Payment for Services — *Recovery.*]—Where, by reason of the confidential relationship existing between the plaintiff and defendant and the influence he was able to exert over her by asserting knowledge of matters which he alleged could be used to her prejudice, and which at the trial he admitted had no existence, he was enabled to procure from the plaintiff an excessive amount for services performed, and which was paid by her even after she had obtained independent advice, the plaintiff was held entitled to recover the same back, less a reasonable amount for the services performed. *Disher* v. *Clarris*, 25 O. R. 493.

Voluntary Conveyance — *Fiduciary Relationship.*]—A voluntary conveyance of a large portion of his property by a husband to his wife, a woman of good business ability, and having great influence over him, executed without competent and independent advice, when his physical and mental condition was greatly impaired, he subsequently becoming an incurable lunatic, was set aside.

The doctrine of undue influence and fiduciary relationship discussed.

Distinction between undue influence in cases of gifts *inter vivos* and testamentary gifts referred to.

Judgment of Rose, J., reversed, Hagarty, C. J. O., dissenting. *McCaffrey* v. *McCaffrey*, 18 A. R. 599.

VACANT LANDS.

See LIMITATION OF ACTIONS, II.

VACATION.

Examination for Discovery.] — Where a special examiner issues an appointment for the examination for discovery during vacation of a party to an action, such party, if duly subpœnaed, is bound to attend for examination.

A special examiner, although an officer of the Supreme Court of Judicature for Ontario, in the sense of being subject to its control and direction, has no office in connection with the Court that comes under any Rule requiring it to be kept open or closed during any particular period of the year.

Decisions of the Master in Chambers and Galt, C.J., 15 P. R. 23, reversed. *Hogaboom* v. *Cox & Co.*, 15 P. R. 127.

Notice of Appeal.]—Upon the true construction of Rule 484, the period of long vacation is not to be reckoned in the time allowed by sec. 71 of the Judicature Act for filing and serving notice of appeal to the Court of Appeal. *Hespeler* v. *Campbell*, 14 P. R. 18.

Pleading—*Notice of Trial.*]—Pleadings may be delivered and notice of trial given in Christmas vacation. *Thompson* v. *Howson*, 16 P. R. 378.

VALIDATING ACT.

See STATUTES, I.

VARIANCE.

See CRIMINAL LAW, III.

VEHICLE.

See BICYCLE.

VENDOR'S LIEN.

See LIEN, IV.—SALE OF GOODS.

VENDORS AND PURCHASERS' ACT.

Church Property—*Sale of.*]—*See Re Wansley and Brown*, 21 O. R. 34, *ante* 134.

Incumbrances—*Executions.*]—Lands were conveyed to and held in the name of a trustee, at the instance and for the benefit of another, but without any disclosed trust. Writs of *fi. fa.* lands against the *cestui que trust* were placed in the sheriff's hands before his death, but after the conveyance to the trustee. After the death of the *cestui que trust*, his administrators sold the lands, and offered to convey the lands with the trustee:—

Held, that the purchaser was not bound to carry out the sale unless the writs were removed or released. *Re Trusts Corporation of Ontario and Medland*, 22 O. R. 538.

Incumbrances—*Executions.*]—The administrators of an insolvent deceased person contracted to sell some of his lands. Subsequently to the contract a creditor who had obtained a judgment against the deceased in his lifetime issued execution thereon under an *ex parte* order therefor against the estate in the hands of the administrators:—

Held, that the execution formed no charge or incumbrance on the lands contracted to be sold.

Orders should not be made *ex parte* allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator. *In re Trusts Corporation of Ontario and Boehmer*, 26 O. R. 191.

Incumbrances—*Interest—Mortgage.*]—In an agreement for the exchange of land it was stated that the property "was subject to a mortgage incumbrance of $750, bearing interest at the rate of seven per cent. per annum." The property was one of four houses and lots, mortgaged for $3,000, with interest at ten per cent., payable half-yearly, to be reduced, if punctually paid, to seven per cent., with an agreement to release each house on payment of $750:—

Held, that the agreement did not convey an accurate statement as to the nature of the incumbrance. *Re Booth and McLean*, 21 O. R. 452.

Incumbrances—*Local Improvement Rates.*]—In a contract for sale and exchange of certain lands free from incumbrances it was provided that "unearned fire insurance premium, interest, taxes, and rental" should be "proportioned and allowed to date of completion of sale;"—

Held, notwithstanding, that special frontage rates imposed for local improvements and construction of sewers by by-laws passed prior to the contract, the period for payment of which had not expired, were incumbrances to be discharged by the vendors, respectively:—

Held, also, that the vendors were likewise bound to discharge a special frontage rate imposed by a by-law passed subsequently both to the date of the contract and the date fixed for the completion of the sale, inasmuch as the work was actually done and the expenditure actually made before the contract, the council having first done the work and then passed the by-law to pay for it, under 53 Vict. ch. 50, sec. 38 (O.). The substantial charge as a whole came into existence upon the finishing of the work. *Cumberland v. Kearns*, 18 O. R. 151, 17 A. R. 281, commented on and distinguished. *Re Graydon and Hammill*, 20 O. R. 199.

See, also, *Armstrong v. Auger*, 21 O. R. 98, *ante*, 879.

Taxes Due up to Time of Sale.]—A mortgagee, under two mortgages, sold the land under the power of sale in the second, and by his conditions of sale stipulated amongst other things that he was selling merely all his estate or interest under the second, subject to the first mortgage and interest; that if a second mortgage was taken for part of the purchase money, it should be a first lien after the first mortgage and interest; that if no objection was made within a certain time the vendor's title was to be held good and considered accepted by the purchaser, and the vendor entitled to the consideration; and further, that the said first mortgage could be paid off:—

Held, that taxes due up to the sale should be paid by the vendor. *Re Wilson and Houston*, 20 O. R. 532.

Title—*Will—Estate.*]—A testator devised his lands to executors and trustees, to lease and pay the amount received to his widow for life, and after her death to sell and divide the proceeds between two sons. One of the sons sold and conveyed all his interest to his brother's wife. During the lifetime of the widow the trustees, the widow, and the remaining son and his wife, all being *sui juris*, conveyed by way of exchange all their interests to a purchaser:—

Held, that the grantee claiming through that conveyance could make a good title. *Re Rathbone and White*, 22 O. R. 550.

See Re Abbott and Medcalf, 20 O. R. 299, *ante* 435; *Re Wilson and Toronto Incandescent Light Co.*, 20 O. R. 397, *ante* 497; *Re Fraser and Bell*, 21 O. R. 455, *post* 1022; *In re Hunter v. Patterson*, 22 O. R. 571, *ante* 986; *Re Vansickle and Moore*, 22 O. R. 560, *ante* 988; *Re Walker and Drew*, 22 O. R. 332, *post* 1022; *Re Canadian Pacific R. W. Co. and National Club*, 24 O. R. 205, *ante* 355; *In re Koch and Wideman*, 25 O. R. 262, *ante* 446; *Re Bain and Leslie*, 25 O. R. 136, *post* 1035.

VENUE.

See TRIAL, VII.

VERDICT.

See JUDGMENT, VIII.—TRIAL, I.

VICE-ADMIRALTY COURT.

Jurisdiction—*Services*—*Remuneration.*]—The Vice-Admiralty Court has jurisdiction to award reasonable remuneration for services rendered to a ship other than salvage services. *The Costa Rica*, 3 Ex. C. R. 23.

VIEW.

See Criminal Law, II. — Municipal Corporations, II.—Trial VII.

VOLUNTARY ASSIGNMENT.

See Company, VIII.

VOLUNTARY CONVEYANCE.

Action to Set Aside—*Fraudulent Intent—Defeating Creditors.*]—Fraudulent intention is a material element in an action to set aside a conveyance as being voluntary and fraudulent against creditors, and where it does not exist, the action cannot succeed.

The fact that the result of a conveyance is to defeat creditors is not necessarily proof that the intention of the grantor in making it was fraudulent.

And where a debtor, under the mistaken belief that she was a trustee of a sum of money invested by her in land, in her own name, made a conveyance thereof to the supposed *cestuis que trust*, honestly thinking she was carrying the trust into effect, an action to set aside the conveyance was dismissed. *Carr* v. *Coxfield*, 20 O. R. 218.

See Fraudulent Conveyance—Undue Influence.

VOLUNTARY WINDING-UP.

See Company, VIII.

WAGES.

See Execution, I.—Lien, III.—Ship, VII.

WAIVER.

Claims Against the Crown—*See Starrs* v. *The Queen*, 1 Ex. C. R. 301, *ante* 292; *McGreevy* v. *The Queen*, *ib.* 321, 18 S. C. R. 371, *ante* 181; *Peterson* v. *The Queen*, 2 Ex. C. R. 67, *ante* 305; *The Queen* v. *Malcolm*, 2 Ex. C. R. 357, *ante* 290.

In Matters of Practice—*See* Practice.

Notice of Application for Certiorari—*See Regina* v. *Whitaker*, 24 O. R. 437, *ante* 128.

Notice of Dishonour—*See Britton* v. *Milsom*, 19 A. R. 96, *ante* 104.

Right of Appeal—*See* Appeal, II.

See Intoxicating Liquors, III.

WAREHOUSE.

See Intoxicating Liquors, III.

WAREHOUSE RECEIPTS.

See Banks, III.

WAREHOUSEMAN.

See Bailment—Carriers, I.

WATER AND WATERCOURSES.

I. Ditches and Watercourses Act.

Appeal—*Time.*]—The provisions of sub-sec. 6 of sec. 22 of 57 Vict. ch. 55 (O.), the Ditches and Watercourses Act, 1894, which require the Judge of the County Court to hear and determine an appeal from an award thereunder within two months after receiving notice thereof, are merely directory. *Re McFarlane* v. *Miller*, 26 O. R. 516.

Award — *Engineer — County Court Judge—Registration—"Owner"—Tenant at Will—Trespass.*]—Held, by the Queen's Bench Division :—

1. Where the engineer of a municipal corporation purports to make an award under the Ditches and Watercourses Act with respect to the making of a drain, the affirmance of such award by the County Court Judge does not preclude the High Court from entertaining the objection that the engineer had no jurisdiction to make the award; nor is such an objection one for the determination of the County Court Judge alone. *Murray* v. *Dawson*, 17 C. P. 588, distinguished.

2. In the absence of a resolution of the municipal council such as is provided for by sec. 6 (*b*) of the Ditches and Watercourses Act, R. S. O. ch. 220, the question whether the engineer has jurisdiction to make an award depends upon whether, before filing the requisition, the owner filing it has obtained the assent in writing of a majority of the owners affected or interested, as provided by sec. 6 (*a*); if he has obtained such assent, the engineer is, immediately upon such filing, clothed with jurisdiction; and the absence of the notice (Form D.) required by

—The provisions of sub-sec. ict. ch. 55 (O.), the Ditches ct, 1894, which require the y Court to hear and deter- rom an award thereunder after receiving notice there- ectory. *Re McFarlane* v. 5.

er — County Court Judge— er"—Tenant at Will—Tres- e Queen's Bench Division :— ineer of a municipal corpora- make an award under the courses Act with respect to rain, the affirmance of such y Court Judge does not pre- ourt from entertaining the ngineer had no jurisdiction ; nor is such an objection nation of the County Court *ray* v. *Dawson*, 17 C. P. 588,

of a resolution of the muni- as is provided for by sec. s and Watercourses Act, R. uestion whether the engineer make an award depends upon ng the requisition, the owner ed the assent in writing of a ners affected or interested, . 6 (*a*); if he has obtained gineer is, immediately upon with jurisdiction ; and the ice (Form D.) required by

sec. 6 would not deprive him of such jurisdiction, but would form only a ground of appeal against his award.

3. The assent of the municipal corporation as one of the land-owners interested may be shewn by resolutions passed by the council directing the engineer to proceed with the work.

4. The term "owner" as used in the Act means the assessed owner ; and a tenant at will may be an owner affected or interested within the meaning of the Act.

5. The decision of the County Court Judge as to matters over which the engineer has jurisdiction cannot be reviewed by the Court ; and whether the plaintiffs were benefited by the proposed work was a matter to be determined by the engineer and the subject of appeal to the County Court Judge.

6. The mere publication by the engineer, within a year after the affirmance of an award, of a notice that he would let the work to be done upon the land of one of the persons affected by the award, and that such letting would take place after the expiry of a year from such affirmance, does not afford any ground for an action of trespass.

Held, by the Court of Appeal, reversing the decision of the Queen's Bench Division, that the word "owner" as used in the Ditches and Watercourses Act, R. S. O. ch. 220, means the actual owner and not the assessed owner : and a tenant at will of land affected, assessed as owner, is not an owner affected or interested within the meaning of the Act.

Held, by the Supreme Court of Canada, affirming the judgment of the Court of Appeal, that "owner" in sec. 6 (*a*) does not mean the assessed owner ; that the holder of any real or substantial interest is an "owner affected or interested ;" and that a mere tenant at will can neither file the requisition nor be included in the majority required.

Quære, whether, if the person filing the requisition is not an owner within the meaning of that term, the proceedings are valid if there is a majority without him. *York* v. *Township of Osgoode*, 24 O. R. 12, 21 A. R. 168, 24 S. C. R. 282.

Engineer—*Notice*—*Mandamus.*]—An owner of land, desiring to construct a drain on his own land and to continue it through that of an adjoining owner, served him with the notice provided by the Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vict. ch. 49, sec. 2 (O.), to settle the proportions to be constructed by each, and, on their failing to agree, served the clerk of the municipality with the notice provided for by such Act requiring the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who declined to attend :—

Held, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises. *Dagenais* v. *Town of Trenton*, 24 O. R. 343.

II. DIVERSION OF WATERCOURSES.

Authority—*Rights of Riparian Owners*—*Notice.*]—The British Columbia Land Ordinance, 1865, contains the following provisions :—44. "Every person lawfully occupying and *bonâ fide* cultivating lands, may divert any occupied water from the natural channel of any stream, lake, or river adjacent to or passing through such land, for agricultural and other purposes, upon obtaining the written authority of the Stipendiary Magistrate of the district for the purpose, and recording the same with him, after due notice, as hereinafter mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such magistrate may require." 45. "Previous to such authority being given, the applicant shall post up in a conspicuous place on each person's land through which it is proposed that the water should pass, and on the District Court House, notices in writing, stating his intention to enter such land, and through and over the same to take and carry such water, specifying all particulars relating thereto, including direction, quantity, purpose, and term." In an action by a grantee of water under this ordinance for interference with the use of the same :—

Held, affirming the judgment of the Court below, that the ordinance was not passed for the benefit of riparian owners only, but any cultivator of land could obtain a grant of water thereunder :—

Held, further, that the water of a stream, etc., may be occupied under the ordinance, even though there may be a riparian proprietor upon a part of it :—

Held, also, Ritchie, C.J., and Strong, J., dissenting, that the provisions of sec. 45 are merely directory, but if imperative, a grantee of water under the ordinance, who has used the water granted to him for several years, would not be required, in an action for damages caused by interference with such user, to prove that he gave the notices required by that section, as it would be presumed that the same were given before recording the grant :—

Held, per Ritchie, C.J., and Strong, J., that the water records in evidence were imperfect, and the grant to the plaintiff was not proved thereby, and, having failed to prove authority from the magistrate to divert the water, his riparian rights, either at common law or under the ordinance, were not established, and the action failed. *Martley* v. *Carson*, 20 S. C. R. 634.

Railway Company—*Purchaser — Notice — Registration — Prescription — Compensation.*]—Where the defendants in 1871, without authority, diverted a watercourse on certain land, and afterwards made compensation therefor to the then owner of the land, the plaintiff's predecessor in title :—

Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a *bonâ fide* purchaser for value without actual notice ; the defendants having shewn no prescriptive right to divert the watercourse ; and the diversion being wrongful as against the plaintiff.

Knapp v. *Great Western R. W. Co.*, 6 C. P. 187 ; *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173 ; *Wallace* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 551 ; and *Partridge* v. *Great Western R. W. Co.*, 8 C. P. 97, distinguished.

The plaintiff, having failed to prove actual damage, was allowed nominal damages for the

wrong; and, instead of granting a mandatory injunction to compel the restoration of the watercourse, the Court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict. ch. 29, sec. 90, sub-sec. *h*, (D.). *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

Railway Company—*Remedy Against—Damages—Compensation.*]—By sec. 90 (*h*) of the Railway Act of Canada, 51 Vict. ch. 29, a railway company have power to divert any watercourse, subject to the provisions of the Act; but, in order to entitle themselves to insist upon the arbitration clauses of the Act, they must, having regard to secs. 123, 144, 145, 146, and 147, shew upon their registered plans their intention to divert.

The defendants built an embankment which entirely cut off the plaintiff's access to the water of a stream by diverting it from his farm:—

Held, by the Queen's Bench Division, that the diversion, not the damage sustained therefrom, gave him his cause of action; and the proper mode of estimating the damages was to treat the diversion as permanent and to consider its effect upon the value of the farm. *McGillivray* v. *Great Western R. W. Co.*, 25 U. C. R. 69, distinguished.

Held, by the Court of Appeal, affirming the above, that where a watercourse has been diverted by a railway company in constructing their line, without filing maps or giving notice, the landowner injuriously affected has a right of action, and is not limited to an arbitration.

For such diversion the landowner, in the absence of an undertaking by the company to restore the watercourse to its original condition, is entitled to have the damages assessed as for a permanent injury.

The mode of computing damages to be allowed in lieu of an injunction, considered. *Arthur* v. *Grand Trunk R. W. Co.*, 25 O. R. 37, 22 A. R. 89.

III. Navigable Waters.

Access to Shore—*Public Rights—Private Rights.*]—The plaintiff, owner of a scow, had, without authority, moored it permanently to the shore of a basin artificially created by the excavation of land adjacent to a navigable river, which formed the boundary at that point between Canada and the United States. The soil of the shore and basin had been patented to certain persons, the usual rights of access to the shore and of navigation being reserved. The defendants, licensees of the owners of the shore, with authority to take, and for the purpose of taking, sand from the shores by means of their own scow and a hired tug, placed the tug and scow alongside the plaintiff's scow, and this action was brought for damages caused by fire communicated by the tug to the plaintiff's scow:—

Held, reversing the decision of Street, J., 24 O. R. 500, that the plaintiff in mooring his scow where he did was not a trespasser, at all events as against the defendants, who were mere licensees "to take sand from in front of" the land granted by the Crown.

The grant to the shore of the river, reserving free access to the shore for all vessels, boats, and persons, carried the land to the water's edge, and not to the middle of the stream.

The effect of the removal of the shore line back from its natural line was to make the water so let in as much *publici juris* as any other part of the water of the river, and such removal did not take away the right of free access to the shore so removed. *Cram* v. *Ryan*, 25 O. R. 524.

Access to Shore—*Public Rights—Private Rights—Ice.*]—The defendant, the owner of certain water lots upon the lake front, subject to the usual reservation in favour of the Crown of free passage over all navigable waters thereon, refused to allow the plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless the plaintiff paid toll, which he refused to do:—

Held, that the water over the defendant's lot was a highway, and the plaintiff had the right without payment to cross the lot, whether the water upon it was fluid or frozen; and, having a cause of complaint, and a right of action for his personal loss, he was entitled to come to the Court for a declaration of right. *Gooderham* v. *City of Toronto*, 21 O. R. 120, 19 A. R. 641, and *City of Toronto* v. *Lorsch*, 24 O. R. 227, followed:—

Held, also, that the defendant was liable for such reasonable damages as flowed directly from the wrong done by his refusal; but, as he had acted without malice and under a *bonâ fide* mistake as to his rights, and as the plaintiff might have paid the toll under protest, the defendant was not liable for the plaintiff's loss of business consequent on his failure to ship the ice. *Cullerton* v. *Miller*, 26 O. R. 36.

Private Waters—*Fishing and Shooting Rights—Public Rights.*]—Ownership of land or water, though not enclosed, gives to the proprietor under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot within the precincts of that private property, subject to game laws, if any; and this exclusive right is not diminished by the fact that the land may be covered by navigable water. In such case the public can use the water solely for *bonâ fide* purposes of navigation, and must not unnecessarily disturb or interfere with the private rights of fishing and shooting.

Where such waters have become navigable owing to artifical public works, the private right to fishing and fowling of the owner of the soil must be exercised concurrently with the public servitude for passage. *Beatty* v. *Davis*, 20 O.R. 373.

See Booth v. *Ratté*, 15 App. Cas. 188, *post* 1006; *Hamelin* v. *Bannerman*, [1895] A. C. 237, *post* 1006.

See Constitutional Law, II.

IV. Overflowing Land.

Boom.]—In an action for damages caused by overflowage, it appeared that the defendants'

boom in a river broke by reason of the heavy floods, whereupon they constructed another boom lower down near to a certain bridge, which also broke, and the logs became massed against the bridge, which the jury found, with the excess of rain, caused the injury complained of. They did not find negligence on the part of the defendants, but that they were guilty of a wrongful act in throwing the boom across the river :—

Held, that the defendants were entitled to judgment.

Per Boyd, C.—The use of the boom being lawful by statute, R. S. O. ch. 121, sec. 5, and no negligence in its construction being pretended, it was impossible to say that what was thus expressly legalized could be made the ground of an action of tort. *Langstaff* v. *McRae*, 22 O. R. 78.

Drain—*Culvert.*]—The defendants the corporations of two townships, without being bound to do so, built a culvert under the highway between the townships, to which the other defendant, the owner of lands adjoining one side of the highway, in order to carry off the surface water of his lands, built a drain, and subsequently a "gangway" of stones for the convenience of access to the highway, which had the effect of damming the water on his land. He afterwards made an opening in the "gangway," and the water suddenly rushing through the culvert, flooded the plaintiff's land on the other side of the highway, which was also connected with the culvert by a receiving drain, through which he had theretofore permitted the water in its ordinary course to flow :—

Held, that the defendants the corporations were not, but that the other defendant was, liable for the damage sustained by the plaintiff. *Bryce* v. *Loutit*, 21 A. R. 100.

V. Prescriptive Rights.

Easement—*Artificial Stream.*]—The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement; and the fact that the burden has been imposed for over forty years does not alter the character of the easement and convert the dominant into a servient tenement.

The owner of a servient tenement taking water under such circumstances is not "a person claiming right thereto" within R. S. O. ch. 111, sec. 35. *Ennor* v. *Barwell*, 2 Giff. 410, distinguished. *Olivet* v. *Lockie*, 26 O. R. 28.

See Ellis v. *Clemens*, 21 O. R. 227, 22 O. R. 216, *post* 1007.

VI. Riparian Owners.

Navigable River—*Damages.*]—Held, that a riparian owner is at liberty to construct and moor to his bank a floating wharf and boathouse, the same not being an obstruction to the navigation, and is entitled to maintain an action for damages in respect thereof caused by any unauthorized interference with the flow and purity of the stream. Judgment of Court of Appeal, 14 A. R. 419, affirmed. *Booth* v. *Ratté*, 15 App. Cas. 188.

Navigable River—*Sale of Artificial Water-power.*]—A riparian proprietor, notwithstanding that the river is navigable, can acquire an interest in its water power, as derived from a reservoir artificially formed by a dam across its channel, and sell the same along with and as appurtenant to his land. Even if such sale should not be effectual against the public, the vendor cannot himself impeach it on that ground.

Held, in this case, that as the vendor of a specified amount of water-power had not reserved to himself a right to supply, either *pari passu* with or preferably to the purchaser, the latter was entitled to damages in respect of any loss incurred by the vendor's use of the water in diminution of the amount sold. *Hamelin* v. *Bannerman*, [1895] A. C. 237.

User of Stream—*Injury — Prescription — Damages.*]—Held by Street, J., that riparian proprietors are entitled to make a reasonable use of the water of a stream, to detain it and retard it within certain limits; but any user which inflicts positive, repeated, and sensible injury upon a proprietor above or below is not to be considered reasonable.

And where the defendant and his predecessor, by discontinuing the use of the water during the hard frosts, although at a loss to themselves, might have prevented the damage complained of by the plaintiff, but did not so discontinue, though requested to do so by the plaintiff :—

Held, that they were making an unreasonable use of the water and were liable for the damage done.

The fact that the defendant and his predecessors had maintained their dam, mill, and raceway in the same position for upwards of forty years, and had during all that time used the water as the necessity of their business required, did not give the defendant a right to use the water to the prejudice of the plaintiff; the defendant could not insist that he had gained a prescriptive right to injure the plaintiff without proving that he and his predecessors had for twenty years been making an unreasonable use of the water, to the injury of the plaintiff; the use which had formerly been reasonable becoming unreasonable because of changed conditions, within twenty years there arose for the first time a grievance which gave the plaintiff a right to complain, and he was not barred of that right by reason of his making no complaint until he began to be injured

Held, by the Queen's Bench Division, that the use by riparian proprietors of the waters of streams through whose lands they flow must be a reasonable use, and the proprietors so using the waters must restore them to their natural channel before they reach the lands of the proprietors below them.

The defendant, in restoring the water of a stream used by him to its natural channel, did so at such times and in such a manner that the

water froze as it was being restored, and formed a solid mass of ice, completely filling the natural channel, so that the water coming down flowed away from the channel and over the plaintiff's land, and injured it. The evidence shewed that the cause of the water freezing as it did was the times at which and the manner in which the defendant so restored it, and was the natural result thereof; and it appeared that the defendant had been remonstrated with by the plaintiff and the consequences of his action pointed out to him:—

Held, that the defendant's use of the water was unreasonable; and, as there was no proof to sanction a prescriptive right to restore the water at the times and in the manner indicated, he was liable to the plaintiff for the injury so caused; his conduct being wrongful, his persistence in it was malicious; and the injury to the plaintiff was an invasion of his rights, and imported damage, whether there was any actual damage or not:—

Held, also, that even if there was a cause, for which the defendant was not responsible, concurrent with the wrongful acts complained of, and contributing to the injury sustained by the plaintiff, the defendant would still be answerable for the injury sustained by such wrongful acts for such damages, or such portion thereof, as were caused by the wrongful acts complained of.

Judgment of Street, J., affirmed. *Ellis* v. *Clemens*, 21 O. R. 227, 22 O. R. 216.

See *Martley* v. *Carson*, 20 S. C. R. 634, *ante* 1002.

VII. Unnavigable Waters.

Water Rights—*Destruction—Compensation.*]—The owner of land through which unnavigable water flows in its natural course is proprietor of the latter by right of accession; it is at his exclusive disposition during the interval it crosses his property, and he is entitled to be indemnified for the destruction of any water power which has been or may be derivable therefrom. *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121.

VIII. Water Privileges.

Occupied Mill Privilege.]—There can be no interference whatever, under the Act respecting Water Privileges, R. S. O. ch. 119, with an occupied mill privilege, even though the authorized works would not affect the mode in which the occupied mill privilege has, up to the time of the application, been used.

An order made under the Act must state specifically the height of the authorized dam. *In re Burnham*, 22 A. R. 40.

See as to costs, *S. C.*, 16 P. R. 390, *ante* 216.

IX. What Constitutes a Watercourse.

Surface Water—*Defined Channel.*]—That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined; and an occupant or owner of land has no right to drain into his neighbour's land the surface water from his own land not flowing in a defined channel.

The rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage has not been adopted in this Province.

McGillivray v. *Millin*, 27 U. C. R. 62; *Crewson* v. *Grand Trunk R. W. Co.*, *ib.* 68; *Darby* v. *Crowland*, 38 U. C. R. 338; and *Beer* v. *Stroud*, 19 O. R. 10, considered. *Williams* v. *Richards*, 23 O. R. 651.

Surface Water—*Permanent Source—Visible Cause.*]—The alleged watercourse was a gully or depression created by the action of the water. The defendants disputed that any water ran along it, except melted snow and rain water flowing over the surface merely. The plaintiff contended that there was a constant stream of water, only, if ever, ceasing in the very dry summer weather:—

Held, per Street, J., that without a permanent source, which, however, need not necessarily be absolutely never failing, there cannot be a watercourse; and that, as the attention of the jury was not expressly called to the difference in effect between the occasional flow of surface water and the steady flow from a source, and as a passage read to the jury from the judgment in *Beer* v. *Stroud*, 19 O. R. 10, divorced from its context, might have misled the jury, there should be a new trial.

Per Armour, C. J., that what the Judge told the jury could not be held a misdirection without reversing the decision in *Beer* v. *Stroud*; and the objection to the charge was too vague and indefinite.

Held, by the Court of Appeal, that if water precipitated from the clouds in the form of rain or snow forms for itself a visible course or channel and is of sufficient volume to be serviceable to the persons through or along whose lands it flows, it is a watercourse, and for its diversion an action will lie. *Beer* v. *Stroud*, 19 O. R. 10, considered. *Arthur* v. *Grand Trunk R. W. Co.*, 25 O. R. 37, 22 A. R. 89.

WATER PRIVILEGES.

See Water and Watercourses, VIII.

WATER RATES.

See Assessment and Taxes, V.

WAY.

I. Closing of Highways.

Owner of Adjoining Lands—*Mortgagee.*]—A mortgagee of land adjoining a highway is one of the persons in whom the ownership of it is vested for the purposes of sub-sec. 9 of sec. 550 of the Consolidated Municipal Act, 1892, and as such is entitled to pre-emption thereunder, subject to the right of the mortgagor to redeem it along with the mortgage, or to have it sold to the mortgagor subject to the mortgage, if the mortgagor so prefer. *Brown* v. *Bushey*, 25 O. R. 612.

II. Dedication of Highways.

Adoption by Sessions—*Presumption.*]—A road was surveyed in 1834, and the surveyor's report was made to the Quarter Sessions in that year. The records were, however, lost or destroyed, and there was no evidence that the road had been adopted by the Sessions under the Act then in force, nor was there a record of any order directing it to be opened. It was, however, actually opened before 1853, with the assent of the owners of the land, and was used for several years, and statute labour was done upon it :—

Held, that the maxim "*Omnia presumuntur ritè esse acta*" applied, and that the due adoption of the road by the Quarter Sessions should be presumed :—

Held, also, that the evidence of dedication was sufficient :—

Held, also, per Maclennan, J.A., that the expressions "laying out" and "opening" a road are used in the Act 50 Geo. III. ch. 1 in an equivalent sense, and that actual work on the ground is not required before the road becomes a public highway. *Palmatier* v. *McKibbon*, 21 A. R. 441.

Evidence—*User*—*Prescription.*]—Prior to the construction of the St. Charles Branch of the Intercolonial Railway, the claimant was in possession of property in the village of Lauzon, in the county of Lévis, P.Q., which was divided into 41 lots, with a street laid out through them. A plan of the lots shewing the location of the street had been recorded in the registry office for the county of Lévis. In the construction of the railway the Crown diverted this street, purchasing for that purpose one of the 41 lots in the claimant's property. Although the municipal corporation had never taken any steps to declare the said street a public way, it was used as such, was open at both ends, and formed a means of communication between two other streets in the village, and work had been done and repairs made thereon under the direction of the rural inspector of roads. The municipal council had also, at one time, passed a resolution for the construction of a sidewalk on the street, but nothing was done thereunder. Upon the hearing of the claim it was contended on behalf of the claimant that the street in question, at the time of the expropriation, was not a highway or public road within the meaning of the Government Railways Act, 1881, 44 Vict. ch. 25, but was her private property, and that she was entitled to compensation for its expropriation. The Crown's contention was that, at the date of expropriation, the street was a highway or public road within the meaning of the Government Railways Act, 1881, 44 Vict. ch. 25, and that the Crown had satisfied the provisions of sec. 5, sub-sec. 8, and sec. 49 thereof, by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was therefore not entitled to compensation :—

Held, 1. That the question was one of dedication rather than of prescription; that the evidence shewed that the claimant had dedicated the street to the public; and that it was not necessary for the Crown to prove user by the public for any particular time.

2. That the law of the Province of Quebec, relating to the doctrine of dedication or destination is the same as the law of England.

Semble, that 18 Vict. ch. 100, sec. 41, sub-sec. 9 (Prov. Can.), is a temporary provision having reference to roads in existence on 1st July, 1855, which had been left open and used as such by the public without contestation during a period of ten years or upwards. *Myrand* v. *Légaré*, 6 Q. L. R. 120, and *Guy* v. *City of Montreal*, 25 L. C. J. 132, referred to. *Bourget* v. *The Queen*, 2 Ex. C. R. 1.

Obstruction Before Dedication.]—*See* *Brown* v. *Town of Edmonton*, 2 S. C. R. 308, *post* 1013.

Plan—*User*—*Municipal Corporations*—*By-law.*]—A piece of land about twenty acres in extent, fenced in, had been owned and occupied as a field by the plaintiffs and their predecessors in title for twenty-five years. Before that it had, with other land lying immediately to the north on which streets had been laid out and opened up, one of them forming the boundary between the north and south portions, been surveyed and laid out on a registered plan into lots and streets, and some lots had been sold by the then owners partly from the land vested in the plaintiffs, and partly from the land to the north. Subsequently the plaintiffs acquired by purchase or lease all the lands to the south of the dividing street, and sought to restrain the defendants from opening up the streets through these lands :—

Held, per Osler and Maclennan, JJ.A., [Hagarty, C.J.O., expressing no opinion], that sec. 62 of R. S. O. ch. 152, which provides that all allowances for streets surveyed in cities or any part thereof, which have been or may be surveyed and laid out and laid down on the plans thereof, and upon which lots of land fronting on such allowances for streets have been or may be sold to purchasers, shall be public highways and streets, is retroactive and applies to streets laid out on plans made and registered before the pas-

sing of the Act, and that the streets shewn on the plan were highways which the city were entitled to open :—

Held, per Burton, J. A., that though the section was retroactive, it applied only to the original or first survey of a city, etc., or part thereof, and not to a subdivision of lots or parcels within the city, and therefore not to the survey in question in the present case.

Judgment of the Common Pleas Division, 21 O. R. 120, affirming, by a division of opinion, that of Ferguson, J., affirmed. *Gooderham* v. *City of Toronto*, 19 A. R. 641.

Plan—*Registration of and Sales Under.*]—Under the Municipal and Surveyors' Acts, by the filing of a plan, and the sale of lots according to it, abutting on a street, the property in the street becomes vested in the municipality, although they may have done no corporate act by which they have become liable to repair. *Roche* v. *Ryan*, 22 O. R. 107.

Plan—*Registration of and Sales Under—User—Adoption.*]—A street or road laid out upon a registered plan of a township lot, where, although houses are clustered, there is not an incorporated village, continues to be a private street or road, although the owner should sell a lot fronting on it, until the township council adopts it as a public highway, or until the public, by travelling upon it, has accepted the dedication offered by the proprietor.

R. S. O. ch. 152, sec. 62, only applies to cities, towns, or incorporated villages.

A person who purchases lots according to such a plan, abutting upon streets laid out thereon, acquires, as against the person who laid out the plot and sold him the land, a private right to use those streets, subject to the right of the public to make them highways, in which case the private right becomes extinguished.

The right so to use a private road does not necessarily mean a right over every part of the roadway, but only to such a width as may be necessary for the reasonable enjoyment of it. *Sklitzsky* v. *Cranston*, 22 O. R. 590.

III. Defects in Ways.

Workmen's Compensation Act—*Plank.*]—The foreman of the defendant, a contractor for the erection of a building, desiring to pry up a part of the flooring, placed a new plank, supplied by the owners of the building, about eleven feet long by eight inches wide and three inches thick, which the evidence shewed had a knot in it two inches wide, and was cross-grained, across an opening in the ground floor, intending to use it as a fulcrum. The plaintiff, a labourer carrying a heavy scantling, was directed by the foreman to place it in another part of the building, and, while crossing the plank to do so, was precipitated into the cellar by the breaking of the plank at the knot, and was injured. It did not appear that there was any way beyond the plank :—

Held, that the plank was a "way" within the meaning of sub-sec. 1 of sec. 3 of the Workmen's Compensation for Injuries Act, and that the knot and cross-grain were defects in the way for which the defendant was responsible. *Caldwell* v. *Mills*, 24 O. R. 462.

Workmen's Compensation Act — *Public Street.*]—A public street in a defective condition, used by an employer in connection with his business, is not a "way used in the business of the employer" within the meaning of 55 Vict. ch. 30, sec. 3 (O.).

The defendants' factory was built immediately on the line of a public street which was fourteen feet wide at the place, and on the other side there was a steep declivity, without a fence. One of their workmen was on a load of straw on a waggon unloading it into the defendants' premises through an aperture facing the street, when he lost his balance, fell off, and down the declivity, and was killed :—

Held, that the defendants were not liable. *Stride* v. *Diamond Glass Co.*, 26 O. R. 270.

IV. Establishing Highways.

Description—*Uncertainty—By-law—Publication.*]—A municipal by-law establishing a public highway is not void for uncertainty when the boundaries of the land so declared are described in the by-law with sufficient precision to enable them to be traced upon the ground, and if so properly described, it is not necessary when private ground has been taken to distinguish it as such.

The fact that one of two parallel courses in a description has by obvious clerical error been incorrectly given in the published notice is not a valid objection to such a by-law.

Where there is no paper published in the township, weekly or oftener, it is not obligatory to publish the required statutory notice of the by-law in a paper issued therein semi-monthly. *Re Chambers and Corporation of Burford*, 25 O. R. 276.

V. Incumbering Highways.

Sidewalk—*Bicycle.*]—A bicycle is a "vehicle," and riding it on the sidewalk is "incumbering" the street within the meaning of sub-sec. 27 of sec. 496 of the Consolidated Municipal Act, and of a by-law of a municipality passed under it.

A *certiorari* to bring up a conviction under the by-law was refused. *Regina* v. *Plummer*, 30 U. C. R. 41, approved. *Regina* v. *Justin*, 24 O. R. 327.

VI. Maintenance and Repair of Highways.

County Road—*Separated City.*]—Held, that the legislation and proceedings thereunder, set out in the judgment of the Court, relating to the Queenston and Grimsby road and the city of St. Catharines, did not make the city liable to pay to the county of Lincoln any part of the expenditure of the latter in connection with that road.

Effect of the withdrawal of city from jurisdiction of county upon roads owned by the county passing through the city, considered.

Regina v. *Louth*, 13 C. P. 615; *Regina* v. *Brown and Street*, *ib.* 357; *St. Catharines Road Co.* v. *Gardner*, 21 C. P. 190, specially referred to.

Unless specially retained by statute, the withdrawal of a city from the jurisdiction of the county terminates all liability of the former to taxation for county purposes.

An agreement by a city withdrawn from the jurisdiction of the county to contribute towards the maintenance and repairs of a county road is *ultra vires* the city corporation. *County of Lincoln* v. *City of St. Catharines*, 21 A. R. 370.

VII. Obstructions in Highways.

Accidents Caused By.]—*See* Municipal Corporations, XIII.

Building on Road Allowance.]—*See McNab* v. *Township of Dysart*, 22 A. R. 508, *ante* 727.

Existence Before Dedication—*Compensation.*]—The right of the public to the free and unobstructed use of a street cannot be taken away by the existence of an obstruction at the time when the street is dedicated; nor is the occupier of a house which constitutes such obstruction entitled to compensation from the municipality for its removal. Decision of the Supreme Court of the North-West Territories, 1 N. W. T. Reps, pt. 4, p. 39, affirmed. *Brown* v. *Town of Edmonton*, 23 S. C. R. 308.

Municipal Corporations—*Declaration—Injunction.*]—A municipal corporation has the right to have it declared, as against a private person, whether or not certain land is a public highway, and whether such person has the right to possess, occupy, and obstruct the same.

And in an action brought by the municipal corporation for the purpose, a declaration may be made according to the facts, and the defendant enjoined from possessing or occupying the land so as to obstruct the use of it as a public highway. *Penelon Falls* v. *Victoria R. W. Co.*, 29 Gr. 4, followed. *Gooderham* v. *City of Toronto*, 21 O. R. 120, 19 A. R. 641, applied and followed. *City of Toronto* v. *Lorsch*, 24 O. R. 227.

Removal of Building—*Petition—Evidence.*]—By sec. 454 of the charter of the city of Halifax, any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the city engineer, and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained, the Supreme Court, or a Judge thereof, may, on petition of the recorder, cause it to be removed. A petition was presented to a Judge, under this section, asking for the removal of a porch built by R. to his house on one of the streets of the city, which, the petition alleged, was upon the line of the street. A porch had been erected on the same site in 1855 and removed in 1885; while it stood, the portion of the street outside of it, and since its removal the portion up to the house, had been used as a public sidewalk; on the hearing of the petition the original line of the street could not be proved, but the Judge held that it was close to the line so used by the public, and ordered its removal. The Supreme Court of Nova Scotia reversed his decision. On appeal to the Supreme Court of Canada:—

Held, that the evidence would have justified the Judge in holding that the porch was upon the line, but having held that it was close to the line, while the petition only called for its removal as upon it, his order was properly reversed. *City of Halifax* v. *Reeves*, 23 S. C. R. 340.

Trees.]—*See* Timber, II.

VIII. Private Ways.

Government Aid—*Effect of, on Private Road—Colonization Road.*]—The proprietor of a piece of land in the parish of Charlesbourg claimed to have himself declared proprietor of a heritage purged from a servitude, being a right of passage claimed by his neighbour, the defendant. The road was partly built with the aid of Government and municipal moneys, but no indemnity was ever paid to the plaintiff, and the privilege of passing on said private road was granted by notarial agreement by the plaintiff to certain parties other than the defendant:—

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the mere granting and spending of a sum of money by the Government and the municipality did not make such private road a colonization road within the meaning of Art. 1718, R. S. Q. *Chamberland* v. *Fortier*, 23 S. C. R. 371.

Grant—*Apparent Servitude—Registration—Evidence.*]—By deed of sale dated 2nd April, 1860, the vendor of cadastral lot No. 369, in the parish of Ste. Marguerite de Blairfindie, district of Iberville, reserved for himself, as owner of lot 370, a carriage road to be kept open and in order by the vendee. The respondent F., as assignee of the owner of lot 370, continued to enjoy the use of the said carriage road, which was sufficiently indicated by an open road, until 1887, when he was prevented by the appellant C. from using the said road. C. had purchased lot 369 from McD., intervenant, without any mention of any servitude, and the original title deed creating the servitude was not registered within the delay prescribed by 44 & 45 Vict. (Q.) ch. 16, secs. 5 and 6. In an action *confessoire* brought by F. against C., the latter filed a dilatory exception to enable him to call McD. in warranty, and McD., having intervened, pleaded to the action. C. never pleaded to the merits of the action. The Judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada:—

Held, affirming the judgment of the Court below, that the deed created an apparent servitude (which need not be registered), and that there was sufficient evidence of an open road having been used by F. and his predecessors in title, as owners of lot No. 370, to maintain his action *confessoire*. *Macdonald* v. *Ferdais*, 22 S. C. R. 260.

Grant—*Construction.*]—A deed of conveyance of land under the Short Forms Act from the plaintiff to the defendants recited that the latter had determined to construct waterworks in their municipality, and for that required the

land for buildings and other purposes connected with the waterworks, and the plaintiff had agreed to sell them such land for such purposes for the consideration and subject to the conditions set forth. The consideration was a valuable one. The grant was to the defendants and their assigns for ever, for the purposes mentioned in the recital, of the land described, with full right of ingress and egress to and from the said lands for the defendants, their employees and others doing business on and about the said waterworks with teams and otherwise, from a certain street, etc., along a certain road, etc.; *habendum* to the defendants, their successors and assigns, for the purposes aforesaid, to and for their sole and only use for ever, subject nevertheless to certain conditions.

Held, that the grant of the right of way gave to the defendants and their employees foot-way, carriage-way, and way for horses, but conferred no right of way upon persons to whom the defendants might sell or lease the land. *McLean* v. *City of St. Thomas*, 23 O. R. 114.

Grant — *Construction* — "*Necessary.*"]— The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land under an agreement which provided, among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber, at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed, would have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber :—

Held, affirming the judgment of the Court of Appeal, 19 A. R. 176, that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendant's right, under the general grant of the trees, to remove the trees across the cleared land. Gwynne, J., dissenting. *Stephens* v. *Gordon*, 22 S. C. R. 61.

Grant — *Construction — Prescription.*]—In an action for obstructing a right of way the plaintiff claimed the use of such right, both by prescription and agreement, and also claimed that by the agreement the way was wholly over the defendant's land. The evidence on the trial shewed that the plaintiff had acquired the land from his father, who retained the adjoining land, which was eventually conveyed to the defendant, and that after so acquiring it the plaintiff continued to use a track or trail over the adjoining land, and mostly through bush land, to reach the concession line, and his claim to the use of way by prescription depended on whether or not his user was of a well-defined road, or merely of an irregular track, and by license and courtesy of the adjoining owner. Finally an agreement was entered into between the plaintiff and his brother, who had acquired the adjoining lot, which he afterwards conveyed to the defendant, by which, in consideration of certain privileges granted to him, the brother covenanted to permit the plaintiff to have a right of way along a lane to which the way formerly used led, and extending forty rods east from the centre of the lot, so as to allow the plaintiff free communication from the defendant's lot along said lane to the concession line. The issue raised on the construction of this agreement was whether the right of way granted thereby should be wholly or in part on the plaintiff's land, or wholly on that of the defendant :—

Held, reversing the judgment of the Court of Appeal, 16 A. R. 3, and restoring that of the Common Pleas Division, 15 O. R. 699, Ritchie, C.J., dissenting, that the plaintiff had no title to the right of way by prescription, the evidence clearly shewing that the user was not of a well-defined road, but only of a path through bush land, and that he only enjoyed it by license from his father, the adjoining owner, which license was revoked by his father's death; but :—

Held, affirming the judgment of the Court of Appeal, that under the agreement the right of way granted to the plaintiff was wholly over the defendant's land, the agreement, not being explicit as to the direction of such right of way, requiring a construction in favour of the plaintiff and against the grantor. *Rogers* v. *Duncan*, 18 S. C. R. 710.

See Sklitzsky v. *Cranston*, 22 O. R. 590, *ante* 1011.

IX. Toll Roads.

Rates — *Intersected Road — Mandamus.*]— Section 87 of R. S. O. ch. 159, as extended by sec. 157 of that Act, and by 52 Vict. ch. 27 (O.), applies not only to toll roads owned or held by private companies, or municipal councils, but also to all toll roads purchased from the late Province of Canada, so that, where one of such roads is intersected by another of them, a person travelling on the latter road shall not be charged for the distance travelled from such intersection to either of the termini of the intersected road, any higher rate of toll than the rate per mile charged by the company for travelling along the entire length of its road from such intersection, but subject to the production of a ticket, which he is entitled to receive from the last toll-gate on the intersecting road, as evidence of his having travelled only from such intersection.

Mandamus granted to compel the issue of such tickets. *Smith* v. *County of Wentworth*, 26 O. R. 209.

Road Company — *Lease of Tolls — Liability for Negligence.*]—C. brought an action against the K. & B. Road Co. for injuries sustained from falling over a chain used to fasten the toll-gate on the company's road. On the trial the following facts were proved : The toll-house extended to the edge of the highway, and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain which was usually carried across the board walk

and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell, sustaining the injuries for which the action was brought. The toll collector was made a defendant to the action, but did not enter a defence. It was shewn that he had made an agreement with the company to pay a fixed sum for the privilege of collecting tolls for the year, and was not to account for the receipts. The company claimed that he was lessee of the tolls, and that they were not responsible for his acts. The jury found, however, that in using the chain to fasten the gate as he did, he was only following the practice that had existed for some years previously, and doing as he had been directed by the company. The statute under which the company was incorporated contained no express authority for leasing the tolls, but used the term "renter" in one section, and in another spoke of a "lease or contract" for collecting the tolls. The company claimed, also, that C. had no right to use the board walk in walking along the highway, and her being there was contributory negligence on her part which relieved them from liability for the accident :—

Held, by the Court of Appeal, Hagarty, C.J.O., dissenting, that a company incorporated under the General Road Companies' Act, R. S. O. ch. 159, may validly lease a toll-gate and the right to collect tolls thereat.

Held, by the Supreme Court of Canada, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence ; that whether the toll collector was servant of the company or lessee of the tolls, the company, under the finding of the jury, was liable for its acts. *Campbell* v. *Kingston and Bath Road Co.*, 18 A. R. 286, 20 S. C. R. 605.

Road Company—*Negligence—Limitation of Actions.*]—Where the defendants, a road company, incorporated under the General Road Companies' Act, R. S. O. ch. 159, sec. 99 of which requires them to keep their road in repair, constructed a culvert across it with a post and rail guard at the mouth thereof in such an improper manner that the wheel of the plaintiff's carriage striking the post, he was thrown out of it into the open ditch at the end of the culvert, and injured :—

Held, that the construction of the culvert and the guard was a thing "done in pursuance of the Act" within the meaning of sec. 145, and that therefore the time for bringing the action was limited to within six months after the date of the accident. *Webb* v. *Barton Stoney Creek Consolidated Road Co.*, 26 O. R. 343.

Road Company—*Tolls — Repair—Attorney-General.*]—Held, by the Common Pleas Division, that the provisions of the General Road Companies' Act, R. S. O. ch. 159, relating to tolls, taken in connection with 53 Vict. ch. 42 (O.), apply to a road company incorporated by special Act, so as to prevent the company from demanding tolls after the engineer appointed under 53 Vict. ch. 42 (O.) has reported the road to be out of repair, until he further reports that the road has been put in good and efficient repair ; and an action will lie at the suit of the Attorney-General to restrain such collection.

Reversed by the Court of Appeal, but restored by the Supreme Court of Canada. *Attorney-General* v. *Vaughan Road Co.*, 21 O. R. 507, 19 A. R. 234, 21 S. C. R. 631.

Toll-gates — *Statutes.*] — A turnpike road company had been in existence for a number of years and had erected toll-gates and collected tolls therefor, when an Act was passed by the Quebec Legislature, 52 Vict. ch. 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of said Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 Vict. ch. 36. After 52 Vict. ch. 43 was passed, the company shifted one of its toll-gates to a point beyond the limits of the village, which limits were subsequently extended so as to bring said gate within them. The corporation took proceedings against the company, contending that the repeal of sec. 2 of 52 Vict. ch. 43 made that Act retroactive, and that the shifting of the toll-gate without the consent of the corporation was a violation of said Act :—

Held, affirming the decision of the Court of Queen's Bench, that as a statute is never retroactive unless made so in express terms, sec. 2 had no effect, and its repeal could not make it retroactive ; that the shifting of the toll-gate was not a violation of the Act, which only applied to the erection of new gates, and that the extension of the limits of the village could not affect the pre-existing rights of the company. *Village of St. Joachim de la Pointe Claire* v. *Pointe Claire Turnpike Road Co.*, 24 S. C. R. 486.

WILL.

I. Construction.

Children—*Grandchildren—Issue—Legacy—Period of Vesting.*]—A testator devised and bequeathed his real and personal estate to his wife for life, or until remarriage, with powers of disposal ; and by a residuary clause devised the residue—not specifically devised or be-

queathed, and not sold or disposed of by his said wife—immediately after her death or remarriage, to his executors to sell and convert the same into money, and out of the proceeds pay a specific sum to each of his five sons, and to divide the balance, share and share alike, between his three daughters, and if his said daughters should die before him, or before said distribution, leaving issue, the share or shares of his said daughters so dying should be divided ratably and proportionately amongst the child or children of said daughter or daughters living at the time of said distribution, so that the issue of any of his said daughters who might be dead should receive her or their parents' share. The widow survived the testator and died without having remarried. A son, C. K. R., and a daughter, M., also survived the testator, but died prior to the widow, the son leaving no issue, and the daughter a son, F., and a daughter, M. C., the said last-named daughter having also died leaving two children :—

Held, that the word *children* here must be taken in its primary sense, *i.e.*, the immediate children of the testator, and excluded grandchildren, so that F. took the whole of his mother's share to the exclusion of the children of the daughter M. C.; and that the legacy to C. K. R. became vested on testator's death, payable on the widow's death, and that his personal representatives were entitled thereto. *Rogers* v. *Carmichael*, 21 O. R. 658.

Children Taking Share of Deceased Parent.]—A testator by his will, after directing payment of his debts by his executors, gave his personal estate and the dwelling-house with the land occupied therewith, to his wife for life, and after her decease to his daughter M., and gave M. a legacy of $2,000. He then devised the residue of his real estate to his executors in trust, to lease the same and pay the interest to his wife for life, and after her death to sell the same and divide the proceeds between his children, share and share alike. At the time of the testator's death, the personal estate was of small value, and was exceeded by the amount of the debts; and it did not appear whether, when the will was made, the testator had sufficient personal estate out of which the legacy could be paid :—

Held, that M. could not claim to have the $2,000 paid out of the proceeds of the real estate devised to the executors, but that there should be no deduction from her share by reason of the real estate devised to her :—

Held, also, that the children of a deceased child took the share of the proceeds of the real estate which their parent was entitled to. *Totten* v. *Totten*, 20 O. R. 505.

Conditional Fee—*Executory Devise.*]—A testator by his will devised as follows :—"I give and bequeath to my son F. . . . lot No. . . . at the age of twenty-one years, giving the executors power to lift the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of twenty-one years.

. . . . . .

"At the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors."

F. attained twenty-one and died unmarried and without issue :—

Held, a conditional fee, with an executory devise over. *Little* v. *Billings*, 27 Gr. 353, distinguished. *Crawford* v. *Broddy*, 25 O. R. 635. Reversed in appeal on another point, 22 A. R. 307.

Condition Precedent—*Formation of Partnership — Predecease of Intended Partner.*]—A testator by his will directed that "as soon as conveniently may be after my decease, a partnership be formed by my two sons . . . in which partnership and firm my two sons shall be equal partners in every particular, and sharing equally in the profits of the same. To the said firm so to be formed I give and bequeath as partnership assets, the building," etc. The testator then proceeded to give and bequeath to the said firm certain specific lands and personal property, and ultimately the whole of his residuary real and personal estate. After the death of one of his said sons, who predeceased him, he made some codicils to his will, in which he referred to the above portion of his will and revoked some of the bequests to the said firm, but otherwise ratified his will :—

Held, that the formation of the partnership as directed was a condition precedent to the vesting of the gifts and bequests above mentioned, and that, as one of the two sons predeceased the testator, there was an intestacy as to them. *McCallum* v. *Riddell*, 23 O. R. 537.

Condition Subsequent—*Payment of Mortgage.*]—Where land is devised upon condition that a mortgage thereon be paid by the devisee, and the devisor pays off the mortgage, the devise is good, such a condition being a condition subsequent.

Judgment of Ferguson, J., 24 O. R. 132, on this point affirmed. *McKinnon* v. *Lundy*, 21 A. R. 560. Reversed on another point by the Supreme Court. *Lundy* v. *Lundy*, 24 S. C. R. 650.

Defeasible Fee.]—A testatrix devised separate lots of land to each of her two daughters, A. and B., and then provided that if "either of my daughters die without lawful issue, the part and portion of the deceased shall revert to the surviving daughter, and in case of both dying without issue, then I authorize" . . naming her executors and other living persons to subdivide the estate among her relatives as they should deem right and equitable. B. conveyed the lot devised to her to a purchaser, through whom, in B.'s lifetime, title was sought to be made :—

Held, that B. took only a defeasible fee simple with a devise over to her sister and her heirs in case B. should die leaving no issue at her death. B. being still alive, it was impossible to say that a conveyance from her passed a good title. *Little* v. *Billings*, 27 Gr. 353, followed. *Ashbridge* v. *Ashbridge*, 22 O. R. 146, not followed. *Nason* v. *Armstrong*, 22 O. R. 542. Affirmed in appeal, 21 A. R. 183. Reversed in the Supreme Court, 25 S. C. R. 263.

Description of Land—*Devise of Land Facing on Two Streets by Description of House Facing on One.*]—In 1886 a testator by his will devised to his brother "all that real estate now owned by me, being No. 32 on the north side of A. street, for and during his life," and afterwards over, and then made a general residuary devise

of the rest of his land to his sisters. It appeared that in 1867 the testator purchased the land in question, with a frontage of twenty-six feet on A. street, by a depth of 200 feet to a lane twenty feet wide, which lane was in 1882 converted into P. street. At the time of purchase there was a house facing on A. street known as No. 32, and also one facing on the lane, afterwards known as No. 21 P. street, occupied as distinct tenements, and each with a fence in the rear, but with certain ground between the two fences used to some extent in common :—

Held, that the specific devise was confined to No. 32 A. street, and the lands appertaining to it, to the exclusion of the house on P. street and the lands appertaining to it, which passed under the residuary devise. *Scanlon* v. *Scanlon*, 22 O. R. 91.

Devise to Children and Their Issue—*Per Stirpes or Per Capita.*]—Under the following provision of a will, "When my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money . . . and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto ;"—

Held, reversing the judgment of the Court of Appeal, 18 A. R. 25, *sub nom. Wright* v. *Bell*, Ritchie, C. J., dissenting, that the distribution of the estate should be *per capita* and not *per stirpes*. *Houghton* v. *Bell*, 23 S. C. R. 498.

Devise to Sons Without Words of Limitation—"*Die Without Lawful Issue*"—"*Survivor*"—*Estate in Fee Simple—Estate Tail.*]—The testator died in 1845, and by his will devised a farm to his two sons, without words of limitation, to be equally divided between them, adding : "And in case either of my sons should die without lawful issue of their bodies, then his share to go to the remaining survivor :"—

Held, that the gift in the earlier part of the devise, though without words of limitation, was sufficient to carry the fee to the sons, unless a lesser estate appeared to be intended on the face of the will.

Both sons outlived the father ; one died in 1874, leaving issue ; the other died without issue in 1890 :—

Held, that the son who first died had an estate in fee simple absolute in one-half of the land ; and, as the other left no survivor, he was not within the words of the will, and nothing had happened to divest him of the estate in fee given by the earlier part of the will, and therefore he also died seized in fee simple of one-half of the land.

The word "survivor" is to be read as meaning "longest liver," not "other."

The words "die without issue" do not mean an indefinite failure of issue which would give rise to an estate tail. *Ashbridge* v. *Ashbridge*, 22 O. R. 146.

Estate in Fee—"*Absolutely*"—"*In the Event of Her Death.*"]—A testator who died on the 9th April, 1891, seized in fee, by his will devised and bequeathed all his real and personal estate to his wife absolutely, and in the event of her death to be equally divided among his children :—

Held, that the will was to be construed as if the words "in my lifetime" followed the words "in the event of her death," and that the widow took an estate in fee simple in the lands.

Construction of sec. 30 of the Wills Act, R. S. O. ch. 109. *Re Walker and Drew*, 22 O. R. 332.

Estate Tail—"*Issue*"—"*Fee Simple*"—*Shelley's Case—Intention.*]—A testator by the third clause of his will devised certain lands "to my son James, for the full term of his natural life, and from and after his decease, to the lawful issue of my said son James, to hold in fee simple ; but in default of such issue him surviving, then to my daughter Sarah Jane, for the term of her natural life ; and upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane, to hold in fee simple ; but in default of such issue of my said daughter Sarah Jane, then to my brothers and sisters and their heirs in equal shares." By a later clause the testator added : "It is my intention that upon the decease of either of my said children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will :"—

Held, reversing the judgment of Ferguson, J., 23 O. R. 401, that the clauses must be read together, and that, having regard to the latter clause, and to the direction that the issue of James were to take in fee simple, there was a sufficiently clear expression of intention to give James a life estate only, to prevent the application of the rule in *Shelley's Case*. *Evans* v. *King*, 21 A. R. 519. Affirmed by the Supreme Court, 24 S. C. R. 356.

Estate Tail—*Remainder.*]—A testator by his will devised to his son, and "to the heirs of his body," a part of his real estate, and to his daughter, and "to the heirs of her body," the remainder of the property, and if "either . . . should die without leaving heirs of their body," the share of the deceased to the survivor, and "to the heirs of their body," . . . and should both die "without leaving living issue," then over in fee simple. The daughter died in the lifetime of her brother, without issue. The son married and had living issue, and conveyed in fee :—

Held, that an estate tail vested in the son, and that there was nothing in the will to give the words "die without leaving living issue," the meaning of "an indefinite failure of issue," and that the ultimate remainder in fee simple expectant on the estate tail could be barred by the son. *Re Fraser and Bell*, 21 O. R. 455.

Executory Devise—*Death of Devisee Before Contingency Happens.*]—A testator devised his farm to his wife "to have and to hold unto my said wife until my daughter E. E. shall arrive at the age of twenty-one years. After that, to my said daughter and her heirs forever, and should my said daughter die before attaining the age of twenty-one years, I give and devise the said farm to my said wife, to have and to hold unto her and her heirs forever." The

widow died intestate before the daughter, who was the only child, and who herself died intestate and unmarried before attaining twenty-one :—

Held, that the widow, under the second gift to her, took an executory devise in fee, which passed upon her death to the daughter, upon whose death it passed to her proper representatives. *Re Bowey—Bowey* v. *Ardill*, 21 O. R. 361.

Executory Devise—*Happening of Event—Vested Estate.*]—A testator devised a farm to his executors in trust for his grandson, with power to sell and apply the proceeds for his benefit; and in case he died before attaining twenty-one, they were to transfer the land, or, if sold, the balance of the proceeds, to his father. The father died before his son, who died before attaining twenty-one, without issue. The land was not sold :—

Held, that the grandson took a vested estate in fee simple, subject to be divested on the happening of a certain event, which had become impossible, and that his estate had become absolute. *Parker* v. *Trusts Corporation of Ontario*, 26 O. R. 494.

Executory Devise—*Residuary Devise.*]—A testator devised certain land to his son W. during his lifetime; and in the event of his death, leaving his wife surviving him, he devised the rents, issues, and profits to her during her lifetime or widowhood; but in the event of both dying within thirty years from his death, in such case he devised the rents and profits thereof, until the expiration of such thirty years, to W.'s children equally, share and share alike; and after W.'s death, and after the death or remarriage of his said wife, and provided that the thirty years should have elapsed, to all of W.'s children by his said wife, share and share alike, to have and to hold the same after the specified periods to them, their heirs and assigns forever. By the last clause of the will, the testator gave all the residue of his estate, real, personal, and mixed, of whatever nature or kind soever, and not otherwise disposed of by his will, to W., to have and to hold the same to him, his heirs and assigns forever.

The testator died on the 9th January, 1876; W. and his wife both survived the testator and enjoyed their life estates, and died leaving children still surviving :—

Held, that under the will the fee in the land, subject to the estate devised to the children until the expiration of the thirty years, vested in W. and his heirs, and, in the absence of any evidence shewing whether or not W. had disposed of the land, the children could not impart a good title in fee. *Re Garbutt and Rowntree*, 26 O. R. 625.

Failure of Issue.]—By his will the testator devised to his son the use during his lifetime of certain land, but if he died without issue, then it was to be equally divided between two named grandsons, and by a subsequent clause, on the death of the testator's widow, he directed that the said land and all other property not bequeathed by his will should be equally divided amongst all his children. The son died, leaving issue, his mother predeceasing him :—

Held, that under R. S. O. ch. 109, sec. 32, the failure of issue referred to was a failure during the son's lifetime or at his death and not an indefinite failure, and that by virtue of the subsequent clause he took a life estate and not an estate tail by implication, and that on the termination of the life estate the lands fell in and formed part of the residue. *Re Bird and Bernard's Contract*, 59 L. T. N. S. 466, and *Stobbart* v. *Guardhouse*, 7 O. R. 230, distinguished. *Martin* v. *Chandlar*, 26 O. R. 81.

Inconsistent Clauses.]—A testator by the third clause of his will, made in numbered clauses, devised a lot to his son F., and by the fourth clause he appointed executors and devised another lot to them to be disposed of by them for the benefit of named sons and daughters in certain shares and amounts. In this clause there was the following paragraph : "At the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors :"—

Held, reversing the judgment of the Chancery Division, 25 O. R. 635, Street, J., dissenting, that this paragraph did not apply to or modify the devise to F. in the third clause. *Crawford* v. *Broddy*, 22 A. R. 307.

Infant—*Maintenance.*]—Under a devise of land to a father "during his life for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body, or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from and independent of their father, but the children being in needy circumstances will be entitled as against the father's execution creditor who has been appointed receiver of his interest to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. *Allen* v. *Furness*, 20 A. R. 34.

Mistake—*Direction to Divide in Impossible Fractions.*]—A testator by his will directed : "When my youngest son is of the age of eighteen years, my estate shall be divided among my children then living, *i.e.*, to each of my sons I leave two-thirds, and to each of my daughters one-third, of all my estate and effects." When the youngest son attained eighteen, there were then twelve children living, seven daughters and five sons :—

Held, that the most reasonable and satisfactory construction of this clause, having regard to the words used, was that each child should have a share, but that each son's portion should be double that of a daughter.

The principle of construction in such cases of mistakes in wills is that the "words are not corrected, but the intention, when clearly ascertained, is carried out, notwithstanding the apparent difficulty caused by the particular words." *Lasby* v. *Crewson*, 21 O. R. 93.

"My Lawful Heirs"—*Time when Heirs Ascertained.*]—A testator by his will, after a gift to his daughter and her mother for their joint lives, and to the survivor of them, directed that "at the decease of both, the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs." Both

lifetime or at his death and failure, and that by virtue of clause he took a life estate and il by implication, and that on of the life estate the lands fell rt of the residue. *Re Bird and ract*, 59 L. T. N. S. 466, and *rdhouse*, 7 O. R. 23; distin- *n* v. *Chandlar*, 26 O. R. 81.

Clauses.]—A testator by the his will, made in numbered a lot to his son F., and by se he appointed executors and lot to them to be disposed of he benefit of named sons and rtain shares and amounts. In was the following paragraph: of any one of my sons or ng no issue, their property to lly among the survivors:"— ng the judgment of the Chan- 25 O. R. 635, Street, J., dissent- paragraph did not apply to or vise to F. in the third clause. *oddy*, 22 A. R. 307.

ance.]—Under a devise of "during his life for the support ice of himself and his (three) remainder to the heirs of his uch of his children as he may e to," there is no trust in favour n so as to give them a beneficial from and independent of their children being in needy circum- e entitled as against the father's ditor who has been appointed interest to have a share of the rt for their maintenance and sup- rriving at the share it is reason- the income into aliquot parts, ne-fourth to the receiver. *Allen* A. R. 34.

Direction to Divide in Impossible testator by his will directed: youngest son is of the age of s, my estate shall be divided ildren then living, *i.e.*, to each of ve two-thirds, and to each of my ne-third, of all my estate and hen the youngest son attained ere were then twelve children daughters and five sons:— the most reasonable and satisfac- tion of this clause, having regard used, was that each child should but that each son's portion should t of a daughter. ple of construction in such cases in wills is that the "words are , but the intention, when clearly s carried out, notwithstanding the fficulty caused by the particular *sby* v. *Creveon*, 21 O. R. 93.

rful Heirs" — *Time when Heirs* —A testator by his will, after aughter and her mother for thei- nd to the survivor of them, directed decease of both, the residue of my onal property shall be enjoyed by e benefit of my lawful heirs." Both survived the testator and died, the daughter surviving the mother. At the death of the testator, his daughter was his only heir:—

Held, that the testator had himself excluded his daughter from being treated as one of his heirs, and by the expression "my lawful heirs" meant the persons who at the time of the death of the last survivor of his wife and daughter should then be his heirs-at-law. *Jones* v. *Colbeck*, 8 Ves. 38, approved and specially referred to. *Thompson* v. *Smith*, 25 O. R. 652. Reversed in appeal, 23 A. R. 29.

"My Own Right Heirs."]—A testator by his will directed that his trustees should, in certain events, after the death of his wife and daughter, sell all his estate, real and personal, and divide the same equally amongst his "own right heirs" who might prove their relationship, etc.:—

Held, that the conversion directed created a blended fund derived from realty and personalty, to be distributed equally among the same class of persons, and that the words "my own right heirs" signified those who would take real estate as upon an intestacy, and not next of kin, and that children of any deceased heirs at law were entitled to share *per stirpes*. *Coutsworth* v. *Carson*, 24 O. R. 185. *See* the next case.

"My Own Right Heirs."—*Period of Ascertainment—Distribution of Estate — "Equally" —Per Capita and not Per Stirpes.*]—Upon appeal from the Master's report on a reference for the administration of the estate of the testator whose will was construed in *Coutsworth* v. *Carson*, 24 O. R. 185:—

Held, having regard to the judgment in that case, that the "right heirs" were to be ascertained at the date of the death of the testator's daughter, and among them the whole of the estate was to be divided equally, share and share alike.

The expression "*per stirpes*" in the former judgment was improvidently used, due weight not having been given to the word "equally." *Re Ferguson—Bennett* v. *Coutsworth*, 25 O. R. 591.

"Nearest of Kin" — *Period of Ascertainment—Tenants in Common—"Then."*]—In the absence of any controlling context, the persons entitled under the description "nearest of kin" in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale.

And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, and provided that in the event of the latter dying without issue, "then in that case" it should be equally divided between his "nearest of kin;" and the daughter died while still an infant and unmarried:—

Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance, she was nevertheless entitled as one of the "nearest of kin;" and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common. *Bullock* v. *Downes*, 9 H. L. C. 1; *Mortimore* v. *Mortimore*, 4 App. Cas. 448; and *Re Ford, Patten* v. *Sparks*, 72 L. T. N. S. 5, followed.

The word "then," introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression "in that case," which followed it, and did not affect the construction of the will.

The widow remained in possession after the death of the testator, with her infant daughter, whom she supported out of the rents, until an order was made under R. S. O. ch. 137 permitting her to lease the farm, to retain one-third of the rents for herself as dowress, and to apply the remaining two-thirds in supporting the infant:—

Held, that she was put to her election by the terms of the will, but that she had not elected to take under it, and was therefore entitled to dower out of the farm in addition to the one-third in fee simple. *Brabant* v. *Lalonde*, 26 O. R. 379.

Personalty—*Words of Limitation in Tail Applied to.*]—A testator bequeathed personal estate to his wife, "to have and to hold unto her and the heirs of her body through her marriage with me, their, and each of their sole and only use forever:"—

Held, that the wife was entitled to the personalty absolutely, there being nothing to shew that the testator meant that the words, "heirs of her body through her marriage with me," should import anything different from their ordinary, natural meaning. *Crawford* v. *Trotter*, 4 Madd. 361, distinguished. *Fuller* v. *Anderson*, 20 O. R. 424.

Poor of County — *Town Detached from County for Municipal Purposes Only—Right of Residents of Town to Participate.*]—The testatrix by her will gave the residue of her estate in trust for a certain class of the poor of a county, "who must have been *bond fide* residents of the said county before becoming destitute or needy." A town in the county originally formed part thereof for all purposes, but was in 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only:—

Held, in the absence of anything in the context of the will clearly to the contrary, that residents of the town coming within the class referred to in the bequest were included therein. *Steele* v. *Grover*, 26 O. R. 92.

"Property" — *"Estate."*]—Either of the words "property" or "estate" is sufficient to pass realty under a will. *Cameron* v. *Harper*, 21 S. C. R. 273.

Right to "a Home"—*Interest in Land.*]—A testator devised land to one in trust, first, to permit his nephew and his wife and children to use it for a home, and, second, to convey it to such child of the nephew as the latter should nominate in his will. The nephew and his family were living upon the land at the time of the making of the will and at the death of the testator, when there were two dwelling-houses thereon. Afterwards the trustee and the nephew's father-in-law, at their expense, improved and altered the property so that the number of houses was increased to seven. The

nephew lived with his family in one and received the rents of the others.

In an action by judgment creditors of the nephew and his wife, seeking the appointment of a receiver to receive the rents in satisfaction of the judgment :—

Held, that the judgment debtors took no estate in the land under the will, and nothing more than the right to call upon the trustee to permit them to use the land for "a home," which expression, however, meant more than simply a house to live in; that they were entitled to the advantage of the increased value of the land; and that their right to the use of the land for a home could not be reached through a receiver so as to make it available for the satisfaction of the plaintiffs' claim. *Allen* v. *Furness*, 20 A. R. 34, distinguished. *Cameron* v. *Adams*, 25 O. R. 229.

Right to Remain and Live on "Place" while Unmarried.]—A testator by his will devised as follows: "I will, devise, and bequeath to my wife S. J. all my real and personal property during her natural life, and that my daughter S. J. shall remain and live on said place as long as she remains unmarried." The only real estate or "place" the testator owned was his farm, on which his widow remained with the daughter until the former's death :—

Held, that the daughter had the right, after the mother's death, to live on the property so long as she remained unmarried, and that she had an estate in and was entitled to the use of it, as she might choose to use it, for that period. *Judge v. Splann*, 22 O. R. 409.

Substitution—*Usufruct — Sheriff's Sale.*]—The will of the late J. McG. contained the following provisions :—"Fifthly, I give, devise, and bequeath unto Helen Mahers, of the said parish of Montreal, my present wife, the usufruct, use, and enjoyment, during all her natural lifetime, of the rest and residue of my property, movable or immovable . . . in which I may have any right, interest, or share at the time of my death, without any exception or reserve : to have and to hold, use and enjoy the said usufruct, use, and enjoyment of the said property unto my said wife, the said Helen Mahers, as and for her own property from and after my decease and during all her natural lifetime. Sixthly, I give, devise, and bequeath in full property unto my son James McGregor, issue of my marriage with the said Helen Mahers, the whole of the property of whatever nature or kind, movable, real, or personal, of which the usufruct, use, and enjoyment during her natural lifetime is hereinbefore left to my said wife, the said Helen Mahers, but subject to the said usufruct, use, and enjoyment of his mother, the said Helen Mahers, during all her natural lifetime as aforesaid, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever ; should, however, my said son, the said James McGregor, die before his said mother, my said wife, the said Helen Mahers, then and in that case I give, devise, and bequeath the said property so hereby bequeathed to him to the said Helen Mahers, in full property, to be disposed of by last will and testament or otherwise as she may think fit, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever : to have and to hold the said hereby bequeathed and given property to the said James McGregor, his heirs and assigns, should he survive his said mother, as and for his and their own property for ever, and in the event of his predeceasing his said mother, the said Helen Mahers, her heirs and assigns, as and for her and their own property forever :"—

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the will of J. McG. did not create a substitution but a simple bequest of usufruct to his wife and of ownership to his son :—

Held, also, that a sheriff's sale (*décret*) of property forming part of J. McG.'s estate under an execution issued against a person who was in possession under a title from his wife, such sale having taken place after J. McG.'s son became of age, was valid and purged all real rights which the son might have had under the will : Art. 711, C. C. P. *Patton* v. *Morin*, 16 L. C. R. 267, approved. *McGregor* v. *Canada Investment and Agency Co.*, 21 S. C. R. 499.

Vesting—*Gift Contained in Direction to Pay —Postponement of Enjoyment.*]—A testator by his will directed that his estate should be divided upon his youngest child attaining the age of twenty-one years, the income of the estate in the meantime to be paid to the wife for the benefit of herself and the children. The only gift was contained in the direction to pay and divide upon the arrival of the period of distribution :—

Held, that the gift vested prior to the enjoyment of the *corpus* of the estate, which was only postponed in order to provide for the maintenance of the family :—

Held, also, that the gift vested in each child upon attaining the age of twenty-one, and that no child who did not attain that age was intended to take a share of the *corpus*. *Re Douglas—Kinsey* v. *Douglas*, 22 O. R. 553.

Vesting—*Life Estate—Remainder Trust— Conversion into Personalty—"Pay or Apply."*]—Devise of land to widow for life for the support of herself and testator's children, with power to sell, etc., as she might think proper for the general benefit and purposes of his estate ; and upon her death, devise of such part of land as might remain undisposed of to trustees to stand seized and possessed of for the benefit of testator's children, in equal shares, and to pay to each his share at majority ; with a provision that upon the death of any child before majority without issue, the trustees were to pay or apply his share to and among the survivors :—

Held, that the estates of the children became equitably vested upon the death of the testator, subject to the mere powers for sale contained in the will ; and so vested as realty, for there was no trust which required, and the use of the words "pay" and "pay or apply" did not work, a conversion of realty into personalty. *McDonell* v. *McDonell*, 24 O. R. 468.

II. Legacies.

Assignment of—*Payment before Period of Distribution, to Assignee.*]—Two devisees of full

age having a vested interest absolute in a definite fund in Court, although not divisible by the terms of the will until a third devisee attained twenty-one, having assigned their interest in the fund to a purchaser, the Court, the estate having been otherwise wound up, made an order for payment out to the assignee, without waiting for the period of distribution. *Re Wartmen*, 22 O. R. 601.

Attachment of Legacies.]—*See McLean* v. *Brace*, 14 P. R. 190, *ante* 60.

Charge on Land—*Registration of Will—Notice—Priority of Legatees over Mortgagees.*]—A testator by his will devised land to his son James, subject to the payment of an annuity to his widow for her life, after the expiration of a lease given by the testator; and directed his executors to apply the rent derived from the land so devised in payment of an incumbrance thereon, "so that my son may have the said property, at the expiration of the said lease, free from all incumbrance;" and he then directed that his son James should pay one-half of the sums thereinafter bequeathed to each of his daughters, as soon as his son Daniel should attain the age of twenty-one; and to the latter he devised other land, and directed him also to pay one-half of the bequests to the daughters. Then followed the bequests to his daughters, with names and amounts, to be paid to them in equal shares by his sons James and Daniel on the latter attaining the age of twenty-one. The will was entirely silent as to the debts of the testator.

James adopted the devise to him, took possession of the land, and dealt with it as his property for many years:—

Held, that the one-half of the legacies to the daughters was charged upon the land devised to James. *Robson* v. *Jardine*, 22 Gr. 120, followed.

The will was duly registered prior to the dates or registry of certain mortgages created by James upon the land devised to him:—

Held, that the mortgagees must be taken to have had, at the time of advancing these moneys, full notice of the will and its contents; and were bound to see to the application of the moneys advanced by them; and that, not having done so, the legatees were entitled to priority:—

Held, also, that that part of sec. 22 of R. S. O. ch. 110 which provides that the four preceding sections "shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies," is of general application, and applies to wills coming into operation as well after as before the 18th September, 1865:—

Held, lastly, that sec. 8 of R. S. O. ch. 110 (sec. 15 of R. S. O. ch. 102) did not apply; because the money was not money payable upon an express or implied trust, or for a limited purpose, within the meaning of the section. *McMillan* v. *McMillan*, 21 Gr. 594, and *Moore* v. *Mellish*, 3 O. R. 174, distinguished. *Gray* v. *Richmond*, 22 O. R. 256.

Charge on Land—*Sale by Executors in Order to Pay the Legacy.*]—A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children, to whom the lot descended.

On an application by the executors at the instance of the official guardian, it was:—

Held, that it was the duty of the executors to sell the land and pay the legacy. *Re Eddie*, 22 O. R. 556.

Interest—*Recovery Back—Interest on Overpayments—Account.*]—Where a testator bequeathed a legacy to be paid by the devisee of certain lands, through the executor, in twenty semi-annual instalments, with interest at the rate of six per cent., payable at the time of each instalment on the amount of such payment, to be computed from the time of his decease; and, by mutual error, interest was paid with each instalment upon the whole amount of principal then remaining unpaid, which payments of interest were consumed by the legatee as income, while he invested the instalments of principal, and the legatee now brought this action against the executor and devisee claiming an instalment as still due, the defendants alleging that he had been overpaid, and asking an account:—

Held, by Meredith, J., that the overpayments of interest were made under mistake of fact, and could be recovered or set off; and that the plaintiff, by reason of the overpayments, was enabled to, and did, invest just so much of the *corpus*, at interest, and so, in effect, got, and should be charged with, interest upon the overpayments; and it being admitted that upon this footing the plaintiff was fully paid, dismissed the action.

Held, by a Divisional Court, affirming that judgment, that the overpayments were made under a mistake of fact, and might be recovered or set off; but, varying it, that an account should be taken, and that all the payments made should be brought into account and applied, but without addition of interest, to the aggregate of the amounts properly due and payable under the will, and any balance due to the plaintiff ascertained. *Cowham* v. *Kingston*, 17 O. R. 432, and *United States* v. *Sanborn*, 135 U. S. R. 271, specially referred to. *Barber* v. *Clark*, 20 O. R. 522. Affirmed in appeal, 18 A. R. 435.

Interest.]—A testatrix by her will directed that a legacy should be paid out of the proceeds of the sale of lands, and that the lands should be sold at any time within two years after her death:—

Held, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale. *Re Robinson—McDonell* v. *Robinson*, 22 O. R. 438.

Interest—*Direction to Sell.*]—Where land was directed to be sold within three years from the testator's death, it was held that legacies bore interest from the date when the lands should have been sold. *McMylor* v. *Lynch*, 24 O. R. 632.

Legacy to Widow in Lieu of Dower—*Right to Annual Specific Sum—Children of Deceased Child—Right to Parent's Share.*]—A testator by his will bequeathed to his wife $150 a year, payable half-yearly out of the rent of his farm until the sale thereof, when she was to be paid the interest on $2,500 at six per cent., or the $150. On the sale, $2,500 was to be left on mortgage

or invested by the executors at interest payable half-yearly to the widow during her lifetime or widowhood, and such provision was to be in lieu of dower. Legacies were given to each of the testator's twelve children (one of whom was dead at the date of the will), to be paid out of the proceeds of the sale of the real estate. The residue of the deceased daughter's legacy was directed to be placed at interest and divided equally between her surviving children on their attaining twenty-one years, and in case any of the testator's children died before receiving their full shares, and leaving issue, the deceased child's share was to be equally divided between his or her children; if such deceased child died without issue, his or her share was to be divided equally between his or her surviving brothers and sisters. All the residue of the estate, not thereinbefore disposed of, he gave to his children, "and their issue as aforesaid provided for," to be divided equally between them from time to time as the money should become payable. The estate proved insufficient to provide for the annuity and payment of the legacies in full, and the annual interest obtainable on the $2,500 was less than $150:—

Held, that there was a gift to the widow of $150 a year, and not merely of the annual interest derivable from the investment of the $2,500, and that she was entitled to have it paid out of the residue in priority to the other legatees:—

Held, also, that the deceased daughter's children were entitled to share in the residue. *Koch* v. *Heisey*, 26 O. R. 87.

Succession Duty—*Residue—Pro Ratâ.*]—A testator devised and bequeathed all his real and personal estate to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees, and others to charitable associations, and provided that the residue of his estate should be divided *pro ratâ* among the legatees:—

Held, that it was the duty of the executors to deduct the succession duty payable in respect of the pecuniary legacies, before paying the amounts over to the legatees, and they had no right to pay such succession duty out of the residue left after paying the legacies in full.

Where the residue of an estate is directed to be divided *pro ratâ* among prior legatees, they take such residue in proportion to the amount of their prior legacies. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

Trust—*Claim on Assets—Priority—Charge on Realty.*]—T. H. and his brother were partners in business, and the latter having died, T. H. became by will his executor and residuary legatee. A legacy was left by the will to E. H., part of which was paid and judgment recovered against the executor for the balance. T. H. having incumbered both his own share of the partnership property and that devised to him, one of his creditors, and a mortgagee of the property, obtained judgment against him, and procured the appointment of receivers of his estate. E. H. then brought an action to have it declared that his judgment for the balance of his legacy was a charge upon the moneys in the receivers' hands, in priority to the personal creditors of T. H.:—

Held, affirming the judgment of the Court below, that it having been established that the moneys held by the receivers were personal assets of the testator, or the proceeds thereof, E. H. was entitled to priority of payment, though his judgment was registered after those of the other creditors.

Held, also, that the legacy of E. H. was a charge upon the realty of the testator, the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and either of the words "property" and "estate" being sufficient to pass realty. This charge upon realty operated against the mortgagees, who were shewn to have had notice of the will. *Cameron* v. *Harper*, 21 S. C. R. 273.

III. Revocation and Revival.

Codicil.]—Where by a codicil dated the 21st July, 1882, expressed to be a codicil to his will of the 17th July, 1880, the testator confirmed the said will, and it appeared that the said will consisted not merely of the document of the 17th July, 1880, but also of an intermediate codicil revoking a particular bequest therein:—

Held, that, though a reference simply to the date of the earlier document was not sufficient in itself to restrict the confirmation to that particular document, yet other words and surrounding circumstances could and did convey such an intention with reasonable certainty, and accordingly the will of the 17th July, after confirmation, was no longer affected by the partial revocation made by the intermediate codicil. *McLeod* v. *McNab*, [1891] A. C. 471.

Codicil.]—The testator made a will on the 14th May, 1890, disposing of all his estate, giving to certain charities specific proportions of the residue, and naming three persons executors. In January, 1891, he made another will revoking all previous wills and making a number of specific devises and bequests, but leaving a large residue undisposed of. In March, 1891, he executed a codicil, in which, after stating that "I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890," he revoked the appointment of one of the named executors in that will "to be one of the executors of this my will," and in his stead appointed another person "with all the powers and duties . . in my said will declared." The attestation clause stated that this was signed, etc., by the testator "as a codicil to his last will and testament:"—

Held, Hagarty, C.J.O., dissenting, affirming the judgment of Robertson, J., that there was shewn in this codicil an intention to revive the revoked will within the meaning of sec. 24 of the Wills Act, R. S. O. ch. 109:—

But held further, reversing the judgment of Robertson, J., that the will so revived took effect as at the date of the codicil, and that, for the purpose of deciding as to the validity of the charitable bequests, it must be treated as if executed at that date. *Holmes* v. *Murray*, 13 O. R. 756, and cases of that class, where the codicil in question refers to an existing will, distinguished. *Purcell* v. *Bergin*, 20 A. R. 535. Reversed by the Supreme Court, 23 S. C. R. 101, *sub nom. Macdonell* v. *Purcell*. *See* the next case.

Codicil—*Intention to Revive—Reference to Date—Removal of Executor.*]—A will which has been revoked cannot, since the passing of the Ontario Wills Act, R. S. O. 1887 ch. 109, be revived by a codicil, unless the intention to revive it appears on the face of the codicil, either by express words referring to the will as revoked and importing such intention, or by a disposition of the testator's property inconsistent with any other intention, or by other expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question. A reference in the codicil to the date of the revoked will, and the removal of an executor named therein and substitution of another in his place, will not revive it.

Held, per King, J., dissenting, that a codicil referring to the revoked will by date and removing an executor named therein is sufficient indication of an intention to revive such will, more especially when the several instruments are executed under circumstances shewing such intention. *Macdonell* v. *Purcell*, *Cleary* v. *Purcell*, 23 S. C. R. 101.

Codicil—*Revocation of Bequest.*]—A testatrix by the third clause of her will bequeathed to S. the interest on the sum of $3,000 for life, and after his death directed the $3,000 to be divided among his children, and by a subsequent clause she directed her executors to deduct out of the $3,000 all payments made to S. after the date of the will. By a codicil she directed that the bequest number three, bequeathing to S. the interest on $3,000, be revoked, and in lieu thereof the sum of $500 be paid to him, or his heirs, and that the direction as to payments made after the date of the will should apply thereto:—

Held, that, the effect of the codicil was to revoke the whole of the third clause. *Edwards* v. *Findlay*, 25 O. R. 489.

IV. Validity.

1. *Wills in General.*

Absence of Witnesses.]—A person insured his life and signed a document directed to the managers of the insurance company, in these words: "I give and bequeath to . . . the amount stated on the policy given on my life by the S—— Life Insurance Co. To be paid to none other unless at my request, dated later." After shewing or reading the policy, which he retained, he handed the document to the plaintiff, remarking: "There, that is as good as a will:"—

Held, that on account of its incompleteness, the transaction was not a gift or a declaration of trust, as the trust intended was not irrevocable, nor could the paper take effect as a will. *Kreh* v. *Moses*, 22 O. R. 307.

Indian.]—An Indian male or female may make a will, and may by such will dispose of real or personal property subject to the provisions of the Indian Act, R. S. C. ch. 43, or other statute.

Quære, whether the last part of sec. 20 of the Indian Act, R. S. C. ch. 43, does not leave all questions arising in reference to the distribution of the property of a deceased Indian, male or female, to the Superintendent-General, so that his decision, and not that of the Court, should determine such questions. *Johnson* v. *Jones*, 26 O. R. 109.

Solicitor's Advice.]—Per Gwynne, J.—A will is not invalid because it is executed in pursuance of a solicitor's opinion on a matter of law, which proves to be unsound. *Macdonell* v. *Purcell*, *Cleary* v. *Purcell*, 23 S. C. R. 101.

Testamentary Capacity—*Weakness of Mind—Undue Influence.*]—In 1889 an action was brought by G. H. H., in the capacity of curator to Mrs. B., an interdict, against A., in order to have a certain deed of transfer made to him by Mrs. B., his mother, set aside and cancelled. Mrs. B. having died before the case was brought on to trial, the respondent, M. B., presented a petition for continuance of the suit on her behalf as one of the legatees of her mother under a will dated the 17th November, 1869. This petition was contested by A. B., who based his contestation on a will dated the 17th January, 1885 (the same date as that of the transfer attacked by the original action), whereby the late Mrs. B. bequeathed the residue of all of her property, etc., to her two sons. Upon the merits of the contestation as to the validity of the will of the 17th January, 1885:—

Held, affirming the judgment of the Court below, that Art. 831, C. C., which enacts that the testator must be of sound mind, does not declare null only the will of an insane person, but also the will of all those whose weakness of mind does not allow them to comprehend the effect and consequences of the act which they perform:—

Held, further, that upon the facts and evidence in the case, the will of the 17th January, 1885, was obtained by A. at a time when Mrs. B. was suffering from senile *dementia* and weakness of mind, and was under the undue influence of A., and should be set aside. *Baptist* v. *Baptist*, 23 S. C. R. 37.

Testamentary Capacity.]—*See Currie* v. *Currie*, 24 S. C. R. 712.

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2. *Interest of Witness.*

Legatee.]—Where one of several residuary legatees was also a witness to the will:—

Held, that the will must be read as if the gift to her had been blotted out by the testator and the residuary gift distributed ratably among the other residuary legatees as if she were non-existent. *Farewell* v. *Farewell*, 22 O. R. 573.

Legatee's Husband.]—A legacy invalid because of the legatee's husband being a witness to the will was held validated by a reviving codicil witnessed by independent persons. *Purcell* v. *Bergin*, 20 A. R. 535.

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3. *Mistake and Misdescription.*

Falsa Demonstratio.]—A testator by his will devised to his son G. "the property I may die possessed of in the village of M., also lot 28 in the 10th concession of B." In the early part of the will he had used the words "wishing

to dispose of my worldly property." The testator did not own lot 28, and the only land he did own in the 10th concession of B. was a part of lot 29. The will contained no residuary devise.

Upon a petition under the Vendors and Purchasers' Act :—

Held, that the part of lot 29 owned by the testator did not pass by the will to the son. *Re Bain and Leslie*, 25 O. R. 136.

Imperfect Description.]— Per Hagarty, C. J. O., and Maclennan, J. A.—A gift or devise will not fail for a misdescription or an imperfect or inaccurate description of a legatee or devisee, if the description is sufficient to designate with reasonable certainty the object of the testator's bounty. Therefore the Methodist Church may take under a gift to "The Missionary Society of the Methodist Church in Canada." *Tyrrell* v. *Senior*, 20 A. R. 156.

Misdescription of Land.]—A testator, owning lots 6 and 8 in the first concession, devised the same in his will in two separate devises as "my property known as lot . . . second concession," etc. :—

Held, that his lots in the first concession passed. *Hickey* v. *Hickey*, 20 O. R. 371.

Mistake—*Direction to Divide in Impossible Fractions.*]—A testator by his will directed : "When my youngest son is of the age of eighteen years, my estate shall be divided among my children then living, *i.e.*, to each of my sons I leave two-thirds, and to each of my daughters one-third, of all my estate and effects." When the youngest son attained eighteen, there were then twelve children living, seven daughters and five sons :—

Held, that the most reasonable and satisfactory construction of this clause, having regard to the words used, was that each child should have a share, but that each son's portion should be double that of a daughter.

The principle of construction in such cases of mistakes in wills is that the "words are not corrected, but the intention, when clearly ascertained, is carried out notwithstanding the apparent difficulty caused by the particular words." *Lasby* v. *Crewson*, 21 O. R. 93.

Unintentional Omission—*Words Read Into Will.*]—A testator, being possessed of personalty and realty, bequeathed pecuniary legacies to a much greater amount than the personalty left by him, and then bequeathed to his "executors . . . in trust to dispose thereof to best advantage, in trust to be divided and paid over to my children in the sums mentioned, and as soon as may be agreeable to the terms and conditions of certain mortgages and leases now standing against the property," without mentioning any property :—

Held, that the words "my property," presumably unintentionally omitted, should be read into the will. *Colvin* v. *Colvin*, 22 O. R. 142.

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4. *Mortmain Act.*

Agricultural Society—*Freemasonry—Free Thought.*]—By his will the testator directed his executors to invest $2,000 and pay over the yearly interest to an agricultural society (incorporated under R. S. O. 1877 ch. 35, and thereby authorized to acquire and hold, but not to take by devise, real estate), to be applied as a premium for the best results in a specified mode of agriculture, but with a provision that all competitors should declare that they were neither Freemasons, Orangemen, nor Oddfellows ; and, in case of neglect to comply with the conditions, the executors were to apply such yearly interest in procuring lectures against Freemasonry and other secret societies. The legacy was payable out of a mixed fund consisting in part of impure personalty :—

Held, that the society came under the Mortmain Act, and, so far as the bequest consisted of impure personalty, it was void :—

Held, also, that the society was not bound to expend annually the interest received, but might apply it from time to time as deemed best, so long as it acted in good faith and did not divert the money from the purpose directed by the testator.

The executors were directed to invest the residue of the estate and to apply the annual interest therefrom for the promotion of free thought and free speech in the Province of Ontario :—

Held, that this bequest was void as opposed to Christianity. *Pringle* v. *Corporation of Napanee*, 43 U. C. R. 285, followed. *Kinsey* v. *Kinsey*, 26 O. R. 99.

Application of Act.]—Held, per Gwynne and Sedgewick, JJ , that the Imperial statute 9 Geo. II. ch. 36 (the Mortmain Act) is in force in the Province of Ontario, the Courts of that Province having so held (*Doe d. Anderson* v. *Todd*, 2 U. C. R. 82 ; *Corporation of Whitby* v. *Liscombe*, 23 Gr. 1), and the legislature having recognized it as in force by excluding its operation from Acts authorizing corporations to hold lands. *Macdonell* v. *Purcell*, *Cleary* v. *Purcell*, 23 S. C. R. 101.

Charitable Bequest—*Indefiniteness—Scheme.*]—A testator by his will devised to certain named persons, who were appointed the executors and trustees thereof, the remainder of his estate to be used to further "the cause of our Lord Jesus Christ :"—

Held, that the legacy was not void for indefiniteness, and discretion having been given to the executors and trustees, it was not necessary that a scheme should be directed. *Phelps* v. *Lord*, 25 O. R. 259.

Charitable Use—*Augmentation of Particular Fund or Residuary Estate.*]—A testator by his will provided as follows :—

"I do order and direct that my executor sell the real estate owned by me, such sale to be made inside of three years from the date of my decease, and out of the proceeds of the said sale to pay to the Archbishop of the Diocese of Toronto $500 ; to the Bishop of the Diocese of Hamilton $500 ; to be applied for the education of young men for the priesthood ; and the balance to be invested by my executor in the proportion of $15 for my wife and $8 for my mother.

"At my mother's death, I order that her proportion . . be divided . . " between five nieces, and that "on my wife's death, her pro-

portion . . be divided" between nephews and nieces.

"All the residue of my estate not hereinbefore disposed of, I give, devise, and bequeath unto my wife:"—

Held, that the bequests to the Archbishop and Bishop named in the will being essentially different from their names in their corporate capacity, were intended for them individually, subject to the trust declared, the purpose of which was a charitable use, and that the money being derived from the sale of land, the legacies failed, and the amount went to augment the residuary gift of the particular fund out of which it was directed to be paid, and not the general residue of the estate.

That as there was no special devise of the real estate, but only a direction to the executors to sell and pay legacies, the land and rents arising therefrom belonged to the widow, under the general residuary gift to her, and that the executor had no power to lease.

That the widow was not bound to elect between her dower and the will. *McMylor* v. *Lynch*, 24 O. R. 632.

Church—*Mixed*]—A testator by his will bequeathed a money to the trustees of a church "to be used in the payment of any indebtedness on said church and for such other purposes as they may deem wise." At the time the will took effect there was no debt on the church:—

Held, that the reference in the will meant outlay in connection with the church such as repair and maintenance or any obligation incurred for which the land was not liable, and that the bequest was valid. *Bunting* v. *Marriott*, 19 Beav. 163, followed.

The will directed the bequest to be paid out of a mixed fund derived from the sale of land and personalty:—

Held, as far as the real estate was concerned, that the gift failed.

Directions as to the application of the fund. *Ostrom* v. *Alford*, 24 O. R. 305.

Marshalling.]—There can be no marshalling in favour of charities; yet where charitable and other legacies are payable out of a mixed fund, the proceeds of realty, impure personalty, and personalty, the charitable legacies do not fail *in toto*, but must abate in the proportion which the sum of the realty and impure personalty charged with charitable gifts bears to the pure personalty. *In re Staebler*, *Staebler* v. *Zimmerman*, 21 A. R. 266.

Methodist Church.]—Section 6 of 47 Vict. ch. 88 (O.) does not confer upon the Methodist Church the powers of the Connexional Society of the Wesleyan Methodist Church in Canada to take by devise without reference to the restrictions of the Religious Institutions Act; and a bequest to the Church payable out of realty, made by will executed within six months of the testator's death, was held void. *Smith* v. *Methodist Church*, 16 O. R. 199, approved. *Tyrrell* v. *Senior*, 20 A. R. 156.

Missions.]—A testator by his will bequeathed to his executors out of his pure personalty the sum of $10,500, to be paid by them as follows: "$3,500 to Wycliffe College, $3,500 to the Bishop of the Diocese of Algoma for the support of missions of the said Diocese, and the balance, to wit, the sum of $3,500, towards the support of any mission or missions which may be undertaken or established by the Rev. Edward F. Wilson, the said Mr. Wilson having left the Shingwauk Home with the intention of establishing a new mission or missions elsewhere:"—

Held, (1) that the bequest of the sum for the support of missions to be undertaken was not a bequest to the Rev. Edward F. Wilson personally, but to the executors for the support of the missions.

(3) That it was a good charitable bequest, and referred to missions connected with the spread of religious teaching either in a field or locality of missionary work. *In re Jarman's Estate*, *Leavers* v. *Clayton*, 8 Ch. D. 584, and *In re Riland's Estate*, *Phillips* v. *Robinson*, W. N. 1881, p. 173, distinguished. *Toronto General Trusts Co.* v. *Wilson*, 26 O. R. 671.

Poor of County.]—The testatrix by her will gave the residue of her estate in trust for a certain class of the poor of a county, "who must have been *bonâ fide* residents of the said county before becoming destitute or needy." A town in the county originally formed part thereof for all purposes, but was in 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only:—

Held, in the absence of anything in the context of the will clearly to the contrary, that residents of the town coming within the class referred to in the bequest were included therein. *Steele* v. *Grover*, 26 O. R. 92.

Temperance Legislation—*Impure Personalty.*]—Where a testator bequeathed a sum of money to trustees, upon trust "to apply the same in such lawful ways as in their discretion they may deem best in order to promote the adoption by the Parliament of the Dominion of Canada of legislation prohibiting totally the manufacture or sale in the Dominion of intoxicating liquor to be used as a beverage, and in order to give practical aid in the enforcement of such legislation when adopted, whether by educating and developing a strong public sentiment in its favour or by other and more direct means, or in such other ways as my trustees shall think best:"—

Held, a good charitable legacy, being for a lawful public or general purpose, and not contrary to morality or to public policy.

The testator merely sought to promote a desirable change in the law by constitutional means.

Held, also, that a promissory note payable to the testator collaterally secured by mortgage on land was impure personalty. *Farewell* v. *Farewell*, 22 O. R. 573.

Unincorporated Association.]—A testator domiciled in the State of Missouri, U.S., at the time of the execution of his will and at the time of his death, bequeathed personal property situate in this Province to a Lodge of Oddfellows in the State of New York, U.S., which, although unincorporated at the time of the testator's death, was subsequently authorized by law to take and hold, in the names of trustees, property devised to the lodge.

In an action to test the validity of the bequest :—

Held, that the parties having selected their forum in this Province, the action must be dealt with here according to the law of the testator's domicile, which, in the absence of evidence to the contrary, would be presumed to be the same as the law of this Province :—

Held, also, there being no prohibitory law of the legatees' domicile, the bequest to the lodge was a valid bequest to the members thereof, and that the trustees of the lodge could be added as parties defendants, on behalf of all the members. *Walker* v. *Murray*, 5 O. R. 638, followed. *Graham* v. *Canandaigua Lodge*, 24 O. R. 255.

Void Bequests—*Intestacy.*]—Certain charitable bequests having been held void, it was further held that those that were good were not increased, but that the amount of the void bequests was distributable as in case of intestacy. *Purcell* v. *Bergin*, 20 A. R. 535.

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5. *Power of Appointment.*

Mode of Exercise.]—A deed of trust provided that certain lands should go to the settlor's three children in default of appointment by deed. Afterwards he made his will, under seal, whereby he devised "all the rest of my estate, real and personal, to which I shall be entitled at the time of my decease," to one of the three children :—

Held, that this residuary devise could not be regarded as an execution of the power of appointment, nor even as such a defective execution as equity would aid, at any rate at the suit of the plaintiff, who, as an illegitimate child of the testator, was only a stranger. *Shore* v. *Shore*, 21 O. R. 54.

Mode of Exercise.]—A father conveyed lands to his daughter by deed with *habendum* "to have and to hold the same unto . . . and the heirs of her body lawfully begotten, to and for their sole and only use forever . . . to and for the sole and separate use and benefit of (grantor) for and during the term of her natural life, and after her death then to the heirs of her body lawfully begotten forever. Provided always, however, that it shall and may be lawful for (grantor) to direct and appoint, either by deed or her last will and testament, which or in what manner her said heirs shall have the lands and premises hereby granted, should circumstances at any time render it necessary, of which circumstances she shall and may be sole judge." She died leaving her husband and several children surviving her, and by her will devised and appointed the lands to her eldest son with instructions to dispose of the same between her husband and children in the proportions mentioned in her will :—

Held, that the daughter took an estate in fee tail general, and that her husband was tenant by the curtesy :—

Held, also, that the provisions of the will were not a valid exercise of the power. *Archer* v. *Urquhart*, 23 O. R. 214.

V. Miscellaneous Cases.

Division of Estate—*Right to Postpone.*]—T. F. F., who, in partnership with his brother J. F., carried on business as manufacturers of boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M. W. F., the appellant, and J. F., the respondent. The will contained also the following provision : "But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself in co-partnership, under the name and firm of Fogarty & Brother, should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor. T. F. F. died on the 29th April, 1889. On the 30th April, 1889, a statement of the affairs of the firm was made up by the book-keeper, and J. W. and M. W. F. having agreed upon such statement, the balance shewn was equally divided between the parties, viz., $24,146.34 being carried to the credit of M. W. F., in trust, and $24,146.34 being carried to J. F.'s general account in the books of the firm. At the foot of the statement a memorandum dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them. On the 6th March, 1890, M. W. F. brought an action against J. F., claiming that he was entitled to $24,146.34, with interest, from the date of the division and distribution, viz., 30th April, 1889. J. F. pleaded that under the will he was entitled to postpone payment until five years from the testator's death, and that the action was premature :—

Held, affirming the judgment of the Court below, that J. F. was entitled under the will to five years to make the division contemplated, and that he had not renounced such right by signing the statement shewing the amount due on the 30th April, 1889. *Fogarty* v. *Fogarty*, 22 S. C. R. 103.

Exoneration from Incumbrance—*Devolution of Estates Act—Distribution of Estate.*]—The testatrix, who died in 1891, specifically devised to her grandson a part of her land, which was incumbered. To the plaintiff she gave a legacy of $5,000. The remainder of her estate, consisting of personalty and other lands, she did not dispose of or in any way refer to in her will, except in this clause : "I hereby charge my estate with payment of all incumbrances upon the said lands at the time of my death :"—

Held, that the residue of the estate was charged with mortgage debts to the exclusion of the land specifically devised.

Such residue was to be treated as one fund, and as if it were all personalty, under sec. 4 of the Devolution of Estates Act, R. S. O. ch. 108 ; and out of it the debts, including the mortgage debts upon the land specifically

tate—*Right to Postpone.*]—artnership with his brother isiness as manufacturers of Montreal, by his last will left l estate to be equally divided thers, M. W. F., the appel- respondent. The will con- wing provision: "But it is l desire that nothing herein ve the effect of disturbing rried on by my said brother lf in co-partnership, under f Fogarty & Brother, should ed between the said Jere- Michael William Fogarty, t be a member of the firm, years computed from the order that my brother, the rty, may have ample time ess and make the division een them and the said ogarty, and in the event r of them, then the whole or. T. F. F. died on the n the 30th April, 1889, a airs of the firm was made er, and J. W. and M. W. F. uch statement, the balance divided between the par- being carried to the credit ust, and $24,146.34 being eral account in the books e foot of the statement a 12th June, 1889, was signed aring that the said amount stributed to them. On the W. F. brought an action ng that he was entitled to rest, from the date of the ion, viz., 30th April, 1889. nder the will he was en- ment until five years from and that the action was

e judgment of the Court entitled under the will to he division contemplated, renounced such right by shewing the amount due 89. *Fogarty* v. *Fogarty*,

Incumbrance—*Devolu- Distribution of Estate.*]—The 1891, specifically devised of her land, which was plaintiff she gave a legacy inder of her estate, con- and other lands, she did any way refer to in her use: "I hereby charge ent of all incumbrances s at the time of my

idue of the estate was e debts to the exclusion devised. be treated as one fund, rsonalty, under sec. 4 of ates Act, R. S. O. ch. he debts, including the the land specifically

devised, were first to be paid, and then the legacy; the balance, if any, to go to the heirs-at-law and next of kin. *Scott* v. *Supple*, 23 O. R. 393.

Felony.]—A devisee who kills the devisor and is convicted of manslaughter therefor, does not forfeit the devise, the element of intent being in such case necessarily absent. *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, distinguished.

Judgment of Ferguson, J., 24 O. R. 132, reversed. *McKinnon* v. *Lundy*, 21 A. R. 560. *See* the next case.

Felony—*Death of Testator Caused by Devisee.*]—No devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter; Taschereau, J., dissenting. Judgment of Court of Appeal, *sub nom. McKinnon* v. *Lundy*, 21 A. R. 560, reversed. *Lundy* v. *Lundy*, 24 S. C. R. 650.

Heirs-at-law — *Change in Law After Will Made.*]—A testator by his will, made on the 14th August, 1850, devised certain land to his widow for life, and after her death to two nephews, and in the case of the death of them, or either of them, in his own lifetime, he devised the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns. The Act commonly known as the Act abolishing primogeniture, 14 & 15 Vict. ch. 6, was passed on the 2nd August, 1851, and came into force on the 1st January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866, and his widow in 1870:—

Held, Galt, C. J. C. P., dissenting, affirming the judgment of Robertson, J., 16 O. R. 341, that the Act abolishing primogeniture did not apply, (1) because the will was made before it was passed or took effect; and (2), because the land had been lawfully devised by the person who died seized, and therefore that the eldest son of the deceased nephew, as his common law heir, was entitled to the remainder in fee expectant upon the death of the widow. *Tylee* v. *Deal*, 19 Gr. 601, approved. *Baldwin* v. *Kingstone*, 18 A. R. 63. Affirmed on this point by the Judicial Committee, 18 A. R., Appendix.

Products and Services Charged on Land—*Tender of and Refusal to Accept—Compensation.*]—A testator by his will devised his farm to his grandson charged with the supply of certain products and personal services in favour of a daughter and granddaughter.

On a disagreement between the parties, a tender of the products and services was made and refused, and an action was brought to have them declared a charge on the land and for a money compensation:—

Held, that the refusal of the products did not deprive the plaintiffs of the right to recover their value, but that they were not entitled to compensation for the personal services proffered and refused. *Murray* v. *Black*, 21 O. R. 372.

Residuary Gift.]—Where there was no special devise of the testator's real estate, but only a direction to the executors to sell and pay legacies, it was held that the land and rents arising therefrom belonged to the widow, under the general residuary gift to her, and that the executor had no power to lease. *McMylor* v. *Lynch*, 24 O. R. 632.

Transfer — *Sale of Rights — Mandatory — Negotiorum Gestor.*]—In 1871 C. Z. D., one of the institutes under the will of G. D., died without issue, and by his will made the defendant his universal legatee. The plaintiff claimed his share in the estate of G. D. under a deed of assignment made by the defendant to the plaintiff in 1862 of all right, title, and interest in the estate:—

Held, that the plaintiff did not acquire by the deed of 1862 the defendant's title or interest in any portion of C. Z. D.'s share under the will of 1871:—

Held, further, that under the will of the late G. D., C. Z. D.'s share reverted either to the surviving institutes or to the substitutes, and that all the defendant took under the will of C. Z. D. was the accrued interest on the capital of the share at the time of his death.

By the judgment appealed from the defendant was condemned to render an account of his own share in the estate which he transferred to the plaintiff by notarial deed in 1862, and also an account of the share of C. D., another institute, who in 1882 transferred his rights to the plaintiff. The transfer made by the defendant was in his capacity of co-legatee of such rights and interests as he had at the time of the transfer, and he had at that time received the sixth of the sum for which he was sued to account:—

Held, reversing the judgment of the Court below, that the plaintiff took nothing as regards these sums under the transfer, and even if he was entitled to anything, the defendant would not be liable in an action to account as the mandatory or *negotiorum gestor* of the plaintiff. 2. That F. D. and E. D. having acquired an interest in C. Z. D.'s share after they had transferred their share to the plaintiff in 1869, the plaintiff could not maintain his action without making them parties to the suit: Art. 920 C. P. C.

Quære, per Taschereau, J., whether the transfers made by the institutes E. D., F. D., and C. D. to the plaintiff while he was curator to the substitution were not null and void under Art. 1484, C. C. *Dorion* v. *Dorion*, 20 S. C. R. 430.

WINDING-UP.

See COMPANY, VIII.—COSTS, IV.

WINNIPEG STREET RAILWAY.

See STREET RAILWAYS, II.

WITNESS.

See EVIDENCE—MALICIOUS ARREST AND PROSECUTION, III.—WILL, IV.

WORDS AND TERMS.

"A Home."—*See Cameron* v. *Adams*, 25 O. R. 229, *ante* 1027.

"A person claiming right thereto."—*See Oliver* v. *Lockie*, 26 O. R. 28, *ante* 378.

"Absconded."—*See Coffey* v. *Scane*, 25 O. R. 22, *ante* 40.

"Absolutely."—*See Re Walker and Drew*, 22 O. R. 332, *ante* 1022.

"Absolutely dispose of."—*See Smith* v. *Spears*, 22 O. R. 286, *ante* 424.

"Acquired."—*See Re Central Bank—Canada Shipping Co.'s Case*, 21 O. R. 515, *ante* 88.

"Act of God."—*See Garfield* v. *City of Toronto*, 22 A. R. 128, *ante* 729.

"Action."—*See Price* v. *Wade*, 14 P. R. 351, *ante* 569; *Hogaboom* v. *Gillies*, 16 P. R. 402, *ante* 544.

"Action commenced."—*See Tinning* v. *Bingham*, 16 P. R. 110, *ante* 763.

"Actual and continued change of possession."—*See Gillard* v. *Bollert*, 24 O. R. 147, *ante* 113; *Hogaboom* v. *Graydon*, 26 O. R. 298, *ante* 491.

"Actual settlers for agricultural purposes."—*See Heggan* v. *Esquimalt and Nanaimo R. W. Co.*, 20 S. C. R. 235, *ante* 308.

"And Co."—*See Lang* v. *Thompson*, 16 P. R. 516, *ante* 772.

"Annual rents."—*See Rodier* v. *Lapierre*, 21 S. C. R. 69, *ante* 953.

"Any claim against the Crown."—*See City of Quebec* v. *The Queen*, 24 S. C. R. 420, *ante* 299.

"Any Judge of a County Court."—*See Re County Courts of British Columbia*, 21 S. C. R. 446, *ante* 164.

"Apothecary."—*See Regina* v. *Howarth*, 24 O. R. 561, *ante* 273.

"Apprentices."—*See Welch* v. *Ellis*, 22 A. R. 255, *ante* 139.

"Arising under any law of Canada."—*See City of Quebec* v. *The Queen*, 24 S. C. R. 420, *ante* 299.

"Arrangement."—*See McCloherty* v. *Gale Mfg. Co.*, 19 A. R. 117, *ante* 651.

"Arrived."—*See The Queen* v. *MacDonell*, 1 Ex. C. R. 99, *ante* 868.

"As nearly as may be."—*See Reid* v. *Creighton*, 24 S. C. R. 69, *ante* 106.

"Assigns."—*See Barry* v. *Anderson*, 18 A. R. 247, *ante* 675; *Re Abbott and Medcalf*, 20 O. R. 299, *ante* 435.

"At large."—*See Thompson* v. *Grand Trunk R. W. Co.*, 22 A. R. 453, *ante* 843.

"At owner's risk."—*See Clark* v. *McClellan*, 23 O. R. 465, *ante* 65.

"Baggage."—*See Dixon* v. *Richelieu Navigation Co.*, 18 S. C. R. 704, *ante* 127.

"Before me."—*See Archibold* v. *Hubley*, 18 S. C. R. 116, *ante* 105.

"Buildings."—*See Adamson* v. *Rogers*, 22 A. R. 415, *ante* 498.

"Car-load."—*See Hanley* v. *Canadian Packing Co.*, 21 A. R. 119, *ante* 192.

"Carry on business."—*See City of London* v. *Watt*, 22 S. C. R. 300, *ante* 44.

"Cause or matter."—*See Re Coe* v. *Coe*, 21 O. R. 409, *ante* 369.

"Change of title."—*See Citizens' Ins. Co.* v. *Salterio*, 23 S. C. R. 155, *ante* 515.

"Children."—*See Murray* v. *Macdonald*, 22 O. R. 557, *ante* 525; *Rogers* v. *Carmichael*, 21 O. R. 658, *ante* 1019.

"Christmas vacation."—*See Thompson* v. *Howson*, 16 P. R. 378, *ante* 793.

"Consecutive years."—*See City of Three Rivers* v. *La Banque du Peuple*, 22 S. C. R. 352, *ante* 691.

"Construction."—*See Saye* v. *Township of West Oxford*, 22 O. R. 678, *ante* 707.

"Costs as between solicitor and client"—"Costs between solicitor and client."—*See Heaslip* v. *Heaslip*, 14 P. R. 21, 165, *ante* 235.

"Court expenses."—*See McNair* v. *Boyd*, 14 P. R. 132, *ante* 210.

"Created."—*See Ford* v. *Mason*, 15 P. R. 392, *ante* 909.

"Custom."—*See Talbot* v. *Poole*, 15 P. R. 99, *ante* 215.

"Damage sustained by reason of the railway."—*See Zimmer* v. *Grand Trunk R. W. Co.*, 19 A. R. 693, *ante* 855.

"Day's sitting."—*See In re Town of Thornbury and County of Grey*, 15 P. R. 192, *ante* 34.

"Defect."—*See Hamilton* v. *Groesbeck*, 18 A. R. 437, *ante* 652; *Headford* v. *McClary Mfg. Co.*, 21 A. R. 164, *ante* 655; *O'Connor* v. *Hamilton Bridge Co.*, *ib.* 596, *ante* 653; *McCloherty* v. *Gale Mfg. Co.*, 19 A. R. 117, *ante* 651.

"Defect in substance or in form."—*See Regina* v. *Hazen*, 20 A. R. 633, *ante* 585.

"Defendant."—*See In re Hanna* v. *Coulson*, 23 O. R. 493, 21 A. R. 692, *ante* 371.

"Demise."—*See Bulmer* v. *The Queen*, 3 Ex. C. R. 184, *ante* 316.

Thompson v. *Grand Trunk* 453, *ante* 843.

'—*See Clark* v. *McClellan*,

Dixon v. *Richelieu Naviga-* 704, *ante* 127.

Archibold v. *Hubley*, 18 5.

Adamson v. *Rogers*, 22

Hanley v. *Canadian Pack-* *ante* 192.

."—*See City of London* v. , *ante* 44.

"—*See Re Coe* v. *Coe*, 21

—*See Citizens' Ins. Co.* v. 55, *ante* 515.

Murray v. *Macdonald*, 22 *Rogers* v. *Carmichael*, 21

on."—*See Thompson* v. *ante* 793.

s."—*See City of Three* *n People*, 22 S. C. R. 352,

See Saye v. *Township of* 678, *ante* 707.

solicitor and client"— citor and client."—*See* P. R. 21, 165, *ante* 235.

See McNair v. *Boyd*, 14

rd v. *Mason*, 15 P. R.

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y reason of the railway." *l Trunk R. W. Co.*, 19

e In re Town of Thorn- *y*, 15 P. R. 192, *ante* 34.

ilton v. *Groesbeck*, 18 A. *lford* v. *McClary Mfg.* 55; *O'Connor* v. *Hamil-* *nte* 653; *McCloherty* v. 117, *ante* 651.

ce or in form."—*See* R. 633, *ante* 585.

n re Hanna v. *Coulson*, 92, *ante* 371.

er v. *The Queen*, 3 Ex.

"Demised premises."—*See Janes* v. *O'Keefe*, 26 O. R. 489, *ante* 597.

"Desirable in the public interest."—*See Re Hodgins and City of Toronto*, 26 O. R. 480, *ante* 725.

"Die without lawful issue."—*See Ashbridge* v. *Ashbridge*, 22 O. R. 146, *ante* 1021.

"Die without leaving living issue."—*See Re Fraser and Bell*, 21 O. R. 455, *ante* 1022.

"Divisible profits," "Divisible surplus."—*See Bain* v. *Ætna Life Ins. Co.*, 20 O. R. 6, 21 O. R. 233, *ante* 530.

"Doing business in Canada."—*See Re Ontario Forge and Bolt Co.*, 25 O. R. 407, *ante* 148.

"Done in pursuance of this Act."—*See Webb* v. *Barton Stoney Creek Consolidated Road Co.*, 26 O. R. 343, *ante* 1017.

"Earth-filling."—*See Adamson* v. *Rogers*, 22 A. R. 415, *ante* 498.

"Embarrassing pleading."—*See Stratford Gas Co.* v. *Gordon*, 14 P. R. 407, *ante* 797.

"Employee."—*See Kearney* v. *Oakes*, 18 S. C. R. 148, *ante* 286.

"Encumbering."—*See Regina* v. *Justin*, 24 O. R. 327, *ante* 97.

"Equally."—*See Re Ferguson, Bennett* v. *Coatsworth*, 25 O. R. 591, *ante* 1025.

"Erections."—*See Adamson* v. *Rogers*, 22 A. R. 415, *ante* 498.

"Estate."—*See Cameron* v. *Harper*, 21 S. C. R. 273, *ante* 1026.

"Every reference, inquiry, examination, or other special matter."—*See Casey* v. *Morden*, 16 P. R. 127, *ante* 230.

"Exchange."—*See Smith* v. *Spears*, 22 O. R. 286, *ante* 424.

"Execution."—*See McMaster* v. *Radford*, 16 P. R. 20, *ante* 28.

"Ex parte order."—*See Flett* v. *Way*, 14 P. R. 123, *ante* 807.

"False Document."—*See Re Murphy*, 26 O. R. 163, *ante* 450.

"Fee Simple."—*See Evans* v. *King*, 21 A. R. 519, *ante* 1022.

"Final disposition of action."—*See Carroll* v. *Provincial Natural Gas Co.*, 16 P. R. 518, *ante* 509.

"Final judgment."—*See* SUPREME COURT OF CANADA, XI.

"Final order."—*See In re D. A. Jones Co.*, 19 A. R. 63, *ante* 250.

"Fixtures."—*See Argles* v. *McMath*, 26 O. R. 224, *ante* 455.

"Franchise."—*See In re City of Toronto and Toronto Street R. W. Co.*, 20 A. R. 125, *ante* 934.

"Freeholder."—*See In re Flatt and United Counties of Prescott and Russell*, 18 A. R. 1, *ante* 934.

"From some other cause."—*See Weegar* v. *Grand Trunk R. W. Co.*, 16 P. R. 371, *ante* 887.

"Future rights."—*See* SUPREME COURT OF CANADA, XII.

"Garnishee."—*See In re Hanna* v. *Coulson*, 21 A. R. 692, *ante* 367.

"Given for a patent right."—*See Craig* v. *Samuel*, 24 S. C. R. 278; *Samuel* v. *Fairgrieve*, 24 O. R. 486, 21 A. R. 418, *ante* 100.

"Giving of sheep to double."—*See Trimble* v. *Lunktree*, 25 O. R. 109, *ante* 886.

"Good cause."—*See McNair* v. *Boyd*, 14 P. R. 132, *ante* 210; *Baskerville* v. *Vose*, 15 P. R. 122, *ante* 210; *Carton* v. *Bradburn*, *ib.* 147, *ante* 211; *Island* v. *Township of Amaranth*, 16 P. R. 3, *ante* 211; *McGillivray* v. *Town of Lindsay*, *ib.* 11, *ante* 212; *Coutts* v. *Dodds*, *ib.* 273, *ante* 212.

"Good cause shewn."—*See Island* v. *Township of Amaranth*, 16 P. R. 3, *ante* 211; *Pollard* v. *Wright*, 16 P. R. 505, *ante* 984.

"Good reason."—*See Howland* v. *Dominion Bank*, 15 P. R. 56, *ante* 814.

"Goods and chattels."—*See Morton* v. *Cowan*, 25 O. R. 529, *ante* 436.

Government institutions." — *See Attorney-General for Canada* v. *City of Toronto*, 20 O. R. 19, 18 A. R. 622, 23 S. C. R. 514, *ante* 731.

"Hold."—*See Re Central Bank—Canada Shipping Co.'s Case*, 21 O. R. 515, *ante* 88.

"Immediately."—*See Clarke* v. *Creighton*, 14 P. R. 34, *ante* 231.

"In my lifetime."—*See Re Walker and Drew*, 22 O. R. 332, *ante* 1022.

"In the event of her death."—*See Re Walker and Drew*, 22 O. R. 332, *ante* 1022.

"In transit to Canada."—*See Carter, Macy, & Co.* v. *The Queen*, 2 Ex. C. R. 126, 18 S. C. R. 706, *ante* 868.

"In trust." — *See Duggan* v. *London and Canadian Loan Co.*, 18 A. R. 305, 20 S. C. R. 481, *ante* 137; *Harte* v. *Ontario Express and Transportation Co.—Kirk and Marling's Case*, 24 O. R. 340, *ante* 147; *Raphael* v. *McFarlane*, 18 S. C. R. 183, *ante* 990.

"Indemnity."—*See Moore* v. *Death*, 16 P. R. 296, *ante* 793.

"Injuriously affected."—*See Hendrie* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 26 O. R. 667, *ante* 852; *McPherson* v. *The Queen*, 1 Ex. C. R. 53, *ante* 278.

"Injury done."—*See McPherson* v. *The Queen*, 1 Ex. C. R. 53, *ante* 278.

"Interest."—*See Lynch* v. *Canada North-West Land Co.*, 19 S. C. R. 204, *ante* 56.

"Interested."—*See Re Townships of Harwich and Raleigh*, 20 O. R. 154, *ante* 703; *In re Townships of Romney and Tilbury West*, 18 A. R. 477, *ante* 704.

"Interlocutory."—*See Clarke* v. *Creighton*, 14 P. R. 34, *ante* 231.

"Invention for which the patent is granted."—*See Royal Electric Co.* v. *Edison Electric Light Co.*, 2 Ex. C. R. 576, *ante* 781.

"Involves a criminal charge."—*See Georgian Bay Co.* v. *World Co.*, 16 P. R. 320, *ante* 221; *Macdonald* v. *World Co.*, *ib.* 324, *ante* 221.

"Issue."—*See Evans* v. *King*, 21 A. R. 519, *King* v. *Evans*, 24 S. C. R. 356, *ante* 387.

"Judge or Court makes no order respecting the costs."—*See McNair* v. *Boyd*, 14 P. R. 132, *ante* 210.

"Judgment."—*See Langevin* v. *Les Commissaires d'Ecole pour la Municipalité de St. Marc*, 18 S. C. R. 599, *ante* 957.

"Justice of the case."—*See Abell* v. *Morrison*, 14 P. R. 210, *ante* 26.

"Labourers."—*See Welch* v. *Ellis*, 22 A. R. 255, *ante* 139.

"Land."—*See Osborne* v. *City of Kingston*, 23 O. R. 382, *ante* 715.

"Lawfully payable."—*See Cobban* v. *Canadian Pacific R. W. Co.*, 26 O. R. 732, *ante* 841.

"Laying-out."—*See Palmatier* v. *McKibbon*, 21 A. R. 441, *ante* 1009.

"Legal heirs."—*See Mearns* v. *Ancient Order of United Workmen*, 22 O. R. 34, *ante* 525.

"Let."—*See Bulmer* v. *The Queen*, 3 Ex. C. R. 184, *ante* 316.

"Letting, hiring, and otherwise departing."—*See Canada Southern R. W. Co.* v. *Town of Niagara Falls*, 22 O. R. 41, *ante* 857.

"Licensing, regulating, and governing."—*See In re Virgo and City of Toronto*, 20 A. R. 435, 22 S. C. R. 447, [1896] A. C. 88, *ante* 721.

"Liquors drunk in a tavern or alehouse."—*See Re McGolrick* v. *Ryall*, 26 O. R. 435, *ante* 365.

"Live transportation contract."—*See Robertson* v. *Grand Trunk R. W. Co.*, 24 O. R. 75, *ante* 841.

"Located and maintained."—*See City of Toronto* v. *Ontario and Quebec R. W. Co.*, 22 O. R. 344, *ante* 116.

"Look into."—*See Moon* v. *Caldwell*, 15 P. R. 159, *ante* 208.

"Main building."—*See Ætna Ins. Co.* v. *Attorney-General for Ontario*, 18 S. C. R. 707, *ante* 515.

"Management and working."—*See Michigan Central R. R. Co.* v. *Wealleans*, 24 S. C. R. 309, *ante* 858.

"Manager in trust."—*See London and Canadian L. & A. Co.* v. *Duggan*, [1893] A. C. 506, *ante* 991.

"Manufacturing establishment."—*See Alexander* v. *Village of Huntsville*, 24 O. R. 665, *ante* 692.

"Manure."—*See Regina* v. *Redmond*, 24 O. R. 331, *ante* 831.

"Market value."—*See The Queen* v. *J. C. Ayer Co.*, 1 Ex. C. R. 232, *ante* 867; *Vacuum Oil Co.* v. *The Queen*, 2 Ex. C. R. 234, *ante* 866.

"Matter."—*See Re Macpherson and City of Toronto*, 16 P. R. 230, *ante* 33.

"May."—*See Bernardin* v. *Municipality of North Dufferin*, 19 S. C. R. 581, *ante* 927; *Re Dwyer and Town of Port Arthur*, 21 O. R. 175, *ante* 49.

"Moderate."—*See The Heather Belle*, 3 Ex. C. R. 40, *ante* 891.

"Month."—*See Manufacturers' Life Ins. Co.* v. *Gordon*, 20 A. R. 309, *ante* 531.

"More or less."—*See Moorhouse* v. *Hewish*, 22 A. R. 172, *ante* 921.

"Moving."—*See Hamilton* v. *Groesbeck*, 18 A. R. 437, *ante* 652.

"Moving machinery."—*See O'Connor* v. *Hamilton Bridge Co.*, 21 A. R. 596, *ante* 653.

"My lawful heirs."—*See Thompson* v. *Smith*, 25 O. R. 652, *ante* 1025.

"My own right heirs."—*See Coatsworth* v. *Carson*, 24 O. R. 185, *ante* 1025.

"Natural gas."—*See Ontario Natural Gas Co.* v. *Gosfield*, 18 A. R. 626, *ante* 715.

"Nearest of kin."—*See Brabant* v. *Lalonde*, 26 O. R. 379, *ante* 376.

"Necessary."—*See Stephens* v. *Gordon*, 19 A. R. 176, *ante* 964.

"Necessary for the purposes of justice."—*See Beaton* v. *Globe Printing Co.*, 16 P. R. 281, *ante* 403.

"Next sitting of the Court."—*See Hogaboom* v. *Lunt*, *Hogaboom* v. *McDonald*, 14 P. R. 480, *ante* 978.

"No reasonable answer."—*See Bank of Hamilton* v. *George*, 16 P. R. 418, *ante* 797.

"Not covered."—*See The Queen* v. *Bank of Montreal*, 1 Ex. C. R. 154, *ante* 104.

"Not qualified."—*See Re Lilley and Allin*, 21 O. R. 424, *ante* 761.

"Occupied mill privilege."—*See In re Burnham*, 22 A. R. 40, *ante* 1007.

"On advances."—*See British America Assurance Co.* v. *Law*, 21 S. C. R. 325, *ante* 530.

"Opening."—*See Palmatier* v. *McKibbon*, 21 A. R. 441, *ante* 1009.

"Operation."—*See Saye* v. *Township of West Oxford*, 22 O. R. 678, *ante* 707.

"Or other municipal authorities."—*See Trustees of R. C. Separate School Section No. 10 of Arthur* v. *Township of Arthur*, 21 O. R. 60, *ante* 835.

"Or practice."—*See Barrett* v. *City of Winnipeg*, 19 S. C. R. 374, *ante* 172.

"Or which has such effect."—*See Molsons Bank* v. *Halter*, 18 S. C. R. 88, *ante* 72; *Stephens* v. *McArthur*, 19 S. C. R. 446, *ante* 73.

"Orders and certificates."—*See Wagner* v. *O'Donnell*, 14 P. R. 254, *ante* 617.

"Other cases where all parties agree that the same may be heard before a Divisional Court."—*See Re Wilson and County of Elgin*, 16 P. R. 150, *ante* 481.

"Other matters or things."—*See O'Dell* v. *Gregory*, 24 S. C. R. 661, *ante* 954.

"Otherwise order."—*See Patterson* v. *Smith*, 14 P. R. 558, *ante* 795.

"Overwhelmingly."—*See Millar* v. *Macdonald*, 14 P. R. 499, *ante* 579.

"Owner."—*See York* v. *Township of Osgoode*, 24 O. R. 12, 21 A. R. 168, 24 S. C. R. 282, *ante* 1001; *Reggin* v. *Manes*, 22 O. R. 443, *ante* 612.

"Owners," "Occupants."—*See Osborne* v. *City of Kingston*, 23 O. R. 382, *ante* 715.

"Parties."—*See Begg* v. *Ellison*, 14 P. R. 267, *ante* 254.

"Party."—*See Henderson* v. *Rogers*, 15 P. R. 241, *ante* 246.

"Party affected."—*See Parker* v. *McIlwain*, 16 P. R. 555, *ante* 60.

"Party concerned."—*See In re McIlmurray and Jenkins*, 22 A. R. 398, *ante* 788.

"Party to the action."—*See Erdman* v. *Town of Walkerton*, 15 P. R. 12, *ante* 769.

"Pay," "Pay or apply."—*See McDonell* v. *McDonell*, 24 O. R. 468, *ante* 1028.

"Payment."—*See Jennings* v. *Willis*, 22 O. R. 439, *ante* 614.

"Payment of money to a creditor."—*See Armstrong* v. *Hemstreet*, 22 O. R. 336, *ante* 786.

"Penal."—*See Huntington* v. *Attrill*, 20 A. R. Appendix i., *ante* 460.

"Pending."—*See Regina* v. *Verral*, 16 P. R. 444, *ante* 263.

"Peremptorily closed."—*See Re Alger and Sarnia Oil Co.*, 21 O. R. 440, *ante* 158.

"Person aggrieved."—*See Johnson* v. *Allen*, 26 O. R. 550, *ante* 760.

"Person claiming right thereto."—*See Oliver* v. *Lockie*, 26 O. R. 28, *ante* 1005.

"Personal actions."—*See Re McGugan* v. *McGugan*, 21 O. R. 289, *ante* 246.

"Persons who become creditors."—*See Gillard* v. *Bollert*, 24 O. R. 147, *ante* 113.

"Per stirpes."—*See Re Ferguson—Bennett* v. *Coatsworth*, 25 O. R. 591, *ante* 1025.

"Place."—*See Judge* v. *Splann*, 22 O. R. 409, *ante* 1027.

"Place where they might properly be."—*See Nixon* v. *Grand Trunk R. W. Co.*, 23 O. R. 124, *ante* 843.

"Plaintiff."—*See Irwin* v. *Turner*, 16 P. R. 349, *ante* 791.

"Plant."—*See Middleton* v. *Flanagan*, 25 O. R. 417, *ante* 190.

"Pleading or other document."—*See Sparks* v. *Purdy*, 15 P. R. 1, *ante* 812.

"Practise as a solicitor."—*See Macdougall* v. *Law Society of Upper Canada*, 18 S. C. R. 203, *ante* 912.

"Preference."—*See Stephens* v. *McArthur*, 19 S. C. R. 446, *ante* 73.

"Present value of the work done."—*See Montreal and European Short Line R. W. Co.* v. *The Queen*, 2 Ex. C. R. 159, *ante* 289.

"Prior mortgage."—*See Cook* v. *Belshaw*, 23 O. R. 545, *ante* 612.

"Proceeding."—*See Cole* v. *Porteous*, 19 A. R. 111, *ante* 82; *Smith* v. *Brown*, 20 O. R. 165, *ante* 12.

"Proceeding to realize the claim."—*See McNamara* v. *Kirkland*, 18 A. R. 271, *ante* 245.

"Process."—*See Re Anderson* v. *Vanstone*, 16 P. R. 243, *ante* 174.

"Property."—*See Cameron* v. *Harper*, 21 S. C. R. 273, *ante* 1026; *In re City of Toronto and Toronto Street R. W. Co.*, 20 A. R. 125, *ante* 934.

"Pro rata."—*See Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235, *ante* 1031.

"Public buildings."—*See Attorney-General for Canada* v. *City of Toronto*, 20 O. R. 19, 18 A. R. 622, 23 S. C. R. 514, *ante* 731.

"Public place."—*See Regina* v. *Bell*, 25 O. R. 272, *ante* 832.

"Real matter in dispute."—*See Tinning* v. *Bingham*, 16 P. R. 110, *ante* 763.

"Reasonable expenses."—*See County of Cape Breton* v. *McKay*, 18 S. C. R. 639, *ante* 831.

"Reference by rule, order, or submission."—*See Re Macpherson and City of Toronto*, 16 P. R. 230, *ante* 33.

"Religious denomination."—*See Regina* v. *Dickout*, 24 O. R. 250, *ante* 134.

"Renewable forever."—*See Clinch* v. *Pernette*, 24 S. C. R. 385, *ante* 600.

"Renewal premiums."—*See Village of London West* v. *London Guarantee and Accident Co.*, 26 O. R. 520, *ante* 476.

"Renewal receipts."—*See Village of London West* v. *London Guarantee and Accident Co.*, 26 O. R. 520, *ante* 476.

"Right heirs."—*See Re Ferguson—Bennett* v. *Coatsworth*, 25 O. R. 591, *ante* 1025.

"Running at large."—*See McSloy* v. *Smith*, 26 O. R. 508, *ante* 359.

"Sabbath-day."—*See Re Cribbin and City of Toronto*, 21 O. R. 325, *ante* 119.

"Sell and absolutely dispose of."—*See Smith* v. *Spears*, 22 O. R. 286, *ante* 424.

"Servant in husbandry."—*See Reid* v. *Barnes*, 25 O. R. 223, *ante* 655.

"Servants."—*See Welch* v. *Ellis*, 22 A. R. 255, *ante* 139.

"Shall in no case be responsible."—*See Robertson* v. *Grand Trunk R. W. Co.*, 24 S. C. R. 611, *ante* 841.

"Shall submit to be examined by a duly qualified practitioner."—*See Clouse* v. *Coleman*, 16 P. R. 496, 541, *ante* 403.

"Shaped."—*See Magann* v. *The Queen*, 2 Ex. C. R. 64, *ante* 867.

"Sold."—*See Rural Municipality of Cornwallis* v. *Canadian Pacific R. W. Co.*, 19 S. C. R. 702, *ante* 52.

"Special case."—*See Draper* v. *Radenhurst*, 14 P. R. 376, *ante* 958.

"Special circumstances."—*See Re Butterfield, a Solicitor*, 14 P. R. 149, *ante* 902; *Re O'Donohoe, a Solicitor*, 14 P. R. 571, 15 P. R. 93, *ante* 907; *In re Chisholm and Logie, Solicitors*, 16 P. R. 162, *ante* 963.

"State of nature."—*See Stovel* v. *Gregory*, 21 A. R. 137, *ante* 631.

"Subject to dower."—*See Cope* v. *Cope*, 26 O. R. 441, *ante* 374.

"Subsequent proceedings."—*See Langman* v. *Hudson and Ramsey*, 14 P. R. 215, *ante* 770.

"Subsequent purchasers or mortgagees."—*See Marthinson* v. *Patterson*, 20 O. R. 726, *ante* 108.

"Such liquors."—*See Re McGolrick* v. *Ryall*, 26 O. R. 435, *ante* 365.

"Sufficient cause."—*See Bennett* v. *Empire Printing and Publishing Co.*, 15 P. R. 430, *ante* 803.

"Sum in dispute."—*See Foster* v. *Emory*, 14 P. R. 1, *ante* 366.

"Survivor."—*See Ashbridge* v. *Ashbridge*, 22 O. R. 146, *ante* 1021.

"Taken."—*See Re Macpherson and City of Toronto*, 26 O. R. 558, *ante* 31.

"Take notice that the defendant disputes the amount claimed by the plaintiff."—*See Mahoney* v. *Horkins*, 14 P. R. 117, *ante* 677.

"Taxable costs of defence."—*See Talbot* v. *Poole*, 15 P. R. 274, *ante* 235.

"Territory."—*See City of Hamilton* v. *Township of Barton*, 20 S. C. R. 173, *ante* 729.

"The price to be paid to the contractor."—*See In re Sear and Woods*, 23 O. R. 474, *ante* 614.

"Then."—*See Brabant* v. *Lalonde*, 26 O. R. 379, *ante* 376.

"Title."—*See O'Dell* v. *Gregory*, 24 S. C. R. 661, *ante* 954.

"Title to lands."—*See Wineberg* v. *Hampson*, 19 S. C. R. 369, *ante* 954.

"To be benefited."—*See Re Stephens and Township of Moore*, 25 O. R. 600, *ante* 706.

"Tort committed within the jurisdiction."—*See Clarkson* v. *Dupré*, 16 P. R. 521, *ante* 484.

"Train of cars."—*See Hollinger* v. *Canadian Pacific R. W. Co.*, 21 O. R. 705, 20 A. R. 244, *ante* 847.

"Transmit."—*See Electric Despatch Co.* v. *Bell Telephone Co.*, 20 S. C. R. 83, *ante* 963.

"Trivial or frivolous."—*See Macdonald* v. *World Co.*, 16 P. R. 324, *ante* 350.

"Unlawful."—*See Regina* v. *Connolly*, 25 O. R. 151, *ante* 260.

"Unmitigated scoundrel."—*See Bennett* v. *Empire Printing and Publishing Co.*, 16 P. R. 63, *ante* 220.

"Until principal and interest shall be fully paid and satisfied."—*See People's Loan and Deposit Co.* v. *Grant*, 18 S. C. R. 262, *ante* 672.

"Use and working."—*See Michigan Central R. R. Co.* v. *Wealleans*, 24 S. C. R. 309, *ante* 858.

"Used or employed."—*See The Queen* v. *The Oscar and Hattie*, 3 Ex. C. R. 241, *ante* 897.

"Usual custom."—*See Re Watson's Trusts*, 21 O. R. 528, *ante* 885.

"Value."—*See Montreal and European Short Line R. W. Co.* v. *The Queen*, 2 Ex. C. R. 159, *ante* 288.

"Vehicle."—*See Regina* v. *Justin*, 24 O. R. 327, *ante* 97.

"Viâ direct line."—*See Dancey* v. *Grand Trunk R. W. Co.*, 19 A. R. 664, *ante* 127.

"Void as against creditors."—*See Meriden Britannia Co.* v. *Braden*, 21 A. R. 352, *ante* 4.

"War vessel."—*See The Minnie* v. *The Queen*, 23 S. C. R. 478, *ante* 898.

"Warehouse."—*See Regina* v. *Halliday*, 21 A. R. 42, *ante* 562.

"Way."—*See Caldwell* v. *Mills*, 24 O. R. 462, *ante* 656; *Headford* v. *McClary Mfg. Co.*, 21 A. R. 164, *ante* 655.

"Way used in the business of the employer." *See Stride* v. *Diamond Glass Co.*, 26 O. R. 270, *ante* 656.

"Where the rights in future might be bound." —*See Larivière* v. *School Commissioners for Three Rivers*, 23 S. C. R. 723, *ante* 955.

"Wilful."—*See Johnson* v. *Allen*, 26 O. R. 550, *ante* 760.

"Within Ontario."—*See County of Wentworth* v. *Smith*, 15 P. R. 372, *ante* 58; *Parker* v. *Odette*, 16 P. R. 69, *ante* 58.

"Within six months after the fact committed."—*See Webb* v. *Burton Stoney Creek Consolidated Road Co.*, 26 O. R. 343, *ante* 1017.

"Would tow up and back"—*See Bailey* v. *Ocean Mutual Marine Ins. Co.*, 19 S. C. R. 153, *ante* 532.

"Year."—*See In re Trustees of School Section No. 5 of the Township of Asphodel and Humphries*, 24 O. R. 682, *ante* 834.

WORK AND LABOUR.

Building Contract—*Action for Price—Delay—Time—Liquidated Damages.*]—Under a building contract, in writing, the contractor agreed that, subject to any extensions of time by the architect, the building should be finished by a named day, and that in default he would pay $50 a week as liquidated damages. It was also provided that all extras, etc., should form a part of the contract, if authorized by the architect, who was first to fix the price, and grant such extension of time therefor as he thought necessary, and power was also given him to extend the time for completion in case of a strike.

The building was not completed for over four months after the time fixed, and this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract.

Although some extras were done, and there was evidence as to delay by strikes, the architect was not asked for, and did not grant, any extension of time:—

Held, that the contract must govern, and that the defendants were entitled to recover, by way of counterclaim, the sum provided by the contract as liquidated damages.

If a claim to liquidated damages by a defendant is pleaded by way of counterclaim the plaintiff may reply matters arising subsequent to action brought. The plaintiff was allowed to reply that the final payment under the contract had accrued due after action brought.

Alter, if pleaded by way of set-off. *Toke* v. *Andrews*, 8 Q. B. D. 428, followed. *McNamara* v. *Skain*, 23 O. R. 103.

Building Contract—*Dismissal of Contractor—Right to Remove Material and Plant—Demand—Conversion.*]—By a contract for the erection of certain buildings the contractor was to supply all labour, material, apparatus, scaffolding, utensils, and cartage of every description needful for the performance of the work; and was to deliver up to the owner, the work in perfect repair, etc., when complete, and was not to sub-let any part of the works without the architect's consent; and all work and material as delivered on the premises was to form part of the works and be considered the property of the owner, and not to be removed without his consent; the contractor to have liberty to remove all surplus material after he had completed the works. Without the architect's consent the contractor entered into a sub-contract with the plaintiff for the excavation, brick and masonry work, and the plaintiff commenced work under his sub-contract, and continued to work for some time, when he was ordered to discontinue by the architect:—

Held, that the plaintiff was entitled to remove from the premises (premises meaning what the parties treated as such) material placed there after he was directed to discontinue, and also material delivered off the premises, as well as plant constituting the fixtures and the apparatus, etc., necessary for carrying on his business, or to recover from the owner the value of any material used by him in the buildings; but that the plaintiff was not entitled to remove any material placed there before he was ordered to discontinue; and that no demand was necessary; it appearing that the owner was using the same, and thus committing an act of conversion. *Ashfield* v. *Edgell*, 21 O. R. 195.

Contract—*Construction of Sewer—Time—Specifications.*]—A contract for the construction of a sewer made between the corporation of a town and the plaintiff, payment for which was to be made by items according to schedule prices, provided for its completion within a

limited time, which was extended by resolution of the council and again informally extended for a further period. The contract provided that if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corporation might employ and place on the work such force of men and teams and procure such materials as might be deemed necessary to complete the work by the day named for completion, and charge the cost thereof to the plaintiff; and by the specifications, which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corporation, before the expiration of the second extension of time, exercised the powers above conferred: —

Held, that under the contract the power conferred could only be exercised during the time fixed for the completion of the work or the extension thereof, but under the specifications thereafter; and therefore, even if the corporation could not under the contract avail themselves of the second extension as granted informally, the powers were properly exercised under the specifications. *Mangan* v. *Town of Windsor*, 24 O. R. 675.

See Canada Bank Note Engraving and Printing Co. v. *Toronto R. W. Co.*, 22 A. R. 462, *ante* 200.

See CONTRACT, V.—LIEN, III.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT, III.

WRIT OF SUMMONS.

See PRACTICE, XIX.

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ACTICE, XIX.