THE

CANADIAN ANNUAL DIGEST

1940

MASTERS AND MORSE

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THE
Canadian Annual Digest
(1896)

OF

THE CASES REPORTED IN

SUPREME COURT OF CANADA REPORTS, VOLS. 25-26.
EXCHEQUER COURT OF CANADA REPORTS, VOL. 5, NOS. 1-3.
ONTARIO APPEAL REPORTS, VOL. 23, NOS. 1-4.
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MANITOBA REPORTS, VOL. 11, NOS. 1-4.
BRITISH COLUMBIA REPORTS, VOL. 3, NO. 2; VOL. 4.

AND OF THE CANADIAN CASES DECIDED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DURING THE YEAR,

WITH

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

BY

CHARLES H. MASTERS,

REPORTER OF THE SUPREME COURT OF CANADA,

AND

CHARLES MORSE, LL.B.

REPORTER OF THE EXCHEQUER COURT OF CANADA.

TORONTO:
CANADA LAW JOURNAL COMPANY.
1897.

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TO THE

HONOURABLE SIR OLIVER MOWAT, K.C.M.G., Q.C.

Minister of Justice for Canada,

SOMETIME VICE-CHANCELLOR AND AFTERWARDS ATTORNEY-GENERAL
OF THE PROVINCE OF ONTARIO,

WHOSE ABLE AND UNREMITTING LABOURS IN BEHALF OF LAW REFORM HAVE WON FOR
HIM THE ESTEEM OF THE WHOLE CANADIAN PEOPLE,

THIS WORK IS
(WITH HIS PERMISSION)
RESPECTFULLY DEDICATED.

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PREFACE.

It was said long ago, and said truly, that the digesting of the law of a community has always been marked in history as an epoch of national progress, and that the more complex the original sources of the law are the more speedily does the need of unification and homogeneity assert itself.

Federated Canada is yet a young country, but the above observation applies to her with especial significance, inasmuch as she is passing through her adolescent period with leaps and bounds, while legal conditions which had their origin in a pre-Confederation period are daily manifesting their unfitness in relation to her present circumstances. Therefore we feel confident that we shall meet with encouragement in undertaking a work designed to reduce into some semblance of congruity the annual output of case-law, which forms so important a part of the body of Canadian Jurisprudence and has heretofore existed as *rudis indigestaque moles*. Of course, with the Civil Law prevailing in the Province of Quebec and the Common Law constituting the basis of the respective systems obtaining in the other provinces, absolute and entire uniformity of doctrine cannot be looked for; but where there are no radical differences in the laws there can be no great dissonance between the judicial decisions of the several provinces, and, so far, there ought to be no insuperable difficulties in the way of a general co-ordination.

Having demonstrated its *raison d'être*, we present the Canadian Annual Digest to the profession without further introduction, merely bespeaking for the premier volume a lenient criticism of the imperfections which unavoidably attend the inception of an undertaking of so arduous a character.

It is our desire to have the Digest issued early in the year in future, and we appeal to the Reporters of the various Courts to aid us in that behalf by expeditiously publishing the cases handed to them for reporting from time to time.

C. H. M.
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CHIEF JUSTICES AND JUDGES

OF THE

Supreme and Exchequer Courts of Canada

AND OF THE

Superior Courts of the Several Provinces

During the Period of this Digest

Supreme Court of Canada

CHIEF JUSTICE.

The Right Hon. Sir Henry Strong, Knight.

JUDGES.

The Hon. Henri Elzéar Taschereau.
" John Wellington Gwynne.
" Robert Sedgewick.
" George Edwin King.
" Désiré Girouard.

Exchequer Court of Canada

JUDGE.

Hon. George Wheelock Burbidge.

LOCAL JUDGES.

Quebec District	Hon	George Irvine, Q.C.
Nova Scotia District	"	James McDonald, C. J.
New Brunswick District	"	Ezekiel McLeod, J.
Prince Edward Island	"	W. W. Sullivan, C.J.
British Columbia District	"	Theodore Davie, C. J.
Toronto District	"	Joseph L. McDougall, County Judge.

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JUDGES.

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" JOSEPH G. BOSSÉ.
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" J. S. C. WÜRTELE.

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" C. C. DeLorimier,
" H. G. Malhiot,
" S. Pagnuelo,
" W. W. Lynch,
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" J. S. Archibald,
" J. J. Curran,
" W. White.

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JUDGES.

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" Albert Clements Killam.
" John Farquhar Bain.

The Supreme Court of British Columbia

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" A. J. McColl.

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Hon. CLIFFORD SIFTON, Q.C.
" JOHN D. CAMERON.

Attorney-General of British Columbia.

Hon. D. M. EBERTS, Q.C.

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Key to Abbreviations

[1896] A.C.	English Appeal Cases.
B.C.	British Columbia.
B.C.R.	British Columbia Reports.
Beav.	Beaven's Reports.
C.C.	Civil Code (Quebec).
C.C.P.	Code Civil Procedure (Quebec).
Ch. App.	Law Reports Chancery Appeals.
Ch. Chamb.	Ontario Chancery Chambers Reports.
Ch. D.	Law Reports Chancery Division.
C.S.C.	Consolidated Statutes of Canada.
C.S.B.C.	Consolidated Statutes British Columbia.
Col.	Column of Digest.
D.	Dominion of Canada.
El. & El.	Ellis & Ellis's Reports.
Ex. C.R.	Exchequer Court of Canada Reports.
F. & F.	Foster and Finlayson's Reports.
Gr.	Grant's Chancery Reports, Ontario.
Imp.	Imperial (Statute).
L.C. Jur.	Lower Canada Jurist.
L.R. Ch.	Law Reports, Chancery Appeals.
L.R.P. & D.	Law Reports, Probate and Divorce.
M.C.	Municipal Code, Quebec.
Man. R.	Manitoba Reports.
N.B.R.	New Brunswick Reports.
N.S.R.	Nova Scotia Reports.
O.) Ont.)	Province of Ontario.
Ont. A.R.	Ontario Appeal Reports.
Ont. P.R.	Ontario Practice Reports.
Ont. R.	Ontario Reports.
Q.R., Q.B.	Quebec Reports, Queen's Bench.
Q.R., S.C.	Quebec Reports, Superior Court.
R.S.C.	Revised Statutes Canada.
R.S. Man.	Revised Statutes Manitoba.
R.S.N.S., 5th ser.	Revised Statutes Nova Scotia, 5th series.
R.S.O.	Revised Statutes Ontario.
R.S.Q.	Revised Statutes Quebec.
S.C.R.	Supreme Court Canada Reports.
U.C.C.P.	Upper Canada Common Pleas Reports.
U.C.L.J.	Upper Canada Law Journal.
U.C.Q.B.	Upper Canada Queen's Bench Reports.

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A DIGEST

—OF—

ALL REPORTED CASES DECIDED BY THE FEDERAL AND PROVINCIAL COURTS IN THE DOMINION OF CANADA, AND BY THE PRIVY COUNCIL ON APPEAL THEREFROM, DURING THE YEAR 1896.

ABANDONMENT.

Partnership—Judicial Abandonment—Dissolution—Composition—Subrogation—Confusion of Rights—Compensation—Arts. 772 and 778 C. C. P.] —A partner in a commercial firm which made a judicial abandonment was indebted to the firm at the time of the abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm, and with the approval of the court the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm," * * * "as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect of the partnership:—Held, affirming the decision of the court below, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estates of each partner as well as the partners' individual rights as between themselves:—Held, reversing the decision of the court below, the Chief Justice and Taschereau J. dissenting, that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally and could not revive the individual rights of the partners as between themselves, and that in consequence, any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion. *MacLean* v. *Stewart*, 25 S.C.R., 225.

[On appeal to the Judicial Committee of the Privy Council, the latter holding was reversed, and the judgment in the Queen's Bench restored in its entirety by judgment pronounced on July 28th, 1896 (unreported).]

—Easement — Prescription.]—The question of abandonment of an easement is one of intention, to be decided upon the facts of each particular case.

Non-user with acquiescence in acts done by the owner of the servient tenement, inconsistent with the easement, will suffice to raise the presumption of abandonment or release without any acts of the dominant owner himself. Such a presumption may be based upon non-user and acquiescence for a shorter period than twenty years. *Bell* v. *Golding*, 23 Ont. A. R., 485.

—Notice of—Marine Insurance—Constructive Total Loss—Sale of Vessel by Master—Necessity for Sale.]—See INSURANCE, V.

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—**Chattel Mortgagee—Mortgagee in Possession—Negligence—Sale under Powers—Practice—Assignment for benefit of Creditors—Revocation of.**]—Under the provisions of R.S.O., c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action—Where creditors refuse to accept the benefit of an assignment under R.S.O., c. 124, and the assignor was notified of such refusal, and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade, who sold the goods in an improper manner. *Rennie* v. *Block*, 26 S.C.R. 356.

—**Partnership—Division of Assets—Art. 1898 C.C.—Mandate—Debtor and Creditor—Account.**]—Upon the dissolution of a partnership, where one of the partners has been entrusted with the collection of moneys due as the mandatary of the others, any of his co-partners may bring suit against him directly either for an account under the mandate, or for money had and received. *Lefebvre* v. *Aubry*, 26 S.C.R. 602.

—**Compensation—Action by Crown—Plea of Compensation.**]—No action can be sustained against the Government of Quebec except by Petition of Right allowed by the express consent or fiat of the Lieutenant-Governor, and to permit a plea of compensation to be set up to an action on behalf of the Government would be equivalent to permitting a suit to be prosecuted without such consent or fiat. *Fortier* v. *Langelier*, Q.R. 5 Q.B. 107.

—**Procedure—Husband and Wife.**]—An action against a wife living under the authority of her husband in which she was by error sued as a widow is wholly null, and the husband cannot be brought into the cause to assist the plaintiff. A judgment permitting the husband to be put in the cause is of no effect. *Phelan* v. *Skelly*, Q.R. 9 S.C. 113.

—**Partnership—Joint Possession—Reddition de Compte.**]—Two persons formed a partnership for working a mine, one to be manager, and receive for his services $2 per day. The mine having been sold the partnership was at an end, and the manager brought an action against his associate for his salary during the time it existed. A *défense en droit* having been pleaded:—Held, that the salary was a *dette sociale*, which the plaintiff could only recover by an action *en reddition de compte*—If several persons own a mine in common, but the title is in the name of one only, that does not constitute a *société*, but a *communauté*, and if the mine is sold by the holder of the title each of the other proprietors has a right of action against him for his share of the price without *reddition de compte*. *Provencal* v. *Nadeau*, Q.R. 9 S.C. 344.

—**Police Constable—Deductions from Pay—Remedy for.**]—By the regulations governing the police force of the city of Montreal, a part of the pay of a police constable in case of unfitness for duty may be stopped by the superintendent, if he thinks proper:—Held, that where the superintendent deducted half the pay of a constable who was retained on the force during a long illness, and handed it over to a benefit society founded for the assistance of the force, the constable could not maintain an action against said society for the amount, his remedy, if he had any, being against the city for non-payment of his full wages. *Prevost* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*, Q.R. 9 S.C. 381.

—**Receiver—Foreign Corporation—Action by Transferee.**]—A receiver of a foreign corporation who, by the law of the foreign state by whose courts he was appointed, has the authority to sue for a debt due to the corporation, may sue in a Court of Quebec for a debt due therein without the special authority of such Court—If a transferee, having the right to do so, brings an action in the name of his transferor, it cannot be opposed by a plea alleging that after the institution of the action the plaintiff had made a transfer of its assets. *Young* v. *The Consumers' Cordage Co.*, Q.R. 9 S.C. 471.

— **Municipal Corporation — Cost of Procès-verbal — Recovery of — Demand of Payment — Art. 951, 961 M.C.**]—When a *procès-verbal* on the subject of a road passing through several municipalities indicates which of them shall contribute to the payment of the cost, the action for recovery of such cost should be brought by the corporation of the county. Although the prior formalities have been observed by the secretary-treasurer of the local municipality or by that of the municipality of the county, the action (when that mode of recovery is resorted to) should be taken by the county corporation. The demand of payment required by Art. 961 of the Municipal Code is a condition precedent to the bringing of the action. The action itself is not such a demand which ought to be made by a special official designated by the law, and who returns the amount exigible only fifteen days after it has been made. The fact that the coporation itself has paid the cost does not give it a right to sue before the formalities have been complied with. *Corporation of Portneuf* v. *Dion*, Q.R. 9 S.C. 525.

—**Money Paid to Agent.**]—An action to recover back money paid to an agent can be brought against the principal only if he had the least colour of right to the money. In an action against the principal, it is immaterial whether or not he actually received the money from the agent. *Williams* v. *Wilson*, 3 B.C.R. 613.

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

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—**Petitory Action—Acquiescence in Title—Trespass — Prima Facie Right of Ownership — Evidence.**]—See TITLE TO LAND.

II. FOR WHAT MAINTAINABLE.

—**Defamation—Witness.**]—On the trial of an action a witness under cross-examination, laboring under excitement from an impression that the examining counsel had insulted his wife, applied a vulgar and insulting epithet to one of the parties who was not present at the time. No especial damage was proved:—Held, that the party so assailed could not maintain an action against the witness. *Larue* v. *Brault*, Q.R. 9 S.C. 149.

—**De in rem verso—Medical services—Railway Accident.**]—Where on the occasion of a railway accident medical services were rendered to the injured by a physician who was not engaged by any agent of the railway company on whose road the accident occurred:—Held, that the company having benefited by such services were liable to pay to the physician the equivalent of such benefit, even though there was no contractual obligation therefor. *Paquin* v. *Grand Trunk Railway Co.*, Q. R. 9 S. C. 336.

—**Replevin—Equitable Title.**]—Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin. *Carter* v. *Long & Bisby*, 26 S.C.R. 430.

—**Procedure — Continuance of Suit — Vacation — Art. 441, C. C. P.**]—An action will lie by a party to a suit to compel the universal legatee of his opponent, who has accepted the succession on the death of the latter, but failed to take up the *instance*, to continue the suit. The person accepting the succession after July 1st is bound to take up the *instance* during vacation. *Hancock* v. *Cassils*, Q.R. 9 S.C. 152.

— **Against Municipal Corporation — Notice — Pleading — Art. 793, M.C.—Art. 138, C.C.P.**]—By Art. 793 of The Municipal Code of Quebec, if a municipal corporation neglects to keep the streets in repair it is liable to a penal action or an action for damages in case of injury caused by such want of repair. The fifteen days notice of action required by the article applies to both. The defence of want of notice does not affect the right of action and should not be raised by *une défense en droit*, but by *exception à la forme*. But the plaintiff must contest the right to plead by *défense en droit* within four days after such defence is produced [Art. 138 C.C.P.], after that delay he cannot complain and the Court may give effect to the plea. *Gauthier* v. *La Municipalité du Village de St. Louis du Mile-End*, Q.R. 9 S.C. 453.

—**City of Montreal—Expropriation by—Residue—Failure to Value—City Charter, 52 V., c. 79, s. 213, s.s. 12 (P.Q.)**]—See EXPROPRIATION.

—**Municipal Corporation — Expropriation — Injury to Persons not Expropriated—Recourse for.**

See EXPROPRIATION.

III. JURISDICTION TO ENTERTAIN.

—**Jurisdiction to Entertain—Mortgage of Foreign Lands—Action to set Aside—Secret Trust—Lex rei sitæ.**]—A Canadian Court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the Court not being able to assume that the law of the foreign country in which the lands were situate corresponded to the statutory law of the province in which the action was brought: *Burns* v. *Davidson* (21 O.R. 547) approved, and followed. *Purdom* v. *Pavey & Co.*, 26 S.C.R. 412.

—**Ontario Division Courts Act—"Cause"—Garnishment.**]—A garnishee proceeding under section 185 of the Division Courts Act is an "action" or "cause" within the meaning of s. 87, and may be transferred from a wrong to the proper forum under the last mentioned section: *Hobson* v. *Shannon*, 26 Ont. R. 554; Re *McLean* v. *McLeod*, 5 Ont. P.R. 467, and Re *Tipling* v. *Cole*, 21 Ont. R. 276, referred to. Re *M'Cabe* v. *Middleton*, 27 Ont. R. 170.

—**On Contract — Forum—Jurisdiction — Art. 34, C.C.P.**]—Where a contract is entered into in one district for work to be done in another, and the work has been executed in the latter, the

right of action does not arise in the district where the contract was made. *Roy* v. *Kennedy*, Q.R. 9 S.C. 111.

—**On Note—Place of Payment—Domicile.**]—See PRACTICE, XXV.

IV. NOTICE OF ACTION.

—**Libel—Newspaper—Notice of Action—Sufficiency of Service—R.S.O. c. 57, s. 5.**]—See LIBEL AND SLANDER, IV.

—**Public Official—Action Against for Defamation—Notice.**]—See LIBEL AND SLANDER, III.

—**Municipal Corporations—Defective Sidewalk—Pleading—Notice of Action—57 Vict. (Ont.) c. 50, s. 13.**—See MUNICIPAL CORPORATIONS, IV.

—**Sufficiency of—Magistrate—Issue of Warrant—Want of Written Information—Trespass.**]—See JUSTICE OF THE PEACE.

V. POSSESSORY.

—**Possessory Action—Temporary Occupation of Land—Railway Company—Principal and Agent.**]—A possessory action may be maintained against a person who temporarily occupies another's land.—In a contract with a railway company for building its road, the company reserved control over the works and engaged to furnish the "entire right of way of the works or branch line and sidings, borrow-pits and ballast-pits." To reach a ballast-pit furnished to them the contractors, without expropriating, laid a short line over the land of L.:—Held, that the company was responsible for this act of the contractors, and L. was entitled to possession of the land on which the track was laid and to damages. *Lachance* v. *Quebec Central Ry. Co.*, Q.R. 9 S.C. 135.

—**Trespass—Defence for—Possession annale—Good Faith**—A plaintiff *en complainte ou en réintégrande* can proceed against the person directly interfering with his right of possession, and the latter cannot set up the defence that he trespassed upon the land by order of a third party, whose name he reveals to the plaintiff. The possessor of land, in order to establish possession for a year and a day (*possession annale*) may join to his possession that of a neighbour, when, by a *bornage* between him and the neighbour, he has been put in possession of part of the latter's land. It is not necessary that the *possession annale* required to found a possessory action should be in good faith; it will suffice if it includes the requisite conditions for a prescription of thirty years. *Latour* v. *Godin*, Q.R. 9 S.C. 456.

VI. REVENDICATION.

—**Criminal Code, s. 575—Confiscation of Gaming Instruments, Moneys, etc.**]—Moneys were seized in a gaming-house, under a warrant issued under sec. 575 of the Criminal Code, and confiscated by the judgment of a Police Magistrate sitting in the City of Montreal. In an action against the Attorney-General to recover the moneys so seized: Held, per Strong C.J., that a judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of revendication. *O'Neil* v. *The Attorney General of Canada.* 26 S. C. R., 122.

VII. RIGHT OF ACTION.

—**Bailees—Common Carriers—Express Company—Receipt for Money Parcel—Conditions Precedent—Formal Notice of Claim—Pleading—Money had and Received—Special Pleas—"Never Indebted."**]—Where an express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed:—Held, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee: *Richardson* v. *The Canada West Farmers' Ins. Co.* (16 U. C. C. P. 430) distinguished.—In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" puts in issue all material facts necessary to establish the plaintiff's right of action. *The Northern Pacific Express Co.* v. *Martin.* 26 S. C. R., 135.

—**Contract—Public Work—Progress Estimates—Engineer's Certificate—Revision by Succeeding Engineer—Action for Payment on Monthly Certificate.**]—A contract with the Crown for building locks and other work on a government canal provided for monthly payments to the contractors of 90 per cent. of the value of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the Minister of Railways and Canals, that the work certified for had been executed to his satisfaction; the certificate so approved was to be a condition precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent. of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty to make any changes or alterations in the work which he should deem expedient:—Held, that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be re-opened and revised by a succeeding engineer. Held also, that the contractors could proceed by action if payment on a monthly certificate was withheld, and were not obliged to await the final completion of the work before suing. *Murray* v. *The Queen.* 26 S. C. R. 203.

—**Several Defendants—Former Judgment against One—Arrest on ca. sa.**]—W. brought an action on behalf of himself and other creditors of C., one of the defendants, to set aside a judgment obtained against C. by his co-defendants on the ground of fraud and collusion. W. had an existing judgment against C., and pending the action he arrested the latter on a ca. sa. there-

under, which arrest was pleaded as a satisfaction of said judgment and bar to the action:—Held by the Divisional Court, reversing the judgment of Walkem, J., that the arrest was no defence; that its effect was only to suspend the exercise of other remedies by execution on the judgment, none of which W. was seeking to exercise; and that in any case the action could be maintained on behalf of the other creditors. *Ward* v. *Clark*, 4 B.C.R. 71.

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

See FOREIGN JUDGMENT.
" RES JUDICATA.

—**Title to Land—Action en Bornage—Surveyor's Report—Chose Jugée.**]—See RES JUDICATA.

—**Right of Action by Mortgagee under Unregistered Mortgage of Ship.**]—See SHIPPING, VI.

—**Right of Action of Trespasser on Crown Land.**]—See TRESPASS.

—**Action Paulienne—Chose Jugée—Revocation of Sale.**]—See HYPOTHEC.

—**Negatoire—Servitude—Right of Passage.**]—See SERVITUDE.

VIII. WARRANTY.

—**In Warranty—Proceedings Taken by Warrantee Before Judgment on Principal Demand.**]—It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby. But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences. *Archbald* v. *deLisle*; *Baker* v. *deLisle*; *Mowat* v. *deLisle*. 25 S. C. R., 1.

—**Action in Warranty—Defence.**]—A builder who has been obliged to pay damages for faulty construction of his work has no recourse in warranty against the architect when it is proved that he deviated from the specifications furnished, which deviations formed the main cause of the defects. If he did not understand the specifications, he should have consulted the architect and followed his instructions. *Royal Electric Co.* v. *Wand*, Q.R. 9 S.C. 117.

—**En Garantie—Warranty—Delit.**]—See WARRANTY.

IX. MISCELLANEOUS CASES.

—**Negligence—Risk Voluntarily Incurred—"Volenti Non Fit Injuria."**]—On the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted, the jury had found that "the deceased voluntarily accepted the risks of shunting," and that the death of the deceased was caused by defendant's negligence in shunting, in giving the car too strong a push:—Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skillful manner, and that the maxim "*volenti non fit injuria*" had no application: *Smith* v. *Baker* ([1891] A.C. 325) applied. *The Canada Atlantic Ry. Co.* v. *Hurdman*. 25 S. C. R., 205.

—**Joinder of Causes of—Recovery of Land—Motion for Judgment.**]—Plaintiff, without obtaining leave therefor, indorsed his writ as follows: "The plaintiff's claim is for recovery of possession and setting aside the conveyance of T. and L. to the defendant of lots G, H, I, etc." Defendant was served, but failed to appear. Plaintiff then served a statement of claim by posting it up in the office in which the proceedings were being conducted, and upon the defendant's further default in delivering a defence, the plaintiff set the action down upon motion for judgment upon the statement of claim under Rule 728. The facts alleged in the statement of claim showed that the setting aside of the conveyance referred to in the indorsement was sought by the plaintiff as a part of what was necessary to establish his title:—Held, that the claim so combined was to be treated either as an action for the recovery of land merely, in which, upon default of appearance by defendant, the plaintiff was entitled, under Rule 714, to enter judgment for possession without a motion; or as an action for such recovery coupled, without leave therefor, with another cause of action. In either view the plaintiff was wrong in setting the case down on motion for judgment, and the motioned should be refused: *Gledhill* v. *Hunter*, 14 Ch. D. 492, followed. *May* v. *Drummond*, 17 Ont. P. R. 21.

—**Title to Land—Reserve of Usufruct.**]—B. brought an action and recovered judgment against the City of Quebec for the value of land taken possession of by the city for an aqueduct. The city then sued to obtain a title and B. pleaded that he had donated the land to another, reserving the usufruct:—Held, that though the city could only get title from the donee, yet it was entitled to a declaratory judgment against B. for possession during the continuance of the usufruct. *City of Quebec* v. *Bédard*, *Q R.* 9 S.C. 140.

—**In rem—Costs of Action benefiting all Claimants against the res.**]—See SHIPPING, IX.

—**Delay in Prosecution of Action.**]—See PRACTICE I (*b*).

—**Right of Action Against Municipality—Where Land Improperly Sold for Taxes—Demurrer.**]—See TAX SALES.

—**Action Transferred from County Court to Court of Queen's Bench—Manitoba Queen's Bench Act, 1895], s. 86.**]—See PLEADING, I.

—**Joinder of Separate Causes of Action.**]—See PRACTICE I (*a*).

—**Settlement of Action—Stay of Proceedings—Summary Trial—Costs.**]—See PRACTICE XXI.

—**For Tort—Certificate for Costs—C.S.N.B. c. 60, s. 42.**]—See COSTS, II (*a*)

—**Of Libel—Nature of Action—Damages.**]—See LIBEL AND SLANDER, I.

—**Summary Action—Procedure—Action Against Bank Directors—Joint and Several Liability—Description.**]—See PRACTICE, XVII (*b*)

—**Cause of—Instruction—Conclusion of Declaration—Right to Trial by Jury—Art. 348 C.C.P.**]—See PRACTICE, XVII (*b*).

—**Discontinuance.**]—See PRACTICE, VIII.

—**En Reddition de Compte—Constituted Rents—Joint Creditors—Mandate—Negotiorum Gestor.**] See RENT.

—**Redhibitory Action—Latent Defects—Reasonable Diligence—Art. 1530 C.C.**]—See SALE, I (*f*).

—**Parties—Joinder of Causes of Action—Ontario Rule 300.**]—See PARTIES, I.

—**Joinder of Causes of Action—Mortgage Action—Ontario Rule 341.**]—See PRACTICE, I (*a*).

—**Costs—Security—Default—Dismissal of Action—Indulgence.**]—See COSTS, III.

—**Administration Action—Receiver—Status.**]—See EXECUTORS AND ADMINISTRATORS.

—**Ontario Law Courts Act, 1896—Pending Action—How Affected by this Enactment.**]—See PRACTICE, I (*a*).

ADJUDICATAIRE.

Bidding at Auction—Mistake in Identity of Lot.]—See SALE, I (*d*).

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.
" SALE, I (*d*).

ADMISSION.

Divisibility of.]—See PLEADING, VI.

ADVOCATE.

See ATTORNEY.
" SOLICITOR.

AFFIDAVIT.

Practice—Commission.]—On application for a commission to take evidence of witnesses abroad the affidavit must give the names of the proposed witnesses. *Hermann* v. *Lawson*, 3 B.C.R. 353.

—**To Hold to Bail—Imperfect Statement of Cause of Action.**]—An affidavit to hold to bail is defective which sets out the different causes of action and adds, "that the defendant is justly and truly indebted to the plaintiff in the sum of ——" the liability sworn to not being connected with the facts.

An affidavit stating the indebtedness to be for premiums of insurance paid for the defendant without an averment that the payment was made at defendant's request, is also bad. *Williams* v. *Richards*, 3 B.C.R. 510.

—**Statutory Form—Defective Jurat.**]—An affidavit filed with a chattel mortgage is good if it follows the statutory form, though the jurat does not state where it was sworn. Per Davie, C.J.: If sworn before a commissioner for British Columbia, it will be presumed that he acted within the territorial limits of his authority. *Brown* v. *Jowett*, 4 B.C.R. 44.

—**To Hold to Bail—1 & 2 V., c. 10 (Imp.).**]—In British Columbia the affidavit required to hold the defendant in an action to bail is governed by the Imperial statute 1 & 2 Vict., c. 10. *Kimpton* v. *McKay*, 4 B.C.R. 196.

—**Of Bona Fides.**]—See BANKRUPTCY AND INSOLVENCY, I.

—**On Production.**]—See PRACTICE, II.

—**For Capias—Arts. 30, 798 C.C.P.**]—See CAPIAS.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See ARBITRATION AND AWARD.
" CONTRACT.
" DEED.
" PRINCIPAL AND SURETY.
" SALE.

ALDERMAN.

Petition to Unseat.]—See MUNICIPAL ELECTION.

ALIMENTS.

Support of Father.]—Where a father claimed support from his children of $3 per week, and it was proved that they had formerly placed him *en pension* in a hospital, paying therefor $5 a month, and he had left the hospital without their knowledge:—Held, that he could not demand further support. *Racine* v. *Racine*, Q.R. 9 S.C. 96.

ALIMONY.

Subsequent Judgment for Arrears in County Court—Effect of.]—On a petition filed for the purpose of realizing arrears of alimony, it appeared that after the recovery and registration of a judgment in alimony proceedings directing payment to the wife of a yearly sum in quarterly instalments, she, on default being made in payment of two of the instalments, brought an action therefor in the County Court, and recovered judgment there for the same. An execution, issued thereon on goods and lands of the husband, was returned *nulla bona* as to goods:—Held, that the proceedings in the County Court did not prevent an order being made to realize out of the husband's lands the arrears of alimony charged thereon by the former judgment. Semble, that the judgment recovered in the County Court was a nullity. *Lee* v. *Lee*, 27 Ont. R. 193.

—**Cruelty—Condonation.**]—Condonation by a wife of acts of cruelty and ill-treatment by her husband, which would justify her leaving him and claiming alimony, is forgiveness with an implied condition that the injuries shall not be repeated, and that the wife in future shall be treated with conjugal kindness. On breach of the condition the right to a remedy for the former injuries revives: *Rodman* v. *Rodman*, 20 Gr. 428, referred to. *Bavin* v. *Bavin*, 27 Ont. R. 571.

—**Service out of Jurisdiction — Ontario Law Courts Act, [1895] s. 28.**]—The right to alimony is not based on contract but on the special provisions of s. 29 of the Ontario Judicature Act (R.S.O. [1887], c. 44), which enables the Court to award interim and future alimony, apart from all other jurisdiction as to the matrimonial status. 2. Alimony, when granted, is that allowance to which a married woman is entitled upon separation from her husband. Hence it is not to be classed either as "debt" or "damages," terms which define the scope of s. 28 of the Ontario Law Courts Act of 1895, providing for the allowance of service out of the jurisdiction of a writ of summons where the plaintiff has a good cause of action upon a contract, and the defendant has assets in Ontario: *Magurn* v. *Magurn*, 3 Ont.R. 579; *Keith* v. *Keith*, 25 Gr. 113; and *Hooper* v. *Hooper*, 3 Sw. & Trist. 251, referred to. *Wheeler* v. *Wheeler*, 17 Ont. P.R. 45.

AMENDMENT.

See PRACTICE, III.

AMIABLES COMPOSITEURS.

See ARBITRATION AND AWARD, IV.

APPEAL.

I. APPEAL GENERALLY.

—**Technical Grounds—Surprise.**]—An appellate court will not give effect to mere technical grounds of appeal, against the merits, and where there has been no surprise or disadvantage to the appellant. *Gorman* v. *Dixon*, 26 S.C.R. 87.

—**Assessment of Damages—Questions of Fact.**]—The Supreme Court will not interfere with the amount of damages assessed by a judgment appealed from if there is evidence to support it. *The Montreal Gas Co.* v. *St. Laurent*, 26 S.C.R. 176; *The City of St. Henri* v. *St. Laurent*, 26 S.C.R. 176.

—**Testamentary Executor—Appeal by—Authority —Art. 919 C. C.**]—A testamentary executor who brings an action for recovery of a debt due to the succession may appeal from a judgment dismissing his action without first obtaining the consent of the heirs. *Hudon* v. *Hudon*, Q.R. 5 Q.B. 457.

—**Dominion Railway Act, R.S.C. c. 109—Order of Judge—Persona Designata—Appeal.**]—Where a judge makes an order for payment out of Court of compensation moneys under s. 165 of R.S.C., c. 109, he acts not for the Court, but as *persona designata* by the statute; and no appeal lies from his order: *C.P.R. Company* v. *Little Seminary of Ste. Thérèse*, 16 S.C.R. 606, followed. *Re Toronto, Hamilton and Buffalo Ry.* and *Hendrie*, 17 Ont. P.R. 199.

—**Master's Certificate—Appeal to Judge in Court —Divisional Court.**]—The certificate of a Master of any determination by him of a matter arising upon a reference, over which he has jurisdiction, is a report upon the matter, and subject to the same rules as to appeal as an ordinary report. *In re Molphy, Beckes* v *Tiernan*, 17 Ont. P. R. 247.

—**Order in Chambers.**]—Where on appeal to the Divisional Court from an order in Chambers counsel could not agree as to what had taken place before the judge who had not given his reasons in writing, the Court sent the case back for a report and re-argument if necessary. *Beaven* v. *Fell*, 3 B.C.R. 362.

—**Appeal from Magistrate's Conviction Under Criminal Code.**]—See CRIMINAL LAW, III.

II. AS TO COSTS.

—**Costs, Appeal for, when it lies—Action in Warranty—Proceedings taken by Warrantee before Judgment on Principal Demand.**]—Though an appeal will not lie in respect of costs only, yet where there has been a mistake upon some matter of law, or of principle, which the party appealing has an actual interest in having reviewed, and which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. *Archbald* v. *deLisle*, *Baker* v. *deLisle*, *Mowat* v. *deLisle*, 25 S.C.R. 1.

—**From Certificate of Taxation of Costs.**—An appeal from the certificate of taxation of a bill of costs between solicitor and client is to the Court as if it were an appeal from a Master's report. *Re Mowat, a Solicitor*, 17 Ont. P.R. 180.

—**Security for Costs—Art. 1122 C.C.P.**]—By Art. 1122, C.C.P., a party to an action wishing to appeal to the Court of Queen's Bench must give security for the effective prosecution of

his appeal and payment of all damages and costs adjudged against him. If he produces a declaration that he will not oppose execution of the judgment, the security may be for costs only:—Held, that in either case the security should be for an indefinite amount, and if for a fixed sum the article was not complied with—Held, also, that where the judgment appealed from contained a money condemnation, security for costs only, without the declaration required by the article, was not sufficient. *Moore* v. *Lamoureux*, Q.R. 5 Q.B. 532.

—**Amount in Controversy—Costs.**]—Art. 1102, C.C.P., prohibits the seizure of immovables on execution pursuant to a judgment in the Circuit Court, unless the sum granted by such judgment exceeds $40:—Held, that the taxed costs given by the judgment form a part of the amount thereof for the purpose of such appeal. *Tapp* v. *Turner*, Q.R. 5 Q.B. 538.

—**From Taxation of Costs—Extension of Time.**]—See COSTS, IV (*a*).

—**Nonsuit by Judge ex mero motu—Costs—Appeal.**]—See COSTS, V.

—**Costs—Security for—Appeal to Court of Appeal—Special Order.**]—See COSTS, III.

—**Solicitor—Costs—Taxation—Appeal.**]—See COSTS, IV (*a*).

—**Security for Costs—Appeal to Court of Appeal—Special Order—Ontario Judicature Act [1895], Sec. 77.**]—See COSTS, III

—**Costs—Taxation—Two Defendants appearing by same Solicitors—Appeal—Extension of time—Solicitor's mistake—Objections to Taxation—Question of Principle—Ontario Rules 1230, 1281.**]—See COSTS, IV (*a*).

III. FROM AND TO PARTICULAR COURTS.

(*a*) *Privy Council.*

—**Appeal from Court of Review—Appeal to Privy Council—Appealable Amount—Addition of Interest—C. C. P. arts. 1115, 1178, 1178a—R. S. Q. art. 2311—54 & 55 V. (D.) c. 25, s. 3, ss. 3—54 V. (P.Q.) c. 48 (amending C. C. P. art. 1115.**]—Under 54 & 55 Vict. (D.) c. 25, s. 3, s.s. 3 there is no appeal to the Supreme Court of Canada from a decision of the Court of Review which would not be appealable as of right to the Privy Council.—Art. 2311 R.S.Q., which provides that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered if they are different," applies to appeals to the Privy Council.—Interest cannot be added to the sum demanded to raise it to the amount necessary to give a right of appeal: *Stanton* v. *Home Ins. Co.* (2 Legal News 314) approved. *Dufresne* v. *Guévremont*, 26 S.C.R. 216.

—**To Privy Council.**]—Leave to appeal to the Privy Council from a decision of the Divisional Court of British Columbia will only be granted by that Court in matters of general public interest. *Gordon* v. *Cotton*, 3 B.C.R. 287.

—**Privy Council—Leave to Appeal from Manitoba Queen's Bench—Imperial Order in Council.**]—The Court of Queen's Bench for Manitoba is empowered by the Imperial Order-in-Council of the 26th November, 1892, to grant leave to appeal direct to the Privy Council, provided the application is made within fourteen days from the pronouncing of its order, but has no jurisdiction to entertain such an application if not made within that time: *Flint* v. *Walker*, 5 Moo. P.C. 179, followed; *Retemeyer* v. *Obermuller*, 2 Moo. P.C. 93, distinguished. *Gray* v. *Manitoba & N. W. Ry. Co.*, 11 Man. 261.

(*b*) *Supreme Court of Canada.*

—**Amount in Controversy—Pecuniary Interest of Appellant—Arts. 746, 747 C. C. P.**]—L. having proved a claim of $920 against an insolvent estate, contested a claim for which respondents had been collocated against the same estate amounting to $2,044.66. The contestation having been decided in favor of respondents, L. appealed to the Supreme Court:—Held, that to determine whether or not there was a sufficient amount in controversy to give jurisdiction to the Supreme Court, the pecuniary interest of the appellant only could be taken into consideration, and his interest being under $2,000 the appeal would not lie, although the consequence of the appellant's contestation might result in bringing back to the insolvent estate a sum of over $2,000. *Lachance* v. *La Société de Prêts et de Placements de Quebec*, 26 S.C.R., 200.

—**Appeal from Court of Review—Appeal to Privy Council—Appealable amount—Addition of interest—C. C. P. arts. 1115, 1178, 1178a—R.S.Q. art. 2311—54 & 55 V. (D) c. 25, s. 3, s.s. 3—54 V. (P.Q.) c. 48 (amending C.C.P. art. 1115).**] Under 54 & 55 V. (D.) c. 25, s. 3, s.s. 3, there is no appeal to the Supreme Court of Canada from a decision of the Court of Review which would not be appealable as of right to the Privy Council.—Art. 2311 R.S.Q., which provides that "whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered if they are different," applies to appeals to the Privy Council.—Interest cannot be added to the sum demanded to raise it to the amount necessary to give a right of appeal: *Stanton* v. *Home Ins. Co.* (2 Legal News 314) approved. *Dufresne* v. *Guévremont*, 26 S.C.R. 216.

—**Appeal—Jurisdiction—Judicial Proceeding—Opposition to Judgment—Arts. 484-493 C.C.P. —R.S.C. c. 135, s. 29—Appealable Amount—54 & 55 Vict., c. 25, s. 3, s.s. 4—Retrospective Legislation.**]—An opposition filed under the provisions of Articles 484 and 487 of the Code of Civil Procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a "judicial proceeding" within the meaning of s. 29 of The Supreme and Exchequer Courts Act, and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court of Canada if the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled is of the sum or value of $2,000. *Turcotte* v. *Dansereau*, 26 S.C.R. 578.

—**Appeal to Supreme**
Security for Costs—C
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(*c*) *Ontario*

—**Appeal from Divis**
Preliminary Issue—
72-73.]—See APPEAL

—**Special Circumsta**
Act [1895], Sec. 72-73.

(*d*) *Ontario*

—**Defence not Pres**
Court.]—Where on
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—**From County Cou**
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R 412.

—**Appeal to Division**
ings—Rule 799 A (14
Divisional Court has
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be set down upon sh
to stay proceedings
v. *Rusnell*, 17 Ont. P

—**Master's Report—A**
There is no appeal t
the decision of a Jud
from a Master's rep
Tiernan, 17 Ont. P.

(*e*) *Court of Q*

—**Amount in Disput**
C.C.P.]—By art. 1115,
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the judgment in app
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and the case did no
Tapp v. *Turner*, Q.R

(*f*) *Superio*

—**Bureau de Délégué**

—**Notice—Art. 1067, M**
decision of a *Bureau*
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—**Appeal to Supreme Court of Canada—Bond for Security for Costs—Condition—Affidavits of Execution and Justification.**] —See APPEAL, IX.

(c) Ontario Court of Appeal.

—**Appeal from Divisional Court—Judgment on Preliminary Issue—Judicature Act [1895], Sec. 72-73.**]—See APPEAL, VIII.

—**Special Circumstances — Terms — Judicature Act [1895], Sec. 72-73.**]—See APPEAL, VIII.

(d) Ontario Divisional Court.

—**Defence not Pressed—Judgment—Divisional Court.**]—Where on the trial of a cause in a Division Court two of the defendants did not press their defence, and judgment was given against them, although not formally entered until judgment, which was reserved against the other defendant, was subsequently given against him, and afterwards the two defendants moved before the Division Court Judge for a dismissal of the action, which was refused on the ground that judgment having been given against them at the trial, they were too late; the Divisional Court held that no appeal would lie to that Court from such decision of the Division Court Judge. *Kinnard* v. *Tewsley*, 27 Ont. R. 398.

—**From County Court to Divisional Court—Ontario Law Courts Act, [1895], s. 44, s.s. 3.**]—A Divisional Court has no jurisdiction under s. 44, sub-sec. 3, of the Ontario Law Courts Act, 1895, to hear an appeal from a County Court in term refusing a new trial on the ground of the discovery of fresh evidence, and this applies to a judgment given before the Act came into force. *Brown* v. *Carpenter*, 27 Ont. R 412.

—**Appeal to Divisional Court—Stay of Proceedings—Rule 799 A (1484) Consol. Rules Ont.**]—A Divisional Court has jurisdiction to allow an appeal from the judgment of a trial judge to be set down upon short notice of motion, and to stay proceedings pending the appeal. *Todd* v. *Rusnell*, 17 Ont. P.R. 127.

—**Master's Report—Appeal to Divisional Court.**]—There is no appeal to the Divisional Court from the decision of a Judge in Court upon an appeal from a Master's report. *Re Molphy, Beckes* v. *Tiernan*, 17 Ont. P.R. 247.

(e) Court of Queen's Bench, Quebec.

—**Amount in Dispute—Costs—Arts. 1102, 1115, C.C.P.**]—By art. 1115, C.C.P, there is no appeal to the Court of Queen's Bench from a judgment of the Court of Review unless the amount in dispute exceeds $200.—Held, that where the judgment in appeal was on an opposition to a seizure under execution of an immovable, it was such immovable that was in dispute, and the case did not fall within said article. *Tapp* v. *Turner*., Q.R. 5 Q B. 538.

(f) Superior Court, Quebec.

—**Bureau de Délégués—Appeal from Decision of—Notice—Art. 1067, M.C.**]—On an appeal from a decision of a *Bureau de Délégués* it is not necessary to specify in the writ the name of every party interested as a respondent. It is sufficient if the writ is served on the Secretary of the Board, who should give public notice in the mode prescribed by art. 1067 of the Municipal Code. *Tremblay* v. *Bureau des Délégués of the County of Chambly*, Q.R. 9 S.C. 290.

—**Quebec Harbour Commissioners—Decision of—Appeal from—Revision of Judgment.**]—Where an appeal is taken to the Superior Court from the action of the Quebec Harbor Commissioners suspending the pilot, the judgment of the Court setting aside the sentence is subject to revision by the Court of Review. *Lachance* v. *Quebec Harbour Commissioners*, Q.R. 9 S.C. 542.

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

—**County Court—Appeal from—Transfer of Case to Queen's Bench—Jurisdiction.**]—Notwithstanding the general and absolute right of appeal apparently given by the 315th section of the Manitoba County Courts Act, no appeal lies from an order made by a County Court Judge, under s. 86 of the Manitoba Queen's Bench Act, 1895 transferring an action to the Court of Queen's Bench after the papers and proceedings in such action have reached the prothonotary, because on this taking place there is no longer a cause in the County Court in which proceedings for the appeal could be taken. It makes no difference whether the order to transfer is properly made or not, because it is for the Judge of the County Court to decide, in the first instance, whether it was shown that the defence involved matters beyond the jurisdiction of that Court. He has jurisdiction to decide that question, and he having determined it judicially, his decision cannot be treated as given without jurisdiction. *Doll* v. *Howard*, 11 Man. R. 21.

(h) British Columbia Supreme Court.

—**From County Court—Questions of Law—County Court Amendment Act, [1892,] s. 2.**]—In an action in a County Court on promissory notes given in payment of an insurance premium, the defence was that the policy had been surrendered to the company. The trial judge held that the company had refused to take back the policy, and that what was done by the agent, even if it was a release as between him and the insured, could not bind the company, as the policy provided that agents could not alter nor discharge contracts:—Held, that no question of law was raised by this decision and there was no appeal therefrom to the Supreme Court, the amount involved being under 250, as to which the appeal was limited by s. 3 of the County Court Amendment Act, 1892, to questions of law, the admission or rejection of evidence and misdirections. *Confederation Life Assurance Co.* v. *McInnes*, 4 B.C.R. 126.

—**Divorce Suit—Jurisdiction of Court—C.S.B.C. [1888,] c. 25, s. 67—20 & 21 V., c. 85, s. 55 (Imp.)**]—By C.S.B.C. (1888), c. 25, s. 67, "an appeal shall lie to the full Court from every judgment, decree or order made by a judge of the Supreme Court, whether final or interlocutory." * * Held, that this section did not give to the full Court jurisdiction to hear an

appeal from the decision of a judge of the Supreme Court on a petition for a divorce *a vinculo matrimonii*, the subject of divorce being within the exclusive legislative authority of the Dominion Parliament. The Imperial Act, 20 & 21 Vict., ch. 85, sec. 55, which gives an appeal from any decision of a single judge in a divorce suit to the full Court, is not applicable to the full Court of British Columbia. *Scott* v. *Scott*, 4 B.C.R. 316.

(*i*) *British Columbia Divisional Court.*

—Ex Parte Order—Practice—Motion to Rescind.]—A Divisional Court will not entertain an appeal from an *ex parte* order made by a judge. The proper course is to move before the judge to have his order rescinded. *Hudson's Bay Co.* v. *Hazlett*, 4 B.C.R. 450.

IV. In Particular Matters.

—By-law—Petition to quash—Appeal to the Court of Queen's Bench—40 V., c. 29 (P.Q.)—53 V., c. 70 (P.Q.)—Judgment Quashing—Appeal to Supreme Court from—R.S.C. c. 135, s. 24 (g).]—Sec. 439 of the Town Corporations Act (40 Vict., c. 29 (P.Q.) not having been excluded from the charter of the city of Ste. Cunégonde (53 Vict., c. 70), is to be read as forming a part of it, and prohibits an appeal to the Court of Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under s. 310 of said charter. Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction, no appeal lies to the Supreme Court of Canada from its decision. *City of Ste. Cunégonde de Montréal* v. *Gougeon*, 25 S.C.R. 78.

—Mandamus—Judgment of Court of Review—54 & 55 V., c. 25 (D).]—54 & 55 V., c. 25 (D.) does not authorize an appeal to the Supreme Court of Canada from a decision of the Court of Review in a case where the judgment of the Superior Court is reversed and there is an appeal to the Court of Queen's Bench: *Danjou* v. *Marquis* (3 S. C. R. 251) and *McDonald* v. *Abbott* (3 S. C. R. 278) followed. *Barrington* v. *The City of Montreal*, 25 S.C.R. 202.

V. Interfering with Judicial Discretion.

—Order to Amend Pleadings—Interference with—Discretion of Court below—Procedure.]—The Supreme Court will not interfere on appeal with an order made by a provincial Court granting leave to amend the pleadings, such orders being a matter of procedure within the discretion of the Court below. *Williams* v. *Leonard & Sons*, 26 S.C.R. 406.

—Discretion—Sequestration.]—In an *action pétitoire* for possession of property, plaintiff asked sequestration of the property, claiming that defendant was insolvent, and he wished to secure the rents. The Superior Court refused sequestration, but it was granted by the Court of Review. The Court of Queen's Bench restored the first judgment, holding that it was a matter of discretion with which an appellate court should not interfere unless satisfied that the discretion had been abused, which was not the case here; that dispossessing the defendant might produce very grave consequences, while the plaintiff could suffer very little by its refusal; and that the insolvency of defendant was not proved. *Blouin* v. *Louise Wharfage and Warehouse Co.*, Q.R. 5 Q.B. 377; reversing 8 S.C. 422, and restoring 8 S.C. 4.

VI. Interfering with Questions of Fact.

—Questions of fact—Reversal on.]—If a sufficiently clear case is made out, the Court will allow an appeal on mere questions of fact against the concurrent findings of two courts: *Arpin* v. *The Queen* (14 S.C.R. 736); *Schwersenski* v. *Vineberg* (19 S.C.R. 243); and *City of Montreal* v. *Lemoine* (23 S.C.R. 390) distinguished. *The North British and Mercantile Insurance Co.* v. *Tourville*, 25 S.C.R. 177.

—Finding of Trial Judge—Interference with—Disturbed.]—Where defendant in an action of assumpsit swore that he had signed the order for the goods in blank, at the solicitation of plaintiffs' agent, with the distinct understanding and agreement that it was to be optional with him to accept or reject the article if sent, and such evidence was not contradicted by or on behalf of the plaintiffs:—Held (per Graham, E.J.), that the trial judge having found in favor of defendant's version of the transaction, his finding should not be disturbed. *White* v. *Smith*, 28 N.S.R. 5.

—Findings of Fact—Drawing Inferences adverse to those of Trial Judge.]—An Appellate Court will not, as a rule, reverse the finding of the trial judge on any question of disputed facts, but may differ from him in the inferences that should be drawn from facts that are not really in dispute. *Booth* v. *Moffatt*, 11 Man. R. 25.

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

See Evidence, I.
" Warranty.

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

See Evidence, VI.
" Negligence, V.

VII. Interlocutory Proceedings.

—Interlocutory Judgment—Dismissal of Action.]—For the purpose of an appeal to the Divisional Court a judgment dismissing the action is interlocutory, as it would have been if the judge had refused to dismiss. *Ward* v. *Clark*, 4 B.C.R. 71.

—Final Judgment—Petition for Leave to Intervene—Judgment on—Interlocutory Proceedings.]—No appeal lies to the Supreme Court from the judgment of the Court of Queen's Bench on a petition for leave to intervene in a cause, the proceedings being interlocutory only. *Hamel* v. *Hamel*, 26 S.C.R. 17.

—**Summary Judgments—Rule 739, Consol. Rules Ont.—Appeal from Interlocutory Order.**]—Plaintiffs moved for an order for summary judgment under Rule 739 in an action upon a promissory note made by the defendant in favor of a trading company and indorsed by them to the plaintiffs. Plaintiffs' manager made an affidavit in support of the original motion, in which he stated that they were holders in due course for value. The defendant, in opposing the motion, made an affidavit in which he denied having received any consideration for the note, and stated that it was made for the accommodation of the company; that he had heard the plaintiffs' local manager say that the note was not discounted by the bank, but was simply left with them; that he believed said local manager knew when he received the note that it was for accommodation, and also knew of the arrangement entered into between the company and the defendant at the time the note was made; and that the accountant placed by the plaintiffs in charge of the books of the company was present when that arrangement was made. He did not, however, state that the local manager had the requisite notice to affect the plaintiffs, nor the grounds of his belief that he had such notice; nor did he state that the accountant mentioned had had any notice or knowledge of the agreement referred to; nor did he adduce any hearsay evidence in support of his defence:—Held, that the affidavit of the defendant did not disclose any reasonable grounds of defence—Although the order of a Judge in Chambers, made upon appeal from an order of the Master in Chambers, allowing summary judgment under Rule 739 to be entered, is an interlocutory order, an appeal lies from it to a Divisional Court. *Bank of Toronto* v. *Keilty*, 17 Ont. P.R. 250.

VIII. Leave to Appeal and Time to Appeal.

—**Time Limit—Commencement of—Pronouncing or entry of Judgment—Security—Extension of Time—Order of Judge—Vacation—R.S.C., c. 135, ss. 40, 42, 46.**]—On the trial of an action the plaintiffs obtained a verdict which the Divisional Court set aside. The Court of Appeal allowed the appeal and restored the judgment at the trial, reducing the amount of damages by a certain specified sum:—Held, that nothing substantial remained to be settled by the minutes on entering the formal judgment of the Court of Appeal, and the time for appealing therefrom to the Supreme Court ran from the pronouncing and not from the entry of such judgment: *O'Sullivan* v. *Harty* (13 S.C.R. 431); *Walmsley* v. *Griffith* (13 S.C.R. 434); *Martley* v. *Carson* (13 S.C.R. 439) followed.—By s. 42 of the Supreme and Exchequer Courts Act (R.S.C. c. 135), a Court proposed to be appealed from or a judge thereof may allow an appeal after the time prescribed therefor by s. 40 has expired, but an order by the Court below or a judge thereof extending the time will not authorize the Supreme Court or a judge thereof to accept security after the 60 days have elapsed.—The delay of 60 days for appealing to the Supreme Court prescribed by s. 40 of the Act, is not suspended during the vacation of the Court established by its rules *The News Printing Co.* v. *Macrae*, 26 S.C.R. 695.

—**Time Limit—Commencement of—Pronouncing or entry of Judgment—Security—Extension of Time—R.S.C. c. 135, ss. 40, 42, 46.**]—On the trial of an action to set aside a chattel mortgage, the plaintiff obtained a declaration that the mortgage was void, and an order setting it aside without costs. This decision was reversed on appeal and the action dismissed with costs, both in the Court of Appeal and in the Court below, by a judgment pronounced on the seventh of November, 1895. The minutes had not been settled until some days afterwards, and at the time of the settlement the draft minutes were altered by the Registrar of the Court of Appeal by refusing costs to one of the respondents and also by changing a direction therein as to the payment over of funds on deposit abiding the decision of the suit. On an application made more than sixty days from the pronouncing of the judgment, for the approval of security under section 46 of the Supreme and Exchequer Courts Acts:—Held, that nothing substantial remained to be settled by the minutes so as to take the case out of the general rule that the time for appealing runs from the pronouncing of the judgment, and that the application was too late. *Martin* v. *Sampson*, 26 S.C.R. 707.

—**Appeal to Court of Appeal from Divisional Court—Judgment on Preliminary Issue—Leave—Judicature Act, (Ont.) [1895], ss. 72, 73.**]—An appeal lies to the Court of Appeal, without leave, from the judgment upon the trial of a preliminary issue, directed by an order in chambers; but leave is necessary to appeal from an order of a Divisional Court affirming an order in chambers, where the appellant is the same party who appealed to the Divisional Court, and the order appealed from was pronounced after, although the appeal was taken and heard before, the coming into force of the Judicature Act of 1895. *Graham* v. *Temperance and General Life Assurance Company of North America* 17 Ont. P.R. 271.

—**Appeal to Court of Appeal—Judicature Act—(Ont.) [1895], ss. 72, 73—Leave—Special Circumstances—Terms.**]—Leave was given under the provisions of ss. 72 and 73 of the Judicature Act, 1895, to appeal to the Court of Appeal from an order of the Divisional Court dismissing an appeal from an order of a Judge in chambers, where the latter dismissed an appeal from an order of the Master in chambers refusing a motion to set aside judgment by default in an action for recovery of land. The special circumstances upon which the appeal to the Court of Appeal was granted were as follows: the omission to file the defence was a mere slip of the solicitor, and the application for relief was made promptly. It also appeared that in a previous action the Court had stayed proceedings under the power of sale contained in the mortgage upon which this action was brought, and had required an action of ejectment to be brought. Terms of payment of costs and security for costs imposed. *Bourne et al.* v. *O'Donohoe*, 17 Ont. P.R. 274.

IX. Practice and Procedure.

—**Increasing Damages without Cross-Appeal—Rule 61, Supreme Court Rules—Special Statute.**]—Under the Ontario Judicature Act, R.S.O. [1887] c. 44, ss. 47 and 48, the Court of Appeal has power to increase damages awarded to a respondent without a cross-appeal, and the Supreme Court has the like power under its rule No. 61. Taschereau, J., dissenting. Per Strong, C.J.—Though the Court will not usually increase such damages without a cross-appeal, yet where the original proceedings were by arbitration under a statute providing that the Court, on appeal from the award, shall pronounce such judgment as the arbitrators should have given, the statute is sufficient notice to an appellant of what the Court may do, and a cross-appeal is not necessary. *The Town of Toronto Junction* v. *Christie*, 25 S.C.R. 551.

—**Improper Admission of Evidence.**]—If in a case tried without a jury, evidence has been improperly admitted, a Court of Appeal may reject it and maintain the verdict if the remaining evidence warrants it. *Merritt* v. *Hepenstal*. 25 S.C.R. 150.

—**Proceedings in Vacation.**]—The delay of 60 days for appealing to the Supreme Court of Canada prescribed by Sec. 40 of the Supreme Court Act, is not suspended by the vacation of the Court established by its rules.—*The News Printing Co.* v. *Macrae*, 26 S.C.R. 695.

—**Pending Actions—Judgment not entered—Leave to Appeal.**]—By paragraph 7 of the schedule to the Ontario Law Courts Act [1896], sec. 73 of the Judicature Act, [1895], was amended so as to enable a Divisional Court and the Court of Appeal, and any judge thereof, to grant leave to appeal in cases where no absolute right to appeal exists, and where, under the law as it stood before the amendment no such leave could have been obtained:—*Held*, that being a matter of procedure, it applied to pending actions: *Walton* v *Walton*, L.R. 1 P. & M. 227, followed. That where at the time the amending statute was passed the judgment of the Court had been pronounced, but had not been entered up, the action was still pending: *Holland* v. *Fox*, 3 El. & B. 977, and in re *Claggett's Estate*, 20 Ch. D. 637, followed. Leave granted to appeal to the Court of Appeal from an order of a Divisional Court affirming, but on different grounds, the judgment at the trial dismissing the action, where no lapse of time had occurred to prejudice the plaintiff's claim to the consideration of the Court, the injury for which he sued being a serious one, and there being no authority upon the question of law decided by the Divisional Court. *Spence* v. *Grand Trunk Railway Co.*, 17 Ont. P.R. 172.

—**Divisional Court—Judgment at Trial—Ontario Rule 1487 (803.)**—The words "appeal from a single judge" in Rule 1487 (803) mean from a judge presiding in court; that rule does not interfere with the right to appeal from the judgment of the trial judge to a Divisional Court; and a party has still the right to prosecute such an appeal without terms being imposed as to giving security for costs. *Semble*, that security should not be "specially ordered" under Rule 1487 (803), upon an appeal by the defendant, where substantial questions arise and the action is of a penal character. *Wilson* v. *Manes*, 17 Ont. P.R. 239.

—**Bond—Condition—Affidavits of Execution and Justification.**]—A bond given by the defendants as security for the costs of an appeal from the Court of Appeal to the Supreme Court of Canada, of which the condition was that if the defendants "shall effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, then this obligation shall be void; otherwise to remain in full force and effect," was held not to be irregular.—The affidavit of execution of such bond need not be entitled in the cause. All that is required is an affidavit or affirmation proving the execution of the instrument as a fact.—It is not necessary that the surety when justifying in the sum sworn to "over and above what will pay all my just debts," should add, "and every other sum for which I am now bail:" *Robinson* v. *Harris*, 14 Ont. P.R. 373, referred to. *Molsons Bank* v. *Cooper*, 17 Ont. P.R. 153.

—**Common Carriers—Amendment Asked in Court of Appeal.**]—In an action against the defendants for breach of contract to carry and deliver safely the plaintiff's goods, and in the alternative for damages against them as warehousemen for the loss of the goods by fire caused by their negligence, the only question at the trial was whether the fire was caused by the defendants' negligence, and this issue was found against them. On appeal the defendants sought for the first time to amend their defence by pleading certain special conditions in the bills of lading, exempting them from liability for loss by negligence in the character of bailees or warehousemen, and for loss by fire:—Held, that the defendants should not be permitted on the appeal to raise the new defence by way of amendment, when they neglected to do so at the trial: *Browne* v. *Dunn*, 6 R. 67 (1894), applied and followed. *Sales* v. *Lake Erie and Detroit River Railway Co.*, 17 Ont. P.R. 224.

—**Bond—Supreme Court of Canada—Condition.**]—A condition in a bond filed upon an appeal to the Supreme Court of Canada to "pay such costs and damages as shall be awarded *in case the judgment shall be affirmed*," is not a compliance with the provisions of the 46th section of the Supreme Court Act, which requires the obligors to bind themselves to "pay such costs and damages as may be awarded against the appellant by the Supreme Court;" and, further, because the words italicized add a condition not required by the Supreme Court Act, by which the respondents ought not to be hampered. Bond disallowed, but the time for putting in another extended. *Davidson* v. *Fraser*, 17 Ont. P.R. 246.

—**Procedure.—Inscription—Art. 1121, C.C.P.**]—An appellant signified to the respondent on July 8th, 1896, an inscription in appeal which he produced to the Clerk of the Court on the following day, July 9th. No other notice of appeal was given:—Held, that the inscription in appeal was irregular; that the signification of a copy before the original had received the

stamps required and been deposited with the Clerk, is not the notice required by art. 1121 of the Code of Civil Procedure, and cannot be considered a signification of the appeal to the respondent. *Evans* v *Francis*, Q R. 5 Q.B. 417.

—**Order not Taken Out—Practice.**]—An appeal will not lie from an order not drawn up and issued. If the party obtaining the order refuse to draw it up his opponent may obtain a similar order on his own account upon summons. An order not within the terms of the summons may be drawn up by the party in whose favor it is made. *McColl* v. *Leamy*, 3 B.C.R. 360.

—**Counter-claim—Striking out Defence—Appeal from Order.**] - See PLEADING, I.

X. RIGHT TO TAKE NEW GROUNDS OR PUT IN FURTHER EVIDENCE.

—**Judge's Notes—Additions After Notice of Appeal.**] Per Taschereau, J.—Where a Court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted, certain of the judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, such documents were improperly allowed to form part of the case on appeal. and could not be considered by the appellate court. *Mayhew* v. *Stone*, 26 S.C.R. 58.

APPROPRIATION OF PAYMENTS.

Debtor and Creditor—Payment by Debtor—Appropriation—Preference—R.S.O. (1887), ch. 124.]—A trader carrying on business in two establishments mortgaged both stocks in trade to B. as security for indorsements on a composition with his creditors, and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favor of B., who received out of the proceeds of the sale of the goods under an order of the Court, the balance remaining due on his mortgage: *Horsfall* v. *Boisseau* (21 Ont. A. R. 663). The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors:—Held, affirming the decision of the Court of Appeal, that there was no preference to B. within R.S.O. (1887), c. 124, s. 2: that his position was the same as if his whole debt, secured and unsecured, had been overdue and there had been one sale of both stocks of goods, realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under s. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off. *Stephens* v. *Boisseau*, 26 S.C.R. 437.

—**Suretyship—Continuing Security—Imputation of Payments—Reference to Take Account.**]—See PRINCIPAL AND SURETY, I.

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

See PRINCIPAL AND SURETY, I.

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

See BANKS AND BANKING.

ARBITRATION AND AWARD

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(*a*) *Disqualification.*

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

See CONTRACT, III (*a*).
" EVIDENCE, VII.

(*b*) *Powers of.*

—**Dominion Railway Act, 51 V., c. 29, s. 150—"Opposite Party"—Mortgage.**]—See RAILWAYS AND RAILWAY COMPANIES, VII.

(*c*) *Proceedings before.*

—**Evidence—Rejection of, by Arbitrators.**]—The court will not exercise its power to revoke a submission to arbitration upon a question of the admission or rejection of evidence by the arbitrators, unless it appears that such admission or rejection involves a miscarriage of justice. If the arbitrators have acted *bonâ fide* and reasonably in the matter, the court will not interfere. In re *Small and St. Lawrence Foundry Co.*, 23 Ont. A.R. 543.

II. AWARD.

—**Terms of Submission—Form of Award—Art. 1352 C.C.P.**]—A deed of submission to arbitration provided that the arbitrators should

be held to be mediators, that they might arrive at their decision in any manner they pleased and obtain information as they thought best, and should be relieved from following out the requirements of the law:—Held, that the arbitrators were not relieved by this provision from the obligation of making out and depositing their award according to law, and it not being in notarial form and deposited with a notary as required by Art. 1352 C.C.P., it was null and the submission was revoked. *Carter* v. *Donoghue*, Q.R. 9 S.C. 180.

—**Extension of Time for Making Award—Irregularity of Extension—Waiver.**]—An arbitrator was required to make and publish his award on or before a day fixed by the submission "or on such further day as the said arbitrator may from time to time enlarge the time for making his said award, by writing under his hand, indorsed on the agreement at any time." Two extensions of time for making the award were written upon another paper, which was at the time among the papers connected with the arbitration, and "either inside or outside the agreement of submission":—Held, that this was not a sufficient compliance with the agreement to render the extension of time effective, as the mode for extending the time indicated by the agreement should have been strictly followed; that the irregularity was not waived by the writing of a letter to the arbitrator objecting to the award on other grounds, it not being shown that at the time the letter was written either the plaintiff or his solicitor had knowledge that the extension of time had not been properly made. *MacKay* v. *Nicol*, 28 N.S.R. 43.

—**Expropriation Proceedings—Demurrer—Estoppel—Waiver—Pleading.**]—In a notice, given under section 699 of the Manitoba Municipal Act, of proceedings for the expropriation by arbitration of the plaintiff's land, the defendants stated that a petition would be presented to fix the compensation to be "*paid to the plaintiff*" for the land required instead of that to be "*allowed for the land.*" The notice also differed from the form directed by that section in referring to the judge of the County Court of the "Eastern Judicial District" instead of the "Judicial Division" within which the land lay. The defendants proceeded with the arbitration proceedings and procured the award of commissioners under that and following sections of the Act, although they declined afterwards to submit it to the County Court Judge for confirmation. In an action by the plaintiff for a mandamus to compel the defendants to complete the arbitration proceedings and pay the amount of the award.—Held, that the irregularities in the notice were not material; and that such irregularities were waived by the defendants in taking subsequent steps in the proceedings:—Held, also, that the defendants were estopped from denying that there was a proper notice given by them, and could not withdraw from the position taken by them therein:—Held, also, that it was not necessary for the plaintiff to allege in his declaration that a by-law had been passed by the defendants authorizing the notice of arbitration in question: *Harpel* v. *Portland*, 17 U.C.Q.B. 455, followed. Held, further, that a count in the plaintiff's declaration setting up a money demand by virtue of the award was held bad, because the award had not been confirmed by the County Court Judge. *Scott* v. *City of Winnipeg*, 11 Man. R. 84.

—**Appeal from Award—Increase of Damages—Cross-appeal.**]—See APPEAL, IX.

III. COSTS AND FEES.

—**Arbitration and Award—Excessive Fees—Penalty—R.S.O., c. 53, s. 29.**]—An arbitrator cannot be held to have received payment of excessive fees where a cheque for the amount has been given to his agent, who was authorized to accept money only, and the arbitrator has refused to accept the cheque. Per Osler, J.A.: In order to fix an arbitrator with the penalty imposed by R.S.O., c. 53, sec. 29, for refusal or delay to deliver an award until a larger fee than is permitted by the Act is paid, a demand must be made upon him after the expiration of the time mentioned in the said section, to make, execute and deliver the award; or it must be clearly proved that such an excessive fee has been actually paid. Per Maclennan, J.A.: If the party desiring to take up the award thinks the amount claimed for costs excessive, he may have the bill taxed. He may then demand the award, offering to pay the amount taxed. If a larger sum is still demanded, and there is refusal or delay, he may at once bring action for the penalty. *Jones* v. *Godson*, 23 Ont. A.R. 34.

IV. SETTING ASIDE AWARD.

—**Award—Laches in Moving to Set Aside—Estoppel.**]—Plaintiff and defendant entered into an agreement on August 28th, 1889, to submit to arbitration all matters touching the division line between their lands. An award was made in writing November 9th, 1889, and defendant had notice. On May 28th, 1894, defendant filed a counter-claim to an action of trespass brought by plaintiff asking to have the award declared null and void on the grounds that the arbitrators exceeded their jurisdiction; that defendant had no opportunity of being heard before the umpire; that the award was made *ex parte* and without hearing evidence, and on other grounds:—Held, that defendant was precluded from having the award set aside, by his laches in moving against it, and that plaintiff was entitled to a declaration that the division line between his lands and defendant's was such as was settled by the award. Held (per MEAGHER, J.), that defendant should not, as between himself and plaintiff, in relation to proceedings arising out of the reference or connected with it, be permitted to deny the truth of what he had alleged in the agreement under seal, viz., that he was the owner, upon the faith of which plaintiff entered into the reference. *Clish* v. *Fraser*, 28 N.S.R. 163.

—**Practice—Judgment.**]—If on submission to arbitration one of the arbitrators privately discusses the matters in dispute with an interested person, an award subsequently made will be set aside. In referring back the matter the Court cannot appoint a new arbitrator, but can only

restore the parties to their original position.—A judgment setting aside an award for misconduct of an arbitrator and referring back the case to the arbitrators, is interlocutory only. *Wood* v. *Gold*, 3 B.C.R. 281.

ARCHITECT.

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

See CONTRACT, III (*a*).
" EVIDENCE, VII.

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

See ACTION, VII.

—Deviation from—Specification of.]—See WARRANTY.

ARREST.

Maintenance Money—Tender—Rule 976.]—A defendant in custody under a writ of ca. sa. will not be discharged for non-payment by plaintiff of the weekly maintenance money under S.C. Rule 976, if the latter has tendered the amount to the sheriff, who refused it on the ground that he had in his hands money of the plaintiff sufficient to cover it. *Ward* v. *Clark*, 3 B.C.R. 609.

—Arrest of Party About to Leave Province—Nova Scotia Practice, Order 44—Necessary Facts to be Shown.]—See DEBTOR AND CREDITOR, II.

And see CAPIAS.

ARRESTATION.

Fausse.]—See CAPIAS.

ARRHES.

See EVIDENCE, I.

ASSAULT.

Malicious Prosecution — Assault — Criminal Code, s. 53.]—See MALICIOUS PROSECUTION.

ASSESSMENT AND TAXES.

Special Tax—Ex post facto Legislation—Warranty.]—Assessment rolls were made by the City of Montreal under 27 & 28 V., c. 60, and 29 & 30 V., c. 56, apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside and the other was lost. The corporation obtained power from the legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed. New rolls were made assessing the lands for the same improvements, and the purchaser paid the taxes and brought suit *en garantie* to recover the amount from the vendor. Held, affirming the judgment of the courts below, Gwynne, J., dissenting, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the vendor was not obliged by her warranty and declaration that taxes had been paid to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale. *La Banque Ville Marie* v. *Morrison*, 25 S.C.R. 289.

—Municipal By-law — Special Assessments — Drainage—Powers of Council as to Additional Necessary Works — Ultra Vires—Resolutions—Executed Contract.]—Where the municipal by-law authorized the construction of a drain benefiting lands in an adjoining municipality which was to pass under a railway where it was apparent that a culvert to carry off the water brought down by the drain and prevent the flooding of adjacent lands would be an absolute necessity, the construction of such culvert was a matter within the provisions of sec. 573 of the Municipal Act (R.S.O. [1887] c. 184), and a new by-law authorizing it was not necessary. *The Canadian Pacific Railway Co.* v. *The Township of Chatham*, 25 S.C.R. 608.

—Gas Company — Mains and Pipes.]—The mains and pipes of the Consumers' Gas Company of Toronto laid under the public streets are assessable for municipal taxation under the Consolidated Assessment Act, 1892, 55 Vict., (Ont.) c. 48: *Toronto Street R.W. Co.* v. *Fleming*, 37 U.C.R. 116, considered. *Consumers' Gas Co. of Toronto* v. *City of Toronto*, 23 Ont. A.R. 551.

—Gas Company—Reduction in Price of Gas—50 V., (Ont.) c. 85 — Construction.]—An action upon a stated case by plaintiffs, suing on behalf of themselves and all other consumers of gas in the city of Toronto, was brought to compel the defendants to carry out certain provisions of the Ontario Act, 50 Vict., c. 85, which would result in a reduction of the price of gas to consumers:—Held, reversing the judgment of Ferguson, J., in 27 Ont. R. 9, that as there was no admission in the stated case of any over-payment by the plaintiffs, they had no *locus standi*. *Johnston* v. *Consumers Gas Co.*, 23 Ont. A.R. 566.

—Provincial Tax — Mortgages — Exemption — C.S.B.C. (1888), c. 111, s. 3.]—By the Assessment Act of British Columbia, C.S.B.C. (1888), c. 111, a provincial revenue tax is imposed on personal property, including mortgages. An English guarantee company held mortgages on land in the province, of which one-eighth represented investment of its own capital, and the balance of moneys borrowed in England, the lenders holding debentures, each of which is a charge on the general assets of the company and on specific mortgages. Sec. 3, s.s. 19 of the Assessment Act exempts from taxation "so much of the personal property of any person as is equal to the just debts owed

by him on account of such personal property, except such debts as are secured by mortgages upon his real estate, or are unpaid on account of the purchase money therefor":—Held, that the company could only be assessed in respect to the amount of the mortgages which represented the investment of its own capital. Held, further, that the tax was a direct and not an indirect tax, and so *intra vires* of the Provincial Legislature: *Bank of Toronto* v. *Lambe* (12 App. Cas. 575), followed. *In re Yorkshire Guarantee Co.*, 4 B.C.R. 258.

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

See HIGHWAY.
" MUNICIPAL CORPORATIONS, V.

—Municipal Corporation—By-law—Assessment—Local Improvement—Agreement with Owners of Property—Construction of Subway—Benefit to Lands.]—See MUNICIPAL CORPORATIONS, V.

—Exemption without Contract.]—See MUNICIPAL CORPORATIONS, I.

—Succession Duty.]—See REVENUE.

ASSIGNMENT.

For Benefit of Creditors—Preferences—R.S.N.S. c. 92, ss. 4, 5, 10—Chattel Mortgage—Statute of Eliz.]—Though an assignment contains preferences in favor of certain creditors, yet if it includes, subject to such preferences, a trust in favor of all the assignor's creditors, it is "an assignment for the general benefit of creditors" under section 10 of the Nova Scotia Bills of Sale Act (R.S N.S., c. 92), and does not require an affidavit of *bona fides: Durkee* v. *Flint* (19 N.S.R. 487) approved and followed; *Archibald* v. *Hubley* (18 S.C.R. 116) distinguished—A provision in an assignment for the security and indemnity of makers and indorsers of paper not due, for accommodation of the debtor, does not make it a chattel mortgage under sec. 5 of the Act, the property not being redeemable and the assignor retaining no interest in it. An assignment is void under the statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member and provides for allowance of interest on claim of the said firm until paid, and the assignee is permitted to continue in the same possession and control of the business as he previously had, though no one of these provisions taken by itself would have such effect—A provision that "the assignee shall only be liable for such moneys as shall come into his hands as such assignee unless there be gross negligence or fraud on his part," will also avoid the assignment under the statute of Elizabeth—Authority to the assignee not only to prefer parties to accommodation paper, but also to pay all "costs, charges and expenses to arise in consequence" of such paper, is a badge of fraud. *Kirk* v. *Chisholm*, 26 S.C.R. 111.

—Debtor and Creditor—Payment by Debtor—Appropriation—Preferences—R.S.O. (1887) c. 124.]—A trader carrying on business in two establishments mortgaged both stocks in trade to B. as security for indorsements on a composition with his creditors and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage and about the same time the sheriff seized them under execution, and shortly afterward the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favor of B., who received, out of the proceeds of the sale of the goods under an order of the Court, the balance remaining due on his mortgage. *Horsfall* v. *Boisseau* (21 Ont. A. R. 663). The assignee of the mortgagor then brought an action against C. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors:—Held, affirming the decision of the Court of Appeal, that there was no preference to B. within R.S.O. [1887], c. 124, s. 2; that his position was the same as if his whole debt secured and unsecured had been overdue and there had been one sale of both stocks of goods realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt, under s. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off. *Stephens* v. *Boisseau*, 26 S.C.R. 437.

—Chose in Action—Equitable Assignment—Parol]—An equitable assignment of a chose in action may be made by parol, and will take priority of a subsequent attaching order of the debt assigned. *Todd* v. *Phœnix and United Fire Ins. Co.*, 3 B.C.R. 302.

—Of Chose in Action—Illegal Consideration—Notice—C.S.B.C. (1888), c. 19.]—An assignment of a chose in action under C S.B.C. [1888], c. 19, is void if made in consideration of the assignee refraining from taking criminal proceedings against the assignor. Where the question of illegality was not raised on the pleadings an Appellate Court ordered a new trial to give the assignee an opportunity to contradict it. Per Bole, County J. Express notice to the person against whom a chose in action could be enforced is not necessary to the validity of an assignment. *Meriden Britannia Co.* v. *Bowell*, 4 B.C.R. 520.

—Insurance Against Fire—Condition of Policy—Fraudulent Statement—Proof of Fraud—Presentation—Assignment of Policy—Fraud by Assignor.]—See INSURANCE, II.

—For Benefit of Creditors—Judicial Abandonment—Subrogation—Confusion of Rights—Compensation—C.C.P., arts. 772 and 778—Composition and Discharge.

See ABANDONMENT.

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

See BILL OF SALE, V.

—Mortgage—Loan to Pay off Prior Encumbrance—Interest—Assignment of Mortgage—Purchase of Equity of Redemption—Accounts—*London Loan Co.* v. *Manley*, 26 S.C.R. 443.

—Chose in Action—Notice—Equities.

See CHOSE IN ACTION.
See also ATTACHMENT OF DEBTS.
" BANKRUPTCY AND INSOLVENCY.
" EQUITABLE ASSIGNMENT.

ASSIGNMENTS AND PREFERENCES.

See ASSIGNMENT.
" BANKRUPTCY AND INSOLVENCY.

ATTACHMENT OF DEBTS.

Garnishee Process—New Trial—Division Court—R.S.O., c. 51, s. 145.]—The provisions of section 145 of the Division Courts Act as to applying for a new trial within fourteen days do not apply to a garnishee: *Re McLean* v. *McLeod*, 5 Ont. P.R. 467, followed. *Re Tipling* v. *Cole*, 21 Ont. R. 276, distinguished. *Hobson* v. *Shannon*, 27 Ont. R. 115.

—Division Courts—Garnishee—"Cause"—"Action"—Jurisdiction.]—A garnishee summons before judgment in a Division Court may be issued out of the division in which the garnishee lives or carries on business, notwithstanding that the cause of action does not arise and the primary debtor does not reside or carry on business therein. A garnishee proceeding under sec. 185 of the Ontario Division Courts Act is an "action" or "cause" within the meaning of sec. 87, and may be transferred from a wrong to a proper forum, under the last-mentioned section: *Hobson* v. *Shannon*, 26 Ont. R. 554; *Re McLean* v. *McLeod*, 5 Ont. P.R. 467; and *Re Tipling* v. *Cole*. 21 Ont. R. 276, referred to. *Re McCabe* v. *Middleton, Ancient Order of United Workmen*, 27 Ont. R. 170.

—Attachment—Garnishee—Rule 935, Consol. Rules, Ont.—Foreign Company—55 V. (Ont.), c. 39, ss. 14, 17.]—A foreign insurance company had a chief agency in Ontario, and an agent or attorney upon whom service of process may have been made for the purposes mentioned in ss. 14 and 17 of 55 Vict., c. 39, the Ontario Insurance Corporations Act. Moneys in the hands of the company were attached as due to the defendants (the judgment debtors) under an insurance policy:—Held, that the garnishees were not "within Ontario" within the meaning of Rule 935: *Canada Cotton Co.* v. *Parmalee*, 13 Ont. P. R., followed; *County of Wentworth* v. *Smith*, 15 Ont. P.R. 372, distinguished. *Boswell* v. *Piper*, 17 Ont., P.R. 257.

—Effect of Attaching Order.]—An attaching order binds only such debts as the debtor can honestly deal with without affecting the interests of third persons. *Parker* v. *McIlwain*, 17 Ont. P.R. 84.

—Garnishment—Assignment for Creditors—Evidence.]—Interpleader issue to decide the title to a sum of money claimed by the plaintiff under an assignment from H. for the benefit of his creditors as against the defendant, a judgment creditor of H., who claimed the money under a garnishing order attaching it in the hands of C., who had paid it into court:—Held, that evidence of the admissions of the judgment debtor was not admissible as against the garnishing creditor either on account of any privity between them, or as evidence of declarations made by a party against his own interest (there being no proof of his death); and that, as there was no other evidence to show that the money in question belonged to the estate of H., a verdict should be entered for the defendant with costs. *Bertrand* v. *Heaman*, 11 Man. R. 205.

—Rent—Garnishee Order Setting Aside—Parties—Amendment—Notice of Assignment.]—H. F., having leased a parcel of land to the defendant, assigned the reversion to trustees for the plaintiff. On 1st April, 1895, the defendant owed $90 for rent of the premises, and soon afterwards a judgment creditor of H. F. obtained an order attaching this rent. In May following an order was made for the payment of the $90 to the judgment creditor, no one appearing to show cause, so far as the order indicated. Thereupon the defendant paid the rent as required by the order, although he had notice of the assignment before the service of the attaching order. Plaintiff then brought action to recover the $90:—Held, that the payment to the garnishing creditor was no defence, notwithstanding that the order had not been set aside.—That it was not necessary for plaintiff before suing to take proceedings under Rule 425 of the Queen's Bench Act, 1895, to set aside the attaching order.—That plaintiff was not entitled to bring this action in his own name, but that leave to amend by adding the trustees as plaintiffs should be allowed under Rule 338, Queen's Bench Act, 1895: *Gandy* v. *Gandy*, 30 Ch. D. 57; *Woodward* v. *Shields*, 32 U.C.C P. 282; and *McGuin* v. *Fretts*, 13 Ont. R. 699, followed. 4. That notice of the assignment should have been given by the trustees, as required by the statute 4 & 5 Anne, c. 16, s. 10; but as defendant had received notice no effect should be given to this objection, following *Lumley* v. *Hodgson*, 16 East 99. Ordered that upon plaintiff filing within a week the written consent of the trustees to be added as co-plaintiffs, the statement of claim be amended accordingly, and judgment entered for the amount sued for and costs, except any costs of making the amendment. *Foulds* v. *Chambers*, 11 Man. R. 300.

See also BANKRUPTCY AND INSOLVENCY.

ATTORNEY.

Costs—Lien.]—An attorney has a lien for his costs of action and execution when the debtor, after seizure, has assigned his goods for the benefit of his creditors. *In re Greaves*, Q.R. 9 S.C. 516.

For Sale of Land.]—See EQUITABLE ASSIGNMENT.

And see SOLICITOR.

ATTORNEY-GENERAL.

Procedure—Substitute—Authority to.] — The Attorney-General of the Province of Quebec, in instituting legal proceedings on behalf of Her Majesty, may be represented by attorney just as a private suitor may. The employment of an attorney to act for him is not a delegation of the powers conferred upon him by law to take such proceedings.—An attorney who institutes proceedings for the Attorney-General is presumed to be duly authorized, and all proceedings signed by him under such presumed authority are to be considered as the act of the Attorney-General.—A statement in an action by the Attorney-General that the proceeding is instituted on petition of an individual named, who has been authorized to use the name of the Attorney-General, does not affect the regularity of the proceeding. Nor is the absence of a bond for security for costs a ground of nullity when a sum of money had been deposited for such security. *Casgrain, Attorney-General* v. *La Cie de Carosserie de Montréal*, Q.R. 9 S.C. 383.

ATTORNMENT.

See LANDLORD AND TENANT.

AVIS d'ACTION

See ACTION, IV.

AVOCAT.

See ATTORNEY.
" SOLICITOR.

AWARD.

See ARBITRATION AND AWARD, II.

BAILEE.

Negligence — Innkeeper.] — An inn-keeper, having detained the trunk of a guest for non-payment of his bill, the guest assisted in carrying it to the reading-room, the baggage-room being full. While there it was broken open and articles of value were lost:—Held, that the act of the guest in assisting to place the trunk in the reading-room was not conclusive evidence that it was placed there at his request, and that the innkeeper was bound to take reasonable care of the goods, and had failed to do so, wherefore he was liable for their value. *Frank* v. *Berryman*, 3 B.C.R. 506.

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

See ACTION, VII.
" CARRIERS.
" CONTRACT, I.

—Carriers—Shipping—Chartered Ship—Perishable Goods—Excepted Perils—Transhipment—Obligation to Transhipment — Repairs—Reasonable Time.

See CARRIERS.
" SHIPPING, II.

BAILIFF.

See NEGLIGENCE, IV.
" DIVISION COURTS.

BANKRUPTCY AND INSOLVENCY.

I. ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Revocation of — Assent by Creditors.]—An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it. *Rennie* v. *Block*, 26 S.C.R. 356.

—Assignments and Preferences—Action by Creditor in Assignee's Name—R.S.O., c. 124, s. 7.]—Under the provisions of s. 7, s.s. 2, of the Act R.S.O., c. 124, a creditor who has brought a successful action in his own behalf to set aside a preferential security cannot recover in such action more than the amount of his own claim, nor can he add the debts of the other creditors to the amount of his claim. The rights of a creditor suing in the assignee's name are not affected by acts done before action by the assignee in his personal capacity. *MacTavish* v *Rogers*, 23 Ont. A.R. 17.

—Preferential Assignment, R.S.O. c. 124, s. 8.]—Where a preferential assignment of book debts is set aside in an action by an assignee for the benefit of creditors, the assignee may recover from the preferred creditor any moneys realized by him upon such book debts before action brought. 2. S. 8 of R.S.O. c. 124, declares that if the person to whom any assignment such as is mentioned in s. 2 of the Act (now sub-sec. 2 of s. 1 of 54 Vict., c. 20) has been made, shall have sold or disposed of the property which was the subject of such assignment, the moneys, etc., realized therefor may be recovered in any action as effectually as the property if still remaining in the possession or control of such person could have been recovered:—Held, that to collect book debts is to "dispose of property" within the meaning of this section. *Meharg* v. *Lumbers*, 23 Ont. A.R. 51.

—**Assignments and Preferences—R.S.O., c. 124 s. 3.**] —H., a trader, had his premises and stock-in-trade destroyed by fire. He was insolvent at the time, and his wife had a claim against him for moneys advanced. He received from an insurance company two unaccepted cheques drawn on certain banks to his order for the amount of his loss. He indorsed these cheques in blank and handed them to his wife, who delivered them to her mortgagees to be applied in reduction of a mortgage upon her lands:—Held, that this was not a payment of money to a creditor by the debtor within the meaning of R.S.O., c. 124, s. 3, and was therefore void as a preferential payment: *Armstrong* v. *Hemstreet*, 22 Ont. R. 336, overruled. *Davidson* v. *Fraser*, 23 Ont. A.R. 439. [Affirmed by the Supreme Court of Canada on May 1st, 1897.]

—**Assignments and Preferences.**]—Under the Assignments and Preferences Act, R.S.O., c. 124, the term creditor must be taken to be "one to whom a debt is owing—co-relative to debtor"; and therefore one who has a claim for damages against the assignor for breach of contract, and brings an action therefor subsequent to the assignment, cannot rank against the estate in the hands of the assignee for the amount of the ascertained damages—Per Meredith, C.J. (at the trial), that in an action against the assignee to establish a contested claim the plaintiff is confined to the affidavit of claim, and cannot go into any questions not specifically set out in the affidavit, nor can he recover more than the amount claimed therein. *Grant* v. *West*, 23 Ont. A.R. 533.

—**Assignment for Benefit of Creditors—Execution—Priorities—Sheriff—Creditor's Relief Act, s. 37.**] —An assignment by an insolvent for the general benefit of his creditors does not oust a prior attachment by a creditor of the insolvent, of a debt due to him: *Wood* v. *Joselin*, 18 Ont. A.R. 59, followed.—Sec. 37, ss. 3, of the Creditors' Relief Act, must be construed to refer only to a case where the facts would entitle a sheriff, if there had been no attaching order issued by a creditor, to obtain one at his own instance, under s.s. (1) of s. 37; and, to entitle him to such order, there must be in his hands several executions and claims and not sufficient lands or goods to pay all his own fees and a debt owing to the execution debtor by a person resident in the bailiwick.—Where a debtor, who was entitled to certain insurance moneys, assigned them to his wife, who subsequently assigned them to her husband's assignee for the benefit of creditors, and such moneys were also attached by a creditor of the husband between the dates of the assignment to his wife and his assignment for creditors; and some months after these transactions, when the moneys were in Court awaiting the result of litigation between the assignee and the attaching creditor, two executions against the debtor came into the hands of the sheriff of the county in which the insurance company, in whose hands the moneys were when attached, had its head office:—Held, that the moneys had ceased to be the property of the debtor, and, even if there had been no attaching order, the sheriff could not have obtained the moneys for the purpose of satisfying the executions. Semble, that the provisions of s.s. (3) of s. 37, should be read as confined to creditors having executions and claims in the sheriff's hands at the time of the attaching of the debt. *Re Thompson*, 17 Ont. P.R. 109.

—**Assignment for Benefit of Creditors—Preferences—R.S.N.S. c. 92, ss. 4, 5 and 10—Statute of Eliz.**

See ASSIGNMENT.

II. MISCELLANEOUS CASES.

—**Landlord's Preferential Lien—58 Vict. (Ont.), c. 26, s. 3, s.s. 4 and 5.**]—A landlord's preferential lien for rent under 58 Vict. (Ont.), c. 26, s.s. 4 and 5, extends not only to a year's rent prior to his tenant's assignment for the benefit of creditors, but also to three months thereafter, whether the assignor retains possession of such additional period or not. If the assignee elects, under s.s. 4, to retain possession, the preferential lien extends so long after the three months as the assignee remains in possession. *Clarke* v. *Reid*, 27 Ont. R. 618.

—**Purchase of Debt before Assignment—Knowledge—Set-off—R.S.O., c. 124, s. 23.**]—Where a person was indebted to an insolvent, and was aware of the insolvency of his creditor, but before the latter had made an assignment for the benefit of his creditors, purchased from a creditor of the insolvent a debt due to the former by the insolvent, under the provisions of R.S.O., c. 124, s. 23, and the general principles of the law of set-off, it was held that he was entitled to set-off the debt so assigned to him against the debt due by him to the insolvent. *Thibaudeau* v. *Garland*, 27 Ont. R. 391.

—**Privileged Claim—Costs—Art. 1994, C.C.**]—A petition was brought for the return by the curator of an insolvent estate of goods purchased by the insolvent before his failure and not paid for. The provisional guardian had refused to return said goods. By the judgment on the petition the return was ordered with costs *distraits* to the solicitors of the petitioner:—Held, that said costs were expenses incurred in the interest of the mass of the creditors within the meaning of art. 1994 C.C., and formed a privileged claim against the estate in precedence of the landlord's claim for rent. Held further, that the curator having collocated the claim of the landlord for the whole available estate, and without giving notice of the dividend sheet paid it to the landlord, he was personally liable for the said solicitors' costs. *In re Sasseville*, Q.R. 9 S.C. 187.

—**Costs of Action of Insolvent Plaintiffs—"Class Suit."**]—See COSTS, III.

BANKS AND BANKING.

"Letters of Credit"—Negotiable Instrument—"Bills of Exchange Act, 1890"—"The Bank Act"—Powers of Executive Councillors—Ratification by Legislature.]—A bank cannot deal in such securities as a "letter of credit" signed by an Executive Councillor without the authority of an order in council, which is dependent upon the vote of the legislature, and therefore not a negotiable instrument within the Bills of Exchange Act, 1890, or The Bank Act, R.S.C. c. 120, ss. 45 and 60. *The Jacques Cartier Bank* v. *The Queen*, 25 S.C.R. 84. And see CONSTITUTIONAL LAW, I (*b*).

—Principal and Agent — Agent's Authority — Representation by Agent—Principal Affected by —Advantage to Other than Principal—Knowledge of Agent—Constructive Notice.]—Where an agent does an act outside of the apparent scope of his authority, and makes a representation to the person with whom he acts to advance the private ends of himself or some one else other than his principal, such representation cannot be called that of the principal. In such a case it is immaterial whether or not the person to whom the representation was made believed the agent had authority to make it.—The local manager of a bank having received a draft to be accepted induced the drawer to accept by representing that certain goods of his own were held by the bank as security for the drafts. In an action on the draft against the acceptor:—Held, affirming the decision of the Supreme Court of New Brunswick, that the bank was not bound by such representation; that by taking the benefit of the acceptance it could not be said to adopt what the manager said in procuring it which would burden it with responsibility instead of conferring a benefit; and that the knowledge of the manager with which the bank would be affected should be confined to knowledge of what was material to the transaction and the duty of the manager to make known to the bank. *Richards* v. *The Bank of Nova Scotia*, 26 S.C.R. 381.

— Debtor and Creditor — Security for Debt — Security Realized by Creditor—Appropriation of Proceeds.]—If a bank agrees to give a customer a line of credit accepting negotiable paper as collateral security, it is not obliged, so long as the paper remains uncollected, to give any credit in respect of it, but when any portion of the collaterals is paid it operates at once as payment of the customer's debt and must be credited to him. *Cooper* v. *Molsons Bank*, 26 S.C.R. 611.

—Dominion Bank Act, 53 Vict., c. 31, ss. 74, 75—Bill or Note—"Negotiation."]—Where a bill or note is taken by a bank on acquiring a security in form C to the Dominion Bank Act, 53 Vict., c. 31, unless the person giving the security, and to whose account the proceeds of the bill or note is credited, is at liberty to draw against them unconditionally, such bill or note is not "negotiated" at the time of the acquisition thereof by the bank within the meaning of the 75th section of the Act. Where the security taken by the bank was an assignment of goods, and was not registered under the Ontario Chattel Mortgage Act, it was held void as against an assignee for creditors. *Halsted* v. *Bank of Hamilton*, 27 Ont. R. 435.

BEHRING SEA AWARD ACT, 1894.

Maritime Law—Behring Sea Award Act, [1894]—Seal Fishery (North Pacific) Act, 1893—Statutes in pari materiâ—Infraction—Presence Within Prohibited Waters—Bona Fides.]—The Seal Fishery (North Pacific) Act, 1893, and the Behring Sea Award Act, 1894, being statutes *in pari materiâ*, are to be read as one Act: (*McWilliam* v. *Adams*, 1 Macq. H.L.C. 120, referred to.):—Held (following *The Queen* v. *The Ship Minnie*, 4 Ex. C.R. 151), that under the provisions of the above Acts the presence of a ship within prohibited waters, fully manned and equipped for sealing, requires the clearest evidence of *bona fides* to relieve the master from a presumption of an intention on his part to violate the provisions of such Acts; and where the master offers no explanation at all, and such evidence as is produced on behalf of the ship is unsatisfactory, the Court may order her condemnation and forfeiture, or may commute the forfeiture into a fine. *The Queen* v. *The Ship Shelby*, 5 Ex. C.R. 1.

—Behring Sea Award Act, [1894]—Infringement.]—By s 1, s.s. 2, of the Behring Sea Award Act, 1894, any ship employed in a contravention of any of the provisions of the Act shall be forfeited to Her Majesty as if an offence had been committed under s. 103 of the Merchants' Shipping Act, 1854. Sub-sec. 3 enacts that the provisions of the Merchant Shipping Act, 1854, respecting official logs (including the penal clauses) shall apply to any vessel engaged in fur seal fishing. The penal clauses of s. 284 of the last mentioned Act merely subject the master to a penalty, in the nature of a fine, for not keeping an official log-book, and do not attach any penalty or forfeiture in respect of the ship:—Held (following *Churchill* v. *Crease*, 5 Bing. 180), that inasmuch as the particular provisions of the Merchant Shipping Act, 1854, inflicting a fine only upon the master, was in seeming conflict with the general provisions of s.s. 2 of the Behring Sea Award Act, 1894, imposing forfeiture for contravention of the latter Act, such provision of the last mentioned enactment must be read as expressly excepting a contravention by omission to keep a log.—Sec. 281 of the Merchant Shipping Act, 1854, enacts that every entry in an official log shall be made "as soon as possible" after the occurrence to which it relates. Held (following *Attwood* v. *Emery*, 1 C.B. N.S., 110) that the words "as soon as possible" should be construed to mean "within a reasonable time;" and what is a reasonable time must depend upon the facts governing the particular case in which the question arises. *The Queen* v. *The Ship Beatrice*, 5 Ex. C.R. 9.

—Wrongful Arrest of Ship—Damages—Interest.]—Where a merchant vessel was seized by one of Her Majesty's ships, acting under powers conferred in that behalf by The Behring Sea Award Act, 1894, and such vessel was found to be innocent of any offence against the said Act, the court awarded damages for the wrongful seizure and detention, together with interest upon the ascertained amount of such damages. *The Queen* v. *the Ship Beatrice*, 5 Ex. C.R. 160.

BENEFIT SOCIETIES.

Weekly Benefits—Non-payment—Liability of Individual Members.]—A workmen's benefit society which, by means of periodical contributions undertakes to pay its members, in case of illness, a fixed sum per week, is not a commercial body. If a benefit society is not constituted by law, and has no charter of incorporation, the responsibility of its members for the

amount of the indemnity to which one of their number is entitled is not *conjoint et solidaire*, but is divided among them all, each for his proportionate share, and in an action against certain members there can be judgment against them for such share, notwithstanding that the conclusion of the declaration was for joint responsibility for the whole. *Vincent* v. *Gaudry*, Q.R. 9 S.C. 415.

And see INSURANCE, IV.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. DEFENCES TO ACTIONS.

—Promissory Note—Accommodation—Prior Indorsement—Delivery.]—Defendant and H. entered into a joint and several promissory note, drawn payable to K., or order, with interest from date, at the rate of seven per cent. The evidence showed that defendant became a party to the note "to accommodate H. for a month or two":—Held, that there was good consideration for the note: *Crears* v. *Hunter*, 19 Q B.D. 341, followed.—The note was indorsed by K. to the plaintiff's wife, on account of money advanced to K. prior to her marriage, and some months later was indorsed to plaintiff on account of a debt due him by K:—Held, that the indorsement in the first instance to plaintiff's wife was not inconsistent with K. being the legal holder at the time of the indorsement to plaintiff. Held, also, that the note, indorsed as it was, passed by delivery, and the consideration being good, was valid in the hands of any legal holder. *Creelman* v. *Stewart*, 28 N.S.R. 185.

—Acceptance held by Bank as Indorsee—Payment to Cashier—Presumption.]—Where an acceptance had been indorsed to a bank, and the cashier of the bank had put it in suit in his own name, and the acceptor subsequently paid the amount thereof to the cashier:—Held that it was a fair inference that payment to the cashier was payment to the bank of which he was cashier. *Seeley* v. *Cox*, 28 N.S.R. 210. [Affirmed by the Supreme Court of Canada, May 6th, 1896.]

—Division Courts—Jurisdiction—Prohibition—Promissory Note Payable by Instalments.]—See DIVISION COURTS.

—Promissory Note Given for Premium—Agents' Authority.]—See INSURANCE, IV.

—Action on Note—Venue—Place of Payment—Domicile—Art. 85 C.C.]—See PRACTICE, XVII. (*b*)

II. FORM.

—"Letter of Credit"—Negotiable Instrument—"Bills of Exchange Act, 1890"—"The Bank Act," R.S.C., c. 120.]—Held, that a bank cannot deal in such securities as a "letter of credit," signed by the Provincial Secretary of Quebec, without the authority of an order in-council, which is dependent on the vote of the legislature, and therefore not a negotiable instrument within the Bills of Exchange Act of 1890, or the Bank Act, R.S.C., c. 120, ss. 45 and 60. *Jacques Cartier Bank* v. *The Queen*, 25 S.C.R. 84.

And see CONSTITUTIONAL LAW, I (*b*).

—Form—Equitable Assignment.]

"N. F., August 26th, 1894.

$400.

On completion of contract on building now in course of erection, pay to order of R. T. & Co., of H., four hundred dollars, value received, and charge to account of

(Sgd.) J. L."

"To C. H., N. F., Ont.

"Accepted payable at N. F., Ont., as payment for lumber used in my building.

(Sgd.) C. H."

Held, that this was not a bill of exchange, because the time of payment was uncertain; nor was it an equitable assignment, because the fund out of which payment was to be made was not specified. *Thomson* v. *Huggins*, 23 Ont. A.R. 191.

—Bill of Exchange—Order—Form—Assignment—C.S.B.C. [1888], c. 19.]—If an order to pay money does not contain the name of the person on whom it is drawn, it is an assignment within the Act relating to Assignments of Choses in Action, C.S.B.C., [1888], c. 19. If the name of the drawee is mentioned it is a bill of exchange, and excepted from the operation of the Act. *McPherson* v. *Johnston*, 3 B.C.R. 465.

III. PARTIES LIABLE.

—Partnership—Judgment Against Firm—Liability of Reputed Partner—Action on Judgment—Agreement with Indorser.]—Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker.—In an action upon a promissory note against M. I. & Co. as makers, and J. I. as indorser, judgment was rendered by default against the firm, and a verdict was found in favor of J. I., as it appeared by the evidence that he had indorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note:—Held, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favor, the said agreement meaning that he was not to be liable either as maker or indorser. *Isbester* v. *Ray, Street & Co.*, 26 S.C.R. 79.

—Company—Bank.]—The president of an incorporated company, without authority therefor, made a promissory note under the seal of the company. It was signed by him as president and payable to his order. He indorsed the note, and it was discounted at a bank on behalf of the company, the proceeds being placed to the company's credit, and subsequently paid out by cheques in the company's name to their creditors, whose claims should have been paid by the president out of funds

which he had misappropriated before the note was discounted:—Held, that the bank, having taken the note in good faith, was entitled to charge the amount of it, when it fell due, to the company's account. *Bridgewater Cheese Co.* v. *Murphy*, 23 Ont. A.R. 66; 26 S.C.R. 443.

—Promissory Note—Makers—Surety.]—A promissory note was dated Oct. 24th, 1888, and was made by G.T. and R.T., payable to bearer, and was by them delivered for value to the defendant, D., who afterwards took the note to the plaintiff, and the latter, upon D. agreeing to become responsible for the payment of the note, and signing his name under those of the makers, discounted the same:—Held, that the liability of the person so signing was that of surety, and that the validity of the note was not affected by the manner in which it was signed. (Per Meredith, J.), that he was liable as maker of a new note. *Kinnard* v. *Tewsley*, 27 Ont. R. 398.

—Payment of Promissory Notes by Executors—Bills of Exchange Act, 53 V. (D.), c. 33—R.S.O., c. 110.] See EXECUTORS AND ADMINISTRATORS.

—Cheque—Delay in Presenting.]—See DEBTOR AND CREDITOR, V.

BILL OF LADING.

Contract—Correspondence—Carriage of Goods—Transportation Co.—Carriage over Connecting Lines.]—Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business and seeks to vary terms of a prior mutual assent *North-West Transportation Co.* v. *McKenzie*, 25 S.C.R. 38. [Leave to appeal to the Judicial Committee of the Privy Council was refused.]

—Railway Co.—Carriage of Goods—Connecting Lines—Special Contracts—Loss by Fire in Warehouse—Negligence—Pleading.]—In an action by S., a merchant at Merlin, Ont., against the Lake Erie and Detroit River Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G.T.R. Co., and the rest to the C.P.R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie, etc., Co., for carriage to Merlin, and that on receipt by the Lake Erie Co. of the goods, it became their duty to carry them safely to Merlin and deliver them to S. There was also an allegation of a contract by the Lake Erie Co. for storage of the goods and delivery to S. when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co. at Merlin:—Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G.T.R. to be transferred to the Lake Erie Co. as alleged, if the cause of action stated was one arising *ex delicto* it must fail, as the evidence showed that the goods were received from the G.T.R. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G.T.R. to the consignors, and if it was a cause of action founded on contract it must also fail, as the contract under which the goods were received by the G.T.R. provided, among other things, that the company would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier.—Held, further, that as to the goods delivered to the companies other than the G.T.R. to be delivered to the Lake Erie Co., the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G.T.R., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie Co., and such finding should not be interfered with.—Held, further, that as to goods carried on a bill of lading issued by the Lake Erie Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one, as railway companies only undertake to warehouse goods of necessity and for convenience of shippers. *The Lake Erie and Detroit River Railway Co.* v. *Sales*, 26 S.C.R. 663.

BILLS OF SALE.

I. AFFIDAVIT OF BONA FIDES.

Assignment for Benefit of Creditors—Preferences—R.S.N.S. c. 92, ss. 4, 5, 10—Chattel Mortgage Statute of Eliz.]—Though an assignment contains preferences in favor of certain creditors, yet if it includes, subject to such preferences, a trust in favor of all the assignor's creditors, it is "an assignment for the general benefit of creditors," under section 10 of the Nova Scotia Bills of Sale Act (R.S.N.S. c. 92), and does not require an affidavit of *bona fides*: *Durkee* v. *Flint*, 19 N.S. R. 487, approved and followed; *Archibald* v. *Hubley*, 18 S.C.R. 116, distinguished; *Kirk* v. *Chisholm*, 26 S.C.R. 111.

—Form—Jurat—Commissioner's Jurisdiction.]—Affidavit filed with a chattel mortgage is sufficient if it follows the form prescribed in the statute, though the jurat may be defective for not stating where it was sworn.—Per Davie, C.J.: If it is sworn before a commissioner for taking affidavits in British Columbia, it will be presumed that he acted within the territorial limits of his authority. *Brown* v. *Jowett*, 4 B.C.R. 44.

II. CHAN

—Fraud—Possessio
tion of a bill of sa
licity given to the
ference of fraud be
tion of possession
v. *Swire*, 9 App. C
Belanger v. *Menard*

III. DESC

—Description—Bill
c. 125—Appeal—
Interference with
chase by Creditor
Debt.]—In a chatte
veyed were descr
which said goods
property of the sai
in and upon the
Machine Tool Co.
on the north side
London;" and in a
mortgage was th
"And all machine
construction, or w
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being in or upon th
the mortgagor
shall be on any oth
of London." Held
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description was not
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25) to cover machin
liams v. *Leonard &*

—Chattel Mortgag
Schedules—Constru
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and a business as ge
the same county.
gage of their goods
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after describing th
goods and chattel
manufactured or
whether for the
or not, or into an
to be occupied by
understood that all
materials whether
premises or not,
mortgage, should be
B covered the goods
to goods thereafter
Held, that the provis
acquired goods refe
into the store in wh
being carried on,
into the store at B,
been subsequently
vision as to after-a
A did not apply t
brought into the sto
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referred to in tha
Sutherland, 27 Ont.

II. Change of Possession.

—**Fraud—Possession—Onus.**]—The due registration of a bill of sale, and the consequent publicity given to the transaction, prevents the inference of fraud being drawn from the retention of possession by the bargainor: *Cookson* v. *Swire*, 9 App. Cas. at pp. 664-5, referred to. *Belanger* v. *Menard*, 27 Ont. R. 209.

III. Description of Goods.

—**Description—Bills of Sale Act—R. S. O., [1887], c. 125—Appeal—Order to Amend Pleadings—Interference with—Debtor and Creditor—Purchase by Creditor—Consideration—Existing Debt.**]—In a chattel mortgage the goods conveyed were described as follows: "All of which said goods and chattels are now the property of the said mortgagor, and are situate in and upon the premises of the London Machine Tool Co. (describing the premises), on the north side of King street, in the city of London;" and in a schedule referred to in the mortgage was this additional description: "And all machines * * * in course of construction, or which shall hereafter be in course of construction, or completed, while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor * * * or which are now or shall be on any other premises in the said City of London." Held, affirming the decision of the Court of Appeal, that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and if it could the description was not sufficient within the meaning of the Bills of Sale Act (R. S. O., 1887, c. 25) to cover machines so manufactured. *Williams* v. *Leonard & Sons*, 26 S.C.R. 406.

—**Chattel Mortgage—After Acquired Goods—Schedules—Construction.**]—Two persons carried on a certain manufacturing business at B., and a business as general storekeepers at L., in the same county. They made a chattel mortgage of their goods to the defendant, as set forth in two schedules, schedule A covering the machinery and goods in the factory, and which, after describing them, extended to all other goods and chattels thereafter purchased or manufactured or brought on the premises, whether for the business of manufacturing or not, or into any other premises thereafter to be occupied by the mortgagors, it being understood that all articles manufactured, and materials whether brought on the mortgagors' premises or not, after the execution of the mortgage, should be covered thereby. Schedule B covered the goods in the store, and extended to goods thereafter brought into the said store:—Held, that the provision in schedule B as to after-acquired goods referred only to goods brought into the store in which the business was then being carried on, and not to goods brought into the store at B, to which that business had been subsequently removed; and that the provision as to after-acquired goods in schedule A did not apply to the after-acquired goods brought into the store at B, for the reference thereto was only to goods of the character referred to in that schedule. *Milligan* v. *Sutherland*, 27 Ont. R. 235.

IV. Impeachment.

(*a*) *Grounds for Impeachment.*

—**Agreement not to Register—Public Policy.**]—Held, per Strong, C. J., that where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession, such mortgage is, on grounds of public policy, void *ab initio*. *Clarkson* v. *McMaster & Co.*, 25 S.C.R. 96.

—**Chattel Mortgage—Affidavit of Bona fides—Money not Advanced.**]—In an action to set aside a chattel mortgage it appeared that while the mortgage purported to secure a present advance of money, and was regularly executed and filed, with an affidavit of *bona fides*, in the proper office, yet the consideration money was not actually paid over until four days after the filing, nor was there any written agreement binding the mortgagee to make the advance at the time of the execution and filing:—Held, that the mortgage was invalid.—That being invalid it could not, since the Act of 1892, 55 Vict., Ont., c. 26, s. 4, be validated by the mortgagee taking possession of the goods: *Clarkson* v. *McMaster*, 25 S.C.R. 96, referred to; *Martin* v. *Sampson*, 27 Ont. R. 545.

—**Fraudulent Preference—Pressure—Affidavit—Defective Jurat—C.S.B.C. [1888] c. 8, s. 3; c. 51.**]—A chattel mortgage will not be set aside as being given with an "intent to prefer," and contrary to the provisions of the Fraudulent Preferences Act, C.S.B.C., [1888], c. 51, s. 2, if it was given in consequence of an urgent demand by the creditor and his promise to give the mortgagor further credit: *Stephens* v. *McArthur*, 19 S.C.R. 446, followed; *Brown* v. *Jowett*, 4 B.C.R. 44.

—**Voluntary Settlement—Bona Fides—Hazardous Enterprise.**—If a bill of sale of all or the greater part of the grantor's property is given just before he engages in a business of a hazardous nature, it may be declared void as against subsequent creditors. In such case the onus of proving *bona fides* is on the grantor: *Mackay* v. *Douglas*, L. R. 14 Eq. 106, followed. *Lai Hop* v. *Jackson*, 4 B.C.R. 168.

—**Preference—C.S.B.C. [1888], c. 51.**]—A bill of sale given by a debtor to a particular creditor who was not aware that the debtor was in insolvent circumstances, but who insisted on security for his debt, is not a bill of sale made with intent to prefer, and the pressure will take the transaction out of the Statute, C.S.B.C. [1888], c. 51. *Stewart* v. *Wilson*, 3 B.C.R. 369.

(*b*) *Persons Entitled to Impeach.*

—**Construction of Statute—55 V. c. 26, ss. 2 and 4 (O).**

—**Chattel Mortgage—Possession by Creditor.**]—By the Act relating to chattel mortgages (R.S.O. [1887] c. 125), a mortgage not registered within five days after execution is "void as against creditors," and by 55 Vict., c. 26, s. 2 (O.) that expression is extended to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting assignments and preferences (R.S.O. [1887] c. 124). By sec. 4 of 55 Vict., c. 26, a mortgage so

void shall not, by subsequent possession by the mortgagee of the things mortgaged, be made valid "as against persons who became creditors . . . before such taking of possession." :—Held, reversing the decision of the Court of Appeal, that under this legislation a mortgage so void is void against all creditors, those becoming such after the mortgagee has taken possession as well as before, and not merely as against those having executions in the sheriff's hands at the time possession is taken, simple contract creditors who have commenced proceedings to set aside and an assignee appointed before the mortgage was given; that the words "suing on behalf of themselves and other creditors," in the amending Act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; and that such mortgage will not be made valid by subsequent taking of possession. *Clarkson* v. *McMaster & Co.*, 25 S.C.R. 96.

—Fraud against Creditors—Estoppel.]—In an action by a creditor to set aside a bill of sale on his debtor's stock-in-trade it appeared that at the time it was made the plaintiff was the sole creditor of the grantor, and had himself prepared the instrument, and advised its being made:—Held, that the plaintiff had no *locus standi* to attack the bill of sale, even if it had not been made in good faith, which, according to the evidence, it had been. *Boultbee* v. *Rolls*, 4 B.C.R. 137.

V. Miscellaneous Cases.

—Special Provision—Negotiable Paper—Indemnity.]—A provision in an assignment for the security and indemnity of makers and indorsers of papers not due, for accommodation of the debtor, does not make it a chattel mortgage under sec. 5 of the Act, R.S.N.S., 5th ser., c. 92, the property not being redeemable, and the assignor retaining no interest in it. *Kirk* v. *Chisholm*, 26 S.C.R. 111.

—Chattel Mortgage—Mortgagee in Possession—Negligence.]—A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives, but for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor. *Rennie* v. *Block*, 26 S.C.R. 356.

—Purchasing Goods — Consideration — Sec. 5, Ontario Bills of Sale Act, R.S.O., c. 125.—A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt, is a purchaser for valuable consideration within sec. 5 of the Ontario Bills of Sale Act. *Williams* v. *Leonard & Sons*, 26 S.C.R. 406.

—Assignment—Insurance—Application of Payments.]—Promissory notes for the purchase money of goods were secured by a chattel mortgage given on behalf of the purchasers, containing a covenant to insure for the benefit of the mortgagee, who discounted the notes with the plaintiffs and assigned the chattel mortgage, but did not transfer the insurance to them, the loss under which was payable to himself. The policy was afterwards renewed by the purchaser's firm, but it did not appear that the renewal was assigned to the mortgagee, or the loss made payable to him. Subsequently a fire occurred, and the purchaser's firm assigned the insurance money to the plaintiffs, with whom they kept an account, as security for their general indebtedness, and the plaintiffs received and applied it on the notes above mentioned, but afterwards sought to apply it in payment of other indebtedness of the purchasers:—Held, that the plaintiffs were bound to apply the insurance money for the benefit of the mortgagee, who was the equitable assignee of the policy under which the money was paid, and entitled to have it applied in payment of the notes, to pay which, as between him and the purchasers, it was primarily applicable, and the plaintiffs took the money subject to the equitable rights of the mortgagee, of which they had notice. *Western Bank* v. *Courtemanche*, 27 Ont. R. 213.

BOND.

See Appeal.
" Contract.
" Principal and Surety.

BOOK DEBTS.

See Chose in Action.
" Execution, III.

BOUNTY.

See Fisheries.

BROKER.

Broker's "Bought Notes"—Parol Agreement Conflicting with—Evidence.

See Evidence, VIII.

BOUNDARY.

Art. 520 C.C.—Adjoining Lands—Division Wall.]—Under art. 520 C.C., a person building a wall on the dividing line between his and a neighbor's land cannot occupy more than nine inches of the latter by the base, at all events unless an *expertise* has decided that the excess is necessary to assure solidity. *Kough* v. *Nolin*, Q.R. 5 Q.B. 206, reversing 7 S.C. 428 and restoring 5 S.C. 213.

BURGLARY.

Insurance Against—Contract License.

See Insurance, III.

BY-LAW.

See Company.
" Municipal Corporations, II.

CALLS.

See Companies, VI.

CANADA TEMPERANCE ACT.

Search Warrant—Magistrate's Jurisdiction—Justification of Ministerial Officers—Goods in Custodiâ Legis—Replevin—Estoppel—Res Judicata.]—A search warrant issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face, it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. The statutory form does not require the premises to be searched to be described by metes or bounds or otherwise.—A judgment on *certiorari* quashing the warrant will not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes* only. *Sleeth* v. *Hurlbert*, 25 S.C.R. 620.

—**Conviction — Distress Warrant — Solicitor's Costs — Replevin — Bond.**]— The defendant G. having been convicted of a violation of the Canada Temperance Act and fined, a warrant of distress was issued to enforce payment of the fine, under which goods of G. were seized. G. brought replevin, and obtained possession of the goods on executing the usual bond. On the trial of the replevin suit judgment was given in favor of plaintiffs for the return of the goods, and payment of the sum of $88.10 costs. Defendant thereupon paid to the solicitors who were entrusted with the enforcement of the judgment the sum of $110, and took a receipt "in full settlement of C.T.A. fine and costs." A satisfaction piece was drawn up, signed by M., the prosecutor, and placed on record. To an action by plaintiffs on the bond alleging that the goods were not returned, and the judgment not satisfied, defendants pleaded that the bond was discharged by the payment, receipt, and satisfaction piece:—Held, that if the matter was to be regarded as a compromise in respect to the value of the replevin judgment, plaintiffs were bound by it, but that, so far as it purported to be a satisfaction of the fine, it must be regarded as invalid. Held, per Townsend, J., that the receipt must be so read as to uphold the intention of taking a sufficient sum to pay the fine and costs, and a smaller sum in satisfaction of the solicitors' costs. Also, that it is within the authority of the solicitors to make any compromise of their costs that they saw fit for the purpose of obtaining speedy payment. Also, the records of the court showing that the judgment had been satisfied, it was to be presumed that the conditions of the bond had been performed, and that it was open to plaintiffs to show the contrary without taking steps to have the release set aside as having been obtained by fraud or mistake. *McMillan* v. *Giovanetti*, 28 N.S.R 91.

—**Conviction—Irregularity—Certiorari—Costs—Penalty.**]—Where a conviction is made for an offence against a provision of the Canada Temperance Act, within the jurisdiction of the justice who made it, and no greater penalty is imposed than the law allows, such conviction cannot be set aside under the provisions of sec. 117 of the Act for defect of form or substance.—Under sec. 119 no conviction in respect of any offence against the second part of the Act can be removed by certiorari into any of Her Majesty's courts of record, and such courts have no power of revision in cases arising under such enactment.—The power of a magistrate to hear and determine a charge is not affected by a failure to exercise his jurisdiction as to part of the case, or the imposition of a lighter punishment in the shape of costs than might have been awarded. Quære, whether costs are to be regarded as forming any part of the penalty? *The Queen* v. *Rood*, 28 N.S. R. 159.

—**Conviction—Imprisonment—Discharge under Habeas Corpus—Costs.**]—M. and others were imprisoned under warrants issued on convictions obtained for violations of the Canada Temperance Act. Upon *habeas corpus* proceedings they were discharged, the costs of the motions being directed to be paid by the prosecutor. Such portion of the order as dealt with costs was appealed from:—Held, that there was power under the rules to make the order for costs, and the discretion of the judge in awarding costs should not be interfered with. Semble, that the power to award costs upon *habeas corpus* proceedings should be exercised only in extreme cases, if at all. *Re Walter Murphy*, 28 N.S.R. 196.

—**Device to Evade—Social Club—Findings of Fact by Magistrate.**]—In a county were the Canada Temperance Act was in force a social club was formed provided with billiard and card tables, in which intoxicating liquors were supplied to the members by a steward. Both residents and non-residents could become members on payment of certain fees. The steward was convicted of selling liquor contrary to the provisions of the Act, the magistrate finding as a fact that it was not a *bonâ fide* club:—Held, on *certiorari*, that the court would not review the findings of fact by the magistrate, there being evidence before him from which he might draw the conclusion he did.—Held further, that if it were a *bonâ fide* club the sale of liquor to the members was a violation of the Act, and the conviction was proper. *Ex parte Coulson*, 33 N.B.R. 341.

—**Conviction for Two Offences—Concurrent sentences.**]—B. was convicted at one time of two distinct offences against the Canada Temperance Act and sentenced to imprisonment for each. The convicting Justice did not state that the second sentence was to commence at the expiration of the first. Having served the one term he applied to be discharged on *habeas corpus*, which the court refused. *Ex parte Bishop*, 33 N.B.R. 428.

CAPIAS.

Malice—Fraudulent Intention—Damages.]—J. the holder of a *hypothèque* against immovables, issued a capias against, and arrested, the owner of the usufruct for cutting and selling the wood thereon. The capias having been set aside for want of a judge's order authorizing its issue, the person arrested brought an action against J. for damages:—Held, that as it was established on the trial of the action

that J. had some animosity against the plaintiff, and other fraudulent intention in issuing the capias, the plaintiff, who in cutting the wood had pursued the same course as in previous years, was entitled to damages for the arrest. *Blanchet* v. *Jalbert*, Q.R. 9 S.C. 333.

—Affidavit for—Cutting Wood on Hypothecated Property—Measure of Damages.] — A capias based on cutting wood on hypothecated lands rests on a claim for damages, the amount of which is not necessarily to be determined by the injury done to the hypothecated immovable, but is the amount by which, in consequence of the cutting, the immovable will fall short of paying the hypothec. It is for such amount the capias should issue and it should be clearly shown in the affidavit and accompanying declaration. Capias is a most strict and rigorous proceeding and should be quashed if the claim is indefinitely stated as to the amount of damages and the description of an immovable in respect to which it was based. *Daigle* v. *Daigle*, Q.R. 9 S.C. 350.

—Sufficiency of Affidavit—Arts. 30, 798 C.C.P.]—By Art. 30 C. C. P. any Superior Court Judge may appoint as many persons in his judicial district as may be necessary as commissioners to take affidavits to be used in the Superior and Circuit Courts in any district, and may also appoint persons in Ontario to take affidavits for use in Quebec:—Held, that a judge may himself use the power which he can thus delegate. Hence an affidavit sworn before a Superior Court Judge in any judicial district is sufficient to authorize the issue of a writ of capias in any other district. The affidavit need not state the place and time of the creation of the debt, nor the date of the secretion of goods alleged therein. The assertion that the secretion was with intent to defraud the plaintiff is sufficient. (Art. 798 C.C.P.) *Caverhill* v. *Frigon*, Q.R. 9 S.C. 539.

—Affidavit for Capias—Attorney's Costs—Subrogation.

See COSTS, V.

CAPITAL STOCK.

Payment in Cash.]

See COMPANY, VI.

CARGO.

Owner of Unregistered Mortgage — Action against Freight and Cargo.]

See SHIPPING, IV.

CARRIERS.

Contract—Correspondence—Carriage of Goods—Transportation Co.—Carriage over Connecting Lines—Bill of Lading.]—A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped. Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business and seeks to vary terms of a prior mutual assent. *North West Transportation Co.* v. *McKenzie*, 25 S.C.R. 38.

—Bailees—Common Carriers—Express Company—Receipt for Money Parcel—Conditions Precedent—Formal Notice of Claim—Pleading—Money Had and Received—Special Pleas] — Where an express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed:—Held, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee: *Richardson* v. *The Canada West Farmers' Ins. Co.* (16 U.C.C.P. 430) distinguished.—*The Northern Pacific Express Co.* v. *Martin*, 26 S.C.R. 135.

—Ships and Shipping—Chartered Ship—Perishable Goods—Ship Disabled by Excepted Perils—Transhipment—Obligation to Tranship—Repairs—Reasonable Time—Carrier—Bailee.]—If a chartered ship be disabled by excepted perils from completing the voyage, the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination and earn the freight. The option to tranship must be exercised within a reasonable time, and if repairs are decided upon they must be effected with reasonable despatch, or otherwise the owner of the cargo becomes entitled to his goods. *Quære*—Is the shipowner obliged to tranship? If the goods are such as would perish before repairs could be made, the shipowner should either tranship, deliver them up or sell, if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable. And if in such a case the goods are sold without the consent of the owner, the latter is entitled to recover from the shipowner the amount they would have been worth to him if he had received them at the port of shipment or at their destination at the time of the breach of duty. *Owen* v. *Outerbridge*, 26 S.C.R. 272.

—Negligence.]—Shippers of certain goods by rail signed a shipping bill, absolving the defendants from liability for negligent carriage, in consideration of a reduced rate of freight. The goods were damaged by the negligence of the defendants:—Held, (following *Grand Trunk Ry. Co.* v. *Vogel*, 11 S.C.R. 612) that the defendants were liable, notwithstanding such agreement to exonerate them. *Cobban* v. *Canadian Pacific Ry. Co.*, 23 Ont. A.R. 115.

—Railway Company—Carriage of Goods—Connecting Lines—Special Contract—Loss by Fire in Warehouse—Negligence—Pleading.]

See RAILWAYS AND RAILWAY COMPANIES, I.

—Action for Breach of Contract—Bailees—Warehousemen—Amendment asked on Appeal.]

—See APPEAL, IX.

CASH PAYMENT.

Of Stock in Company.]

See COMPANY, VI.

CAUTION JUDICIAIRE.

Arrest—Delay—Contrainte par Corps.]

See PRACTICE AND PROCEDURE, XVII (*b*).

CAUTIONNEMENT.

Judicatum Solvi—Curator for Absent Person—Art. 29 C.C.]

See COSTS, III.

CEMETERY.

Extension of.]

See DAMAGES.

CERTIORARI.

Costs in Proceedings of Habeas Corpus and Certiorari.]—Per Graham, E.J.: No distinction can be drawn as to costs, between the case of a *habeas corpus* and that of a *certiorari*. Re *Walter Murphy*, 28 N.S.R. 196.

—Conviction—Issue of Search Warrant after Writ—Contempt.]

See CONTEMPT OF COURT.

—Conviction for Illegally Practising Medicine—Certiorari.]

See MEDICAL PRACTITIONER.

—Summary Conviction—Certiorari—Duty of Court as to Reviewing Evidence.]

See PRACTICE AND PROCEDURE, VII.

—Conviction—Irregularity—Penalty—Costs.]

See CANADA TEMPERANCE ACT.

—Discharge of Rule—Original Proceedings—Affidavit.]

See PRACTICE AND PROCEDURE, VII.

CERTIFICATE.

Contract—Public Work—Final Certificate of Engineer—Previous Decision—Necessity to Follow.]

See RES JUDICATA.

—Contract—Public Work—Progress Estimates—Engineer's Certificate—Revision by succeeding Engineer—Action for payment on monthly Certificate.]

See ACTION, VII.
" CONTRACT, VII.

—Of Engineer—Contract for Public Work.]

See CONTRACT, III (*a*).

CERTIFICATION.

Of Cheque—Payment.]

See DEBTOR AND CREDITOR, V.

CESSION DE BIENS.

Advocate's Costs—Cession by Debtor.]

See ATTORNEY.
" COSTS, V.

CHALLENGE.

To Array—Jury List.]

See PRACTICE AND PROCEDURE, XVII (*b*).

CHARITABLE DEVISE.

Gift for School Teacher's and Minister's Residences—Invalidity—9 Geo. II., ch. 36.]

See WILL, II.

CHATTEL MORTGAGE.

See BILLS OF SALE.

CHATTELS.

Fixtures—Severance from Realty—Conditional Sale—Unpaid Vendor—Hypothecary Creditor—C. C. Arts. 379, 2017, 2083, 2085, 2089.]

See CONTRACT, III (*a*).

CHATTELS, PERSONAL.

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

See MORTGAGE, III.

CHEMIN DE FER.

See RAILWAYS AND RAILWAY COMPANIES.

CHEQUE.

Presentment for Payment—Delay.]

See DEBTOR AND CREDITOR, V.

CHIEN.

See NEGLIGENCE, III.

CHILD.

Accident to.]

See NEGLIGENCE, I.

CHOSE IN ACTION.

Assignee—Right to Sue—Written Instrument—Registry—Action for Damages.]—An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it.—Under the provisions of R.S.O., c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his ori-

ginal right of action.—Where creditors refused to accept the benefit of an assignment under R.S.O., c. 124, and the assignor was notified of such refusal, and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade who sold the goods in an improper manner. *Rennie* v. *Block*, 26 S.C.R. 356.

—**Covenant—Assignment of, by one joint Covenantee to his Co-covenantees — Mercantile Amendment Act, R.S.O., c. 122 — Mortgage.**]—One joint covenantee can by virtue of the Mercantile Amendment Act, R.S.O. c. 122, assign to his co-covenantees his interest in the covenant, and they can then sue upon it without joining him as plaintiff.—A conveyance of the equity of redemption to one of several joint mortgagees, he covenanting to pay off the mortgage, does not extinguish the mortgagor's liability or his covenant for payment of the mortgage debt. *Scarlett* v. *Nattress*, 23 Ont. A.R. 297.

—**Assignment—Collateral security—Action by Assignor—Insurance.**]—Where an assignment of a Chose in Action is made by way of security, the assignor retaining a beneficial interest, he may, notwithstanding the assignment, maintain an action in his own name to recover the debt, the assignee being a proper but not a necessary party.—Where there is separate insurance in different companies in favour of mortgagee and mortgagor, the latter, in an action on the policy effected by him, is not bound by a settlement of the amount of the loss between the mortgagee and his insurers, although assented to by the mortgagor. *Prittie* v. *Connecticut Fire Ins. Co.*, 23 Ont. A.R. 449.

—**Assignment — Notice — Equities.**]—Where a non-negotiable Chose in Action is absolutely transferred by writing for value, and the transferee again absolutely assigns it for valuable consideration to another person, who takes without notice, the latter obtains a valid title to it, free from any latent equity between the original assignor and assignee. *In re Agra and Masterman's Bank*, L.R., 2 Ch. 397, referred to. *Quebec Bank* v. *Taggart*, 27 Ont. R. 162.

—**Book Debts—Parol Assignment—R.S.O. c. 122, s. 7.**]—Under the provisions of the Ontario Mercantile Amendment Act, R.S.O., c. 122, sec. 7, an assignment of book debts need not be made in writing, and the assent of the debtor is not essential to its validity: Decisions and dicta of the judges in *Armstrong* v. *Farr*, 11 Ont. A.R. 186; *Hall* v. *Prittie*, 17 Ont. A.R. 306; *Lane* v. *Dungannon Agricultural Driving Park Association*, 22 Ont. R. 264, followed. *Trusts Corporation of Ontario* v. *Rider*, 27 Ont. R. 593.

—**Assignment of Debt—Set-off.**]—An agreement for the dissolution of a partnership, provided that the partnership between G. and P. should be "dissolved and terminated by mutual consent," . . . and that "all claims and demands, notes, bills, and book-accounts, belonging to said firm above mentioned, belong to and will be collected by S. and P., who are the owners thereof." The assignees so mentioned then sued a debtor of the late firm for goods sold and delivered, and defendant set up a claim for damages for non-delivery of goods by the firm which arose before the dissolution of the partnership:—Held, that the assignment was a valid one, and that the defendant could set off the claim for damages arising by reason of a breach of the agreement under which the debt arose. Differences between Ontario and English Choses in Action Act commented upon. *Seyfang* v. *Mann*, 27 Ont. R. 631.

CHOSE JUGEE.

See RES JUDICATA.

CHURCH.

Trust—Alteration in Constitution—Change of Doctrine—Secession of Members.]—The civil courts will deal with questions of church doctrine and beliefs only in so far as it becomes necessary so to do to determine civil rights.—Where a dispute arises as to which of two bodies represents a particular church in trust for which property has been granted, a question of ecclesiastical identity arises, and those who claim that the trust has been violated must show that their opponents have so far departed from the fundamental principles of the church in question as to be in effect no longer members thereof.—A provision that "no rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands," is not violated by mere alterations in expression or fuller and clearer statements of doctrine.—Where the constitution of a church provides that there shall be no alteration therein, "unless by request of two-thirds of the whole society," alterations initiated by the governing body and assented to at a regularly constituted general conference of the whole church and by two-thirds of those of the members who have voted thereon, all members having been asked to vote, are valid. No previous request is necessary, nor is it necessary to have the assent of two-thirds of all the members. *Itter* v. *Howe*, 23 Ont. A. R. 256.

CHURCH FUND.

See TEMPORALITIES FUND.

CIVIL CODE OF LOWER CANADA.

Pre-existing Law.]

See WILL, I.

CLASS SUIT.

See COSTS, III.

CODICIL.

See WILL.

COERCIVE IMPRISONMENT.

See CAPIAS.
" HUSBAND AND WIFE, IV.

COGNIZOR.

See RECOGNIZANCE.

COLLECTION AGENCY.

Collection of Debt—Posting Public Notice—Liability to Damages.]—A subscriber to a collection agency, which resorts to threats and the public posting of debtors as a means of enforcing payment, is responsible in damages for such acts, even though the agency has contravened his positive instructions as to the posting. But where the debtor is in a position to pay, but has made no effort to do so, only actual and not punitive damages will be awarded. *Stein* v. *Bélanger*, Q.R. 9 S.C. 535.

COLLISION.

Maritime Law—Rules of the Road—Narrow Channel—Navigation—R.S.C. c. 79, s. 2—"Crossing" Ships—"Meeting" Ships—"Passing" Ships—Contributory Negligence—Moiety of Damages—36 & 37 V. (Imp.) c. 85, s. 17—Manœuvres in "Agony of Collision."

See SHIPPING, III.

COLLOCATION.

Contestations of Report—Appeal—Amount in Controversy—Pecuniary Interest of Appellant—Arts. 746, 747 C. C. P.]

See APPEAL, III (*b*).

COMMENCEMENT DE PREUVE PAR ECRIT.

See EVIDENCE, I.

COMMISSAIRES D'ECOLES.

See MANDAMUS.

COMMISSAIRES DU HAVRE.

See HARBOUR COMMISSIONERS.

COMMISSIONERS IN EXPROPRIATION.

See MUNICIPAL CORPORATIONS, VII.

COMMON EMPLOYMENT.

See MASTER AND SERVANT.
" NEGLIGENCE, II.

COMMUNITY.

Continuation of—Demand by Minors—Priority of Hypothec—Avis de Parents—Homologation.]—The privilege given to minors to elect for the continuation of the community can be exercised for them during their minority, and if such privilege, the exercise of which is not subject to any particular formality, has been exercised for them and to their advantage, they cannot afterwards repudiate its continuation and pretend that it did not exist. The tutor of the minors, with the assent of the subrogate tutor, may declare the election of the continuation of the community, and the fact of the subrogate tutor accepting this declaration and availing himself of it, is equivalent to a demand of the continuation on the part of the minors. Priority of hypothec over the hypothec of the minors for their part of the community can be accorded to him who pays the debts of the community and of its continuation, and this priority may be agreed to by a tutor *ad hoc* appointed to represent the minors at the sale of the immovables of the community and of its continuation, and at the division, settlement and regulation of their affairs, and to accept the succession devolving upon the minors.—An order of homologation of a judicial decree (*avis de parents*) commenced, " we, prothonotary, have homologated and do homologate the above decree" (*avis de parents*) and proceeded to authorize the accomplishment of one of the objects of the deliberations of the family council and to homologate the decree as to the nomination of a tutor *ad hoc*, to be accepted according to its form and tenor; it then ordered that the person named should become tutor *ad hoc* for the purposes above mentioned:—Held, that this authorized the tutor to perform all the acts approved by the family council, though those acts were not specially mentioned in the order of homologation. *Comeau* v. *Murray*, Q.R. 5 Q.B. 401.

And see HUSBAND AND WIFE.

—Contract of Marriage—Interest of Wife—Recourse on Dissolution.]—A marriage contract contained this provision, " The property of the future wife consists of . . . and especially a sum of $1,450 with interest, due to the future wife from C., in virtue of an *acte* of sale agreed to by L., her tutor, to the said C., and received before ——, notary, the days, months and year there mentioned, and duly registered, which said sum and interest the said future wife reserves in the nature of *propre* by inheritance":—Held, that this provision had the effect of making the capital sum and interest paid to the community by the debtor of this debt a *propre* of the wife, but did not authorize her to demand from the community, after its dissolution, interest or profits that the community should have received on the capital sum and interest paid to her by the debtor, more especially as it did not appear that she had received any profit or interest on this sum. *Montpellier* v. *Lahaie*, Q.R. 5 Q.B. 475.

COMPANY.

I. Directors and Officers.

By-law—Power of Directors to repeal—Right of Shareholders to vary at General Meeting.]—A by-law for increasing the capital stock of a joint stock company prescribed the manner in which the new shares should be allotted in accordance with the second sub-section of the 18th section of R.S.O., c. 157, and provided that the allotment should be made, save as to twenty one shares, by the shareholders. This by-law was sanctioned by the shareholders at a general meeting in the manner required by the 21st section of the Act, and it was the basis of the new issue:—Held, that the directors had no power to pass a by-law directing its repeal, and providing for the allotment of the shares by themselves.—A by-law was passed by the directors under sec. 37 of the Act, and subsequently confirmed by the shareholders, providing that the directors should hold office for one year, and until their successors were appointed:—Held, that this by-law could only be repealed at the next annual general meeting of the company, and therefore a by-law passed, during the director's year of office, by the shareholders at a special meeting of the company, providing that the appointment should be terminable by resolution, was invalid. *Stephenson* v. *Vokes*, 27 Ont. R. 691.

II. Liability of Shareholders.

—Promoter—Debts Incurred before Incorporation—Contribution.]—A proposed corporator in a joint stock company, who, in advance of the incorporation, takes a practical part in the prosecution of the intended business of the company, or who sanctions or ratifies the conduct of affairs by some act, not being a mere subscription to shares, is liable to contribute, with other subscribers to stock in a like position, to a liability properly incurred in carrying out the objects of the projected company, and the proportionate amount of contribution by each depends on his share subscription irrespective of the amount paid on the shares. *Sandusky Coal Co.* v. *Walker*, 27 Ont. R. 677.

III. Powers of Company.

—Joint Stock Company—Ultra Vires Contract—Consent, Judgment on—Action to set aside.]—A company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter, or such as are reasonably incidental thereto, nor to exercise their powers in the attainment of authorized objects in a manner not authorized by the charter. The assent of every shareholder makes no difference.—If a company enters into a transaction which is *ultra vires*,—and litigation ensues in the course of which a judgment is entered by consent, such judgment is as binding upon the parties as one obtained after a contest, and will not be set aside because the transaction was beyond the power of the company. *Charlebois* v. *Delap*, 26 S.C.R. 221.

IV. Proceedings By.

—Defamation—Libel—Incorporated Company.]—An action will lie at the suit of an incorporated trading company to recover damages for a libel calculated to injure their reputation in the way of business: *South Hetton Coal Co.* v. *North Eastern News Association* (1894) 1 Q.B. 133, followed. *Journal Printing Company* v. *McLean*, 23 Ont. A.R. 324

V. Proceedings Against.

—Company—Promoters—Action.]—The promoters of a company are not liable for each other's acts as partners nor as each other's agents. An action for the value of work done for the promoters can only be brought against such of them as have expressly contracted for the same. *Hung Man* v. *Ellis*, 3 B.C.R. 486.

—Master and Servant—Implied Contract of Company.]

See Master and Servant.

VI. Stock.

—Certificate of Stock—Transfer—Estoppel.]—A certificate of stock in a company incorporated under R.S.O.O., c. 157, contained the words: "Transferable only on the books of the company in person or by attorney on the surrender of this certificate." The holder of this certificate assigned it for value, and indorsed the assignment thereon. The transferee gave no notice of such assignment to the company, and did not apply to be registered as a shareholder until after the original holder had executed another transfer of the shares covered by the certificate to an innocent purchaser, who was registered by the company as the holder of the shares without production of the certificate:—Held, that under the provisions of section 52 of the Act, a complete legal title to the shares could not be acquired without a transfer on the books; and that the company were not bound to insist on the production of the certificate by the second transferee before registering the assignment to him, and were not estopped from denying the original transferee's right to the shares. *Smith* v. *Walkerville Malleable Iron Co.*, 23 Ont. A.R 95.

—Payment for Stock—Cash Payment.]—By R.S.Q., art. 4722, "the capital stock of all joint stock companies shall consist of that portion of the amount authorized by the charter which shall have been *bonâ fide* subscribed for and allotted, and shall be paid in cash:—Held, that in the absence of fraud, anything which would support a plea of payment in an action is a payment in cash under this section. So where property was sold to a company, and a portion

of the price paid in cash, and the balance credited to the vendors as fifty per cent. paid up on stock held by them, this was held a cash payment within the meaning of said art. 4722. *Larocque* v. *Beauchemin*, Q R. 9 S.C. 73.

—**Joint Stock Company—Calls made before Organization—Requirements of Resolution authorizing Call**]—A joint stock company was not organized until some four months after the statute incorporating the same had been passed;—Held, that calls made prior to the latter date were clearly informal, there being no one who had power to make calls.—The resolution of a joint stock company authorizing a call to be made for the payment of stock subscribed must appoint a certain day and place for payment, and where the resolution does not do this, and a notice of call is sent out in pursuance thereof which designates a day and place for payment, both the resolution and the notice are invalid.—No action will lie against subscribers to a share list which has not been accepted or recognized, or vested by the Act of incorporation in the company, it being, in such a case, a mere offer or promise to take shares.—Defendant subscribed the name of the firm of "M., Son & Co.," of which he was a member, to a subscription list, the parties to which agreed to take the number of shares set opposite their names in the "H. O. Co." The company was incorporated by Act passed on May 19th, 1891, as the "H. C. Co.," defendant being named as a shareholder. No reference was made to previous acts of promotion:—Held, that if it was competent for the directors to adopt the offer on the part of "M., Son & Co.," and if the offer in question was to be regarded as such, it must be adopted in its entirety, and that it was not an acceptance of the offer to place the name of one member only of the firm in the charter:—Held, further, that if defendant was to be regarded as a member of the company by virtue of the charter, he must be allowed an opportunity of saying how many shares he would take. *Halifax Carette Co.* v. *Moir*, 28 N.S.R. 45.

VII. Winding Up.

(*a*) *Contributories.*

—**Judgment Creditor of Company—Liability of Shareholder.**]—Plaintiff was a judgment creditor of an incorporated company, and on 3rd of April, 1894, on his application, an order was made under the Dominion Winding-up Act, R.S.C., c. 129, declaring the company insolvent, directing that it should be wound up, and referring the matter to the Master-in-Ordinary, and on a subsequent application by the plaintiff a liquidator was appointed. No further step was taken under such order. On the 13th June, 1894, plaintiff brought an action against defendant, who was a shareholder in the said company, as a contributory, asking payment of the amount due on his stock, in accordance with the provisions of section 61 of the Ontario Joint Stock Company's Letters Patent Act, R.S.O., c. 157.—Held, that the winding-up order was a bar to the action. *Shaver* v. *Cotton*, 23 Ont., A.R. 426, reversing 27 Ont. R., 131.

—**Increase of Capital—New Shares—Assent by Shareholders—Contributories**]—At a general meeting of shareholders of a joint stock company a resolution was passed increasing the capital stock as authorized by the charter. The resolution was not registered nor ratified at a subsequent meeting. New shares were issued in consequence of this resolution to the holders of the original stock and the company having been put in liquidation under the Winding-up Act (R.S.C., c. 124), the liquidator wished to put the shareholders on the list of contributories in respect of such new shares:—Held, that though the confirmation of the resolution, an essential formality, was not observed, the shareholders who had assented to the resolution and accepted the new issue could not complain of the irregularity on the winding-up proceedings, but must be considered to have waived it; lapse of time and acquiescence, therefore, validated the resolution. *In re Thunder Hill Mining Co.*, 4 B.C.R. 61.

(*b*) *Liquidators.*

—**Liquidator of Company—Personal Liability for Costs.**]

See Costs V.,

(*c*) *Miscellaneous Cases.*

—**Auditor—"Clerk"—Winding-up Act.**]—A person engaged in auditing the books of a company does not come within the class of persons designated in sec. 56 of the Winding-up Act, R.S.C., c 129, so as to entitle him to the special privilege, thereby conferred, of being collocated in the dividend sheet for arrears of salary or wages. *Re Ontario Forge and Bolt Co.; Townsend's Case*, 27 Ont. R. 230.

—**Winding-up Act—Valuation of Securities.**]—Under sec. 62 of the Winding-up Act, R.S.C., c. 129, a creditor having security must value it, leaving it to the liquidator to take it at the valuation, or allow the creditor to keep it. The creditor cannot withdraw the valuation and enforce the security. *In re British Columbia Pottery Co.*, 4 B.C.R. 525.

COMPENSATION.

Judicial Abandonment—Confusion of Rights—Composition and Discharge.]

See Abandonment.

—**For Expropriation and Consequent Damages.**

See Public Work.

" Railways and Railway Companies, VI.

COMPETENCE.

See Practice and Procedure, XVII (*b*).

COMPLAINTE

See Action.

COMPOSITION AND DISCHARGE.

Debtor and Creditor—Acquiescence In—New Arrangement of Terms of Settlement—Waiver of Time Clause—Principal and Agent—Deed of Discharge—Notice of Withdrawal from Agreement—Fraudulent Preferences.]—Upon default to carry out the terms of a deed of composition and discharge a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented:—Held, that a creditor who had benefited by the realization of the assets, and by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it. The debtor's assent to such repudiation, and the grant of better terms to the one creditor, would be a fraud upon the other creditors, and as such inoperative and of no effect. *Howland, Sons & Co.* v. *Grant*, 26 S.C.R. 372.

COMPOUNDING FELONY.

Mortgage—Larceny—Mitigation of Sentence.]

See MORTGAGE, IX.

COMPTE DU TUTEUR.

See TUTOR.

CONDITION PRECEDENT.

Engineer's Certificate.]

See CONTRACT, III (*a*).

CONDITIONAL NOTE.

See INSURANCE, IV.

CONFISCATION.

See PRACTICE AND PROCEDURE, XVII (*b*).

CONFLICT OF LAWS.

Mortgage of Foreign Lands—Action to Set Aside—Lex Loci Rei Sitæ.]

See ACTION, III.

CONFUSION OF RIGHTS.

Compensation—Judicial Abandonment—Composition and Discharge.]

See ABANDONMENT.

CONSEIL DE FAMILLE.

See TUTOR.

CONSEIL MUNICIPAL.

See MUNICIPAL CORPORATIONS.

CONSEILLER, ELECTION DE.

See MUNICIPAL CORPORATIONS, VI.

CONSTABLE.

The Criminal Code, s. 575—Persona Designata—Officers de Facto and de Jure—Chief Constable—Common Gaming House—Confiscation of Gaming Instruments, Moneys, &c.—Evidence—The Canada Evidence Act, 1893, ss. 2, 3, 20 & 21.]—Section 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the City of Montreal. The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable, though he was not such *de jure*. *O'Neil* v. *Attorney-General of Canada*, 26 S.C.R. 122.

—Canada Temperance Act—Search Warrant—Magistrate's Jurisdiction—Justification of Ministerial Officer—Goods in Custodiâ Legis—Replevin — Estoppel — Res Judicata — Judgment Inter Partes.]

See CANADA TEMPERANCE ACT.

—Benefit Society—Action for Injuries.]

See ACTION, I.

CONSTITUTIONAL LAW.

I. EXECUTIVE POWER.

(*a*) *Dominion.*

Conservation of Fisheries—Pollution of tidal Rivers.]—The crown in right of the Dominion, by virtue of its control over tidal rivers and fisheries, make take proceedings to restrain persons from polluting such rivers, though the Attorney-General of the Province could take proceedings to abate such pollution as a public nuisance.—An injunction may issue in such case, although the Act is made an offence by statute, and punishable by fine and imprisonment. *Attorney-General of Canada* v. *Ewen*; *Attorney-General of Canada* v. *Munn*, 3 B.C. R. 468.

(*b*) *Provincial.*

—Powers of Executive Councillors—"Letter of Credit"—Ratification by Legislature—Obligations Binding on the Province—Discretion of the Government as to the Expenditures—Petition of Right—Negotiable Instrument—"Bills of Exchange Act, 1890"—"The Bank Act," R.S.C. c. 120.]—The Provincial Secretary of Quebec wrote the following letter to D. with the assent of his colleagues, but not being authorized by order in council:—"J'ai l'honneur de vous informer que le gouvernement fera voter, dans le budget supplémentaire de 1891-92, un item de six mille piastres qui vous seront payées immédiatement aprés la session, et cela à titre d'acompte sur l'impression de la 'Liste des terres de la Couronne, concédées depuis 1763 jusqu'au 31 décembre 1890,' dont je vous ai confié l'impression dans une lettre en date du 14 janvier 1891. Cette somme de six mille piastres sera payée au porteur de la présente lettre, revêtue de votre endossement." D. indorsed the letter to a bank as security for advances to enable him to do the work:—Held, affirming the judgment of the Court of Queen's Bench, that the latter constituted no contract between D. and the government; that the Provincial Secretary had no power to bind the Crown by his signature to such a document; and that a subsequent vote of the legislature of a sum of money for printing "liste des terres de la Couronne," etc., was not a ratification of the agreement with D., the government not being obliged to expend the money though authorized to do so, and the vote containing no reference to the contract with D. nor to the said letter of credit. *The Jaques-Cartier Bank* v. *The Queen*, 25 S.C.R. 84.

—Contract with Crown—Ratification of unauthorized Agreement.]—An agreement by a Minister to purchase property is not binding on the Crown, but if the money to pay for the property is voted by the legislature, and a part is paid by warrant authorized by Order-in-Council, there is a contract which entitles the subject to recover the balance. But where the sum was included in a vote for other purposes, a part payment by a Minister without authority of an Order in Council does not make a contract. *The Queen* v. *Lavery*, Q.R. 5 Q.B. 310.

—Order-in-Council—Jurisdiction of Courts.]—An order of the Lieutenant-Governor-in-Council of the Province of Quebec is not subject to be annulled by a court of justice at the instance of the Attorney-General or any other person. *Casgrain* v. *School Commissioners of St. Gregoire le Thaumaturge*, Q.R. 9 S.C. 225.

II. Legislative Powers.

(*a*) *Dominion.*

—Ontario—Liquor Laws—Power of Prohibition—Distribution of Legislative Powers—British North America Act, ss. 91, 92—Canada Temperance Act, 1886—Ontario Act (53 V., c. 56), s. 18.—The general power of legislation conferred upon the Dominion Parliament by s. 91 of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion. Dominion enactments, when competent, override, but cannot directly repeal, provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or Provincial Legislature. Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old Provincial Act of 1864 (27 & 28 Vict., c. 18), was *ultra vires* the Dominion. Its own prohibitory provisions are, however, valid, when duly brought into operation in any provincial area, as relating to the peace, order, and good government of Canada: *Russell* v. *Reg.* (7 App. Cas 829) followed; but not as regulating trade and commerce within s. 91, subs. 2 of the Act of 1867: *Citizens Insurance Co.* v. *Parsons* (7 App. Cas. 98) distinguished, and *Municipal Corporation of Toronto* v. *Virgo* [1896] A.C. 93, followed.

Held, also, that the local liquor prohibitions authorized by the Ontario Act (53 Vic. c. 56), s. 18, are within the powers of the Provincial Legislature. But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886. *Attorney-General for Ontario* v. *Attorney-General for the Dominion* [1896], A.C. 348.

—Canadian Waters—Property in Beds—Public Harbours—Erections in Navigable Waters—Interference with Navigation—Rights of Fishing—Power to Grant—Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta—Provincial Legislation—R.S.O. (1887) c. 24, s. 47—55 V. (O.) c. 10, ss. 5 to 13, 19 to 21—R.S.Q. Arts. 1375 to 1378.]—The beds of public harbours not granted before confederation are the property of the Dominion of Canada: *Holman* v. *Green* (6 S.C.R. 707) followed. The beds of all other waters not so granted belong to the respective provinces in which they are situate, without any distinction between the various classes of waters. Per Gwynne, J.—The beds of all waters are subject to the jurisdiction and control of the Dominion Parliament so far as required for creating future harbours, erecting beacons or other public works for the benefit of Canada under the British North America Act, s. 92, item 10, and for the administration of the fisheries—R.S.C. c. 92, "An Act respecting certain works constructed in or over navigable rivers," is *intra vires* of the Dominion Parliament—The Dominion Parliament has power to declare what shall be deemed an interference with navigation and to require its sanction to any work in navigable waters—A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with R.S.C. c. 92, — Riparian proprietors before confederation had an exclus-

ive right of fishing in non-navigable, and in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown: *Robertson* v. *The Queen* (6 Can. S.C.R. 52) followed. —The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers. Where beds of such waters have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide—Where the provisions of Magna Charta are not in force, as in the province of Quebec, the Crown in right of the province may grant exclusive rights of fishing in tidal waters, except in tidal public harbors in which, as in public harbors, the Crown in right of the Dominion may grant the beds and fishing rights—Per Strong, C.J., and King and Girouard, JJ. The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec), unless repealed by legislation, but such legislation has probably been passed by the various provincial legislatures, and these provisions of the Charter, so far as they affect public harbors, have been repealed by Dominion legislation. The Dominion Parliament cannot authorize the giving by lease, license or otherwise, the right of fishing in non-navigable waters, nor in navigable waters the beds and banks of which are assigned to the provinces under the British North America Act The legislative authority of Parliament under section 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries, under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license, and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personal, conferring qualification, and give no exclusive right to fish in a particular locality. Section 4 and other portions of Revised Statutes of Canada, c. 95, so far as they attempt to confer exclusive rights of fishing in provincial waters, are *ultra vires*. Gwynne, J., contra.—Per Gwynne, J.—Provincial legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by the British North America Act, section 91, item 12, including the grant of leases or licenses for exclusive fishing. Per Strong, C.J., Taschereau, King and Girouard, J.J.—R.S.O. c. 24, s. 47, and ss. 5 to 13 and 19 to 21 inclusive of the Ontario Act of 1892, are *intra vires*, but may be superseded by Dominion legislation. R.S.Q. arts. 1375 to 1378 inclusive, are also *intra vires*. Per Gwynne J. —R.S.O. c. 24, s. 47, is *ultra vires*, so far as it assumes to authorize the land covered with water within public harbors. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. The Act of 1892 and R.S.Q. arts. 1375 to 1378, are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*. *In re Jurisdiction over Provincial Fisheries*, 26 S.C.R. 444.

—Railways—Crossings—Railway Act of Canada, 1888—Railway Committee—Municipal Corporations.]—The legislation of the Parliament of Canada with reference to the guarding of the crossings of a railway which, under sub-section 10 of section 92 of the British North America Act, is under the exclusive legislative authority of Parliament, is within the scope of necessary legislation. Under sections 11, 18, 21, 187 and 188 of the Railway Act, 1888, Parliament conferred upon the Railway Committee of the Privy Council the power to order that gates and watchmen should be provided and maintained by such a railway at crossings of highways traversing different adjacent municipalities, to decide which municipalities are interested in the crossings; to fix the proportion of the cost to be borne by the different municipalities; to vary any order made by adding other municipalities as interested, and to readjust the proportion of the cost. It is also provided that every order of the Railway Committee shall be final, subject only to the power of the Committee itself, or the Governor-in-Council upon petition, to review, rescind, or vary any decision or order made by such committee. The Courts have no power to review the decisions of the Railway Committee The fact that any highways affected by the order or decision of the Privy Council are vested in municipalities, or in any sense controlled by them, does not in any wise limit the powers of Parliament to legislate respecting the subject, or of the Railway Committee to make any such orders. The municipal corporations are subject to such legislation and to the orders made thereunder as any private individual would be. *Re Canadian Pacific Railway Co. and the County and Township of York*, 27 Ont. R. 559.

(*b*) *Provincial.*

—Nova Scotia—Jurisdiction of Provincial House of Assembly—Immunities of its Members—Order of Imprisonment — R. S. N. S. 5th Ser., c. 3—Law of Nova Scotia.]—The Nova Scotia House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members, is a breach of privilege and contempt, and to punish that breach by inprisonment. In an action for assault and imprisonment against members of the Assembly who had voted for the plaintiff's imprisonment:—Held, that the sections of the local Revised Statutes, 5th series, c. 3, which create the jurisdiction of the House and indemnify its members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except so far as they may be deemed to confer any criminal jurisdiction, otherwise than as incident to the protection of members, are *intra vires* of the local legislature, as relating to the constitution of the province within the meaning of s. 92 of the British North America Act, 1867, or under the authority of s. 5 of the Colonial Laws Validity Act (28 & 29 Vic. c. 63), which was recognized by the Act of 1867, s. 88: *Barton* v. *Taylor* (11 App. Cas. 197) distinguished. *Fielding* v. *Thomas* [1896], A.C. 600.

— Powers of Provincial Legislatures — Direct Taxation—Manufacturing and Trading Licenses —Distribution of Taxes—Uniformity of Taxation—55 & 56 V., c. 10, and 56 V., c. 15 (P. Q.)—British North America Act, 1867.]—The provisions of the Quebec Statute, 55 & 56 Vict., c. 10, as amended by 56 Vict., c. 15, do not involve a regulation of trade and commerce, and the license fee thereby imposed is a direct tax and *intra vires* of the legislature. The license required to be taken out by the statute is merely an incident to the collection of the tax, and does not alter its character. Where a tax has been imposed by competent legislative authority the want of uniformity or equality in the apportionment of the tax is not a ground sufficient to justify the courts in declaring it unconstitutional: *Bank of Toronto* v. *Lambe* (12 App. Cas. 575), followed; *Attorney-General* v. *The Queen Insurance Co.* (3 App Cas. 1090), distinguished. *Fortier* v. *Lambe*, 25 S.C.R. 422.

—Municipal Corporation—Powers of Legislature—License—Monopoly—Highways and Ferries —Navigable Streams—By-laws and Resolutions —Intermunicipal Ferry—Tolls—Disturbance of Licensee—North-West Territories Act, R.S.C. c. 50, ss. 13 and 24—B.N.A. Act, s. 92, s.s. 8, 10 and 16—Rev. Ord. N.W.T. [1888] c. 28—N.W. Ter. Ord. No. 7 of 1891-92, s. 4.]—The authority given to the Legislative Assembly of the North-West Territories, by R.S.C. c. 50, and orders in council thereunder, to legislate as to "municipal institutions," and "matters of a local and private nature" (and perhaps as to license for revenue) within the Territories, includes the right to legislate as to ferries.—The town of Edmonton, by its charter, and by "The Ferries Ordinance" (Rev. Ord. N.W.T. c. 28), can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality; and as under the charter the powers vested in the Lieutenant-Governor-in-Council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license, and a by-law is not necessary.—A "club or partnership styled "The Edmonton Ferry Company" was formed for the purpose of building, establishing, and operating a ferry within the limits assigned in the license by the municipality, granting exclusive rights to ferry across the river in question, the conditions being that any person could become a member of the club by signing the list of membership, and taking at least one share of $5 therein, which share entitled the signer to 100 tickets that were to be received in payment of ferry service, according to a prescribed tariff, and when expended could be renewed by further subscriptions for shares *ad infinitum*. The club supplied their ferryman with a list of membership, and established and operated their ferry, without any license, within a short distance of one of the licensed ferries, thereby, as was claimed, disturbing the licensee in his exclusive rights:—Held, that the establishment of the club ferry and the use thereof by members and others under their club regulations was an infringement of the rights under the license, and that the licensee could recover damages by reason of such infringement. *Dinner*, v. *Humberstone*, 26 S.C.R. 252.

—Marital Rights—Married Woman—Separate Estate—Jurisdiction of North-West Territorial Legislature—Statute, Interpretation of—40 V., c. 7, s. 3 and amendments—R.S.C. c. 50—N. W. Ter. Ord. No. 16 of 1889.]—The provisions of ordinance No. 16 of 1889, respecting the personal property of married women, are *intra vires* of the legislature of the North-West Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the order of the Governor-General in Council passed under the provisions of "The North-West Territories Act."—The provisions of said ordinance No. 16 are not inconsistent with sections 36 to 40 inclusively of "The North-West Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.—The words "her personal property" used in the said ordinance No. 16 are unconfined by any context, and must be interpreted not as having reference only to the "personal earnings" mentioned in sec. 36, but to all the personal property belonging to a woman, married subsequently to the ordinance, as well as to all the personal property acquired since then by women married before it was enacted. *Brittlebank* v. *Gray-Jones* (5 Man. L. R. 33) distinguished. *Conger* v. *Kennedy*, 26 s. S.R. 397.

—Railway Company—56 V., c. 36 (P.Q.)]—The Quebec Statute, 56 Vict., ch. 36, which authorizes the appointment of a curator to the property of an insolvent railway company subsidized by the Province, and the sale of such property, applies to a company whose road has been declared a work for the general advantage of Canada, and which is therefore under the control of the Federal Parliament. Where part of a railway line was put in operation pending the construction of the rest, the discontinuance of work on such part is a ground for the appointment of a curator under said Act. *Bay de Chaleurs Railway Co.* v. *Nantel*, Q.R. 5, Q.B. 64, aff'g 9 S.C. 47.

—Provincial Legislature—Charter of Company—Powers under.]—The Legislature of Quebec is competent to pass an act authorizing a Light and Power Company to lay wires underground in the streets of Montreal, and to open the streets for the purpose, without first obtaining the consent of the municipal authorities. *City of Montreal* v. *The Standard Light and Power Co.*, Q.R. 5 Q.B. 558.

—Municipal Corporation — License — Municipal Act [1885] s. 11.]—Ss. 10 and 11 of the Municipal Act, 1885 (B.C.), authorizing municipalities to impose a license fee on every person who keeps and carries on a public wash-house or laundry, is *ultra vires*. *The Queen* v. *Mee Wah*, 3 B.C.R. 403.

—Protection of Game—Game Protection Act, 1895, Sec. 7—Trade and Commerce.]—Sec. 7 of the Game Protection Act, [1895] prohibiting the export, or the purchase or possession, with intent to export, of any or any portion of the animals or birds mentioned in the Act in their

raw state, is not *ultra vires* as interfering with trade and commerce. *The Queen* v. *Boscowitz*, 4 B.C.R. 132.

—**Provincial Revenue—Direct or Indirect Tax—Personal Property—Mortgages—C.S.B.C. (1888) C. 111.**]—A provincial revenue tax on "mortgages" included by the interpretation clause of the taxing Act within the term "personal property," is a direct tax and so *intra vires* of the Provincial Legislature: *Bank of Toronto* v. *Lambe* (12 App. Cas. 575) followed. *In re Yorkshire Guarantee Co.*, 4 B.C.R. 258.

—**Taxation—Dominion Officials.**]—An Act of the Legislature authorizing the imposition of a tax on incomes of Dominion officials held to be *ultra vires*. *The Queen* v. *Bowell*, 4 B.C.R. 498.

III. Miscellaneous Cases.

—**Trade—Power to Regulate—Prohibitory Power — By-Laws — Construction — Ontario Revised Statutes, [1887] c. 184, s. 495 (3).**]—A statutory power conferred upon a municipal council to make by-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner. So held, where, under c. 184 of Revised Statutes of Ontario, [1887] s. 495 (3), a municipal by-law was passed prohibiting hawkers from plying their trade in an important part of the municipality, no question of apprehended nuisance having been raised. *Municipal Corporation of the City of Toronto* v. *Virgo* [1896], A.C. 88.

—**Province of Canada—Treaties by, with Indians — Surrender of Indian Lands — Annuity to Indians — Revenue from Lands — Increase of Annuity—Charge upon Lands—B.N.A. Act, s. 109.**]—In 1850 the late province of Canada entered into treaties with the Indians of the Lake Superior and Lake Huron districts, by which the Indian lands were surrendered to the government of the province in consideration of a certain sum paid down, and an annuity to the tribes, with a provision that "should all the territory hereby ceded by the Indians at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time." By the B.N.A. Act the Dominion of Canada assumed the debts and liabilities of the province of Canada, and sec. 109 of that Act provided that all lands, etc., belonged to the several provinces in which the same were situate, "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same." The lands so surrendered are situate in the province of Ontario, and have for some years produced an amount sufficient for the payment of an increased annuity to the Indians. The Dominion Government has paid the annuities since 1867 (from 1874 at the increased amount) and claims to be reimbursed therefor:—Held, reversing the said award, Gwynne and King, JJ., dissenting, that the provision in the treaties as to increased annuities had not the effect of burdening the lands with a "trust in respect thereof" or "an interest other than that of the province in the same," within the meaning of said sec. 109, and therefore Ontario held the lands free from any trust or interest, and was not solely liable for repayment to the Dominion of the increased annuities, but only liable jointly with Quebec as representing the province of Canada. *The Province of Ontario* v. *the Dominion of Canada and the Province of Quebec. In re Indian Claims*, 25 S.C.R. 434.

—**Navigable Waters—Title to Bed of Stream—Crown—Dedication of Public Lands—Presumption of Dedication—User—Navigation, Obstruction of—Public Nuisance—Balance of Convenience.**]—The title to the soil in the beds of navigable rivers is in the Crown in right of the provinces, not in right of the Dominion: *Dixson* v. *Snetsinger* (23 U.C.C.P. 235) discussed.—The property of the Crown may be dedicated to the public and a presumption of dedication will arise from facts sufficient to warrant such an inference in the case of a subject.—By 23 Vict., c. 2, s. 35 (Can.) power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use.—The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication. If a province before confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.—An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance, though of very great public benefit and the obstruction of the slightest possible degree. *The Queen* v. *Moss*, 26 S.C.R. 322.

CONTEMPT OF COURT.

Certiorari—Notice to Magistrate—Contempt.]—A magistrate is not guilty of contempt in issuing a distress warrant upon a conviction made by him after the issue of a writ of *certiorari* for the removal of the conviction for the purpose of quashing it, where the writ, though served on the Clerk of the Peace, had not come to the notice or knowledge of the magistrate. *The Queen* v. *Woodyatt*, 27 Ont. R. 113.

CONTRACT.

I. Breach of Contract.

Bailees—Common Carriers—Express Company — Receipt for Money Parcel — Conditions Precedent—Formal Notice of Claim—Pleading — Money had and received — Special Pleas.]—Where an Express Company gave a receipt for money to be forwarded with the condition endorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed:—Held, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the Express Company for failure to deliver the parcel to the consignee: *Richardson* v. *Canada West Farmers' Ins. Co.* (16 U.C.C.P. 430) distinguished.—In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" put in issue all material facts necessary to establish the plaintiff's right of action. *The Northern Pacific Express Co.* v. *Martin*, 26 S.C.R. 135

—Railway Company—Carriage of Goods—Connecting Lines—Special Contract—Loss by Fire in Warehouse—Negligence—Pleading.]—In an action by S., a merchant at Merlin, Ont., against the Lake Erie and Detroit River Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G.T.R. Co., and the rest to the C.P.R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie, &c., Co. for carriage to Merlin, and that on receipt by the Lake Erie Company of the goods it became their duty to carry them safely to Merlin and deliver them to S. There was also an allegation of a contract by the Lake Erie Co. for storage of the goods and delivery to S. when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co. at Merlin: Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G.T.R. to be transferred to the Lake Erie Co., as alleged, if the cause of action stated was one arising *ex delicto*, it must fail, as the evidence showed that the goods were received from the G.T.R. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G.T.R. to the consignors, and if it was a cause of action founded on contract it must also fail, as the contract under which the goods were received by the G.T.R., provided, among other things, that the company would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier:—Held, further, that as to the goods delivered to the companies other than the G.T.R. to be transferred to the Lake Erie Co., the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G.T.R., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie Co., and such finding should not be interfered with:—Held, also, that as to goods carried on a bill of lading issued by the Lake Erie Co,, there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one, as a rai way company only undertakes to warehouse goods of necessity and for convenience of shippers. *The Lake Erie and Detroit River Railway Company* v. *Sales*, 26 S.C.R. 663

—Storage—Negligence—Evidence]—In an action for damages for loss of salt stored in a warehouse by an unusually high tide by which the warehouse was flooded, plaintiff failed as the evidence clearly established that he knew of the danger from floods when he made the contract for storage. *Fry* v. *Quebec Harbour Commissioners*, Q.R. 5, Q.B. 340, aff'g 9 S.C. 14.

—Sale of Land—Offer to Purchase—Withdrawal.]
See Sale, II (*b*).

II. Consideration.

—Oral Agreement alleged in variation of written Contract — Consideration.]—Defendant had agreed in writing to accept certain goods in payment of two bills of exchange accepted by plaintiff, and plaintiff, having delivered the goods in payment of such bills, was subsequently sued by an indorsee of one of them and compelled to pay it. In an action to recover the amount so paid by plaintiff, the defendant offered evidence to show that at the time the said agreement in writing was made, the plaintiff orally agreed that the goods should not be taken as payment in full of the bills, and that he would pay the balance as soon as he was able:—Held, that such agreement, if made, was void for want of consideration. *Seeley* v. *Cox*, 28 N.S.R. 210. Affirmed by Supreme Court of Canada, May 6th, 1896.

—Monopoly—Restraint of Trade—Corporation —Seal—Consideration.]—A contract by which a trading company agreed to ship all goods, etc., purchased by, and shipped by or consigned to them, at certain named ports by a particular line of steamers, is not void as being in restraint of trade. A provision that the company shall have the benefit of reductions in the rate of freights, and not be affected by in-

creases, is a good consideration for such contract. The contract could be enforced by the corporation owning the line of steamers, though not under its corporate seal. *Canadian Pacific Navigation Co.* v. *The Victoria Packing Co.*, 3 B.C.R. 490.

III. Construction.

(*a*) *Conditions.*

—Correspondence — Carriage of Goods — Transportation Co.—Carriage over Connecting Lines —Bill of Lading.]—Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration: *Hussey* v. *Horne-Payne* (4 App. Cas. 311) followed.—A shipping agent cannot bind his principal by a receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped.—Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business, and seeks to vary terms of a prior mutual assent. Taschereau, J., dissented on the ground that the correspondence in the case did not contain the contract relied on, and that the injury to the goods for which the action was brought took place while they were not under the control of the company. *The North-West Transportation Co.* v. *McKenzie*, 25 S.C.R. 38.

—Construction of—Inconsistent Conditions—Dismissal of Contractor—Architect's Powers—Arbitrator — Disqualification — Probable bias—Evidence, rejection of—Judge's discretion as to order of Evidence.]—A contract for the construction of a public work contained the following clause: "In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract except so far as inconsistent herewith, in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: "In case the works from the want of sufficient or proper workmen or materials are not proceeding with all the necessary dispatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion (with the consent in writing of the Court House Committee, or Commission as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor":—Held, that this last clause was inconsistent with the above clause of the contract and that the latter must govern. The architect, therefore, had power to dismiss the contractor without the consent in writing of the Committee. *Neelon* v. *The City of Toronto*, 25 S.C.R. 579.

—Resolutory Condition—Conditional Sale—Arts. 379, 2017, 2083, 2085, 2089, C.C.—Hypothecary Creditor—Unpaid Vendor—Property Real and Personal — Immovables by Destination — Movables incorporated with the Freehold—Severance from Realty]—An action was brought by L. to revendicate an engine and two boilers under a resolutory condition (*condition resolutoire*) contained in a written agreement providing that, until fully paid for, they should remain the property of L., and that all payments on account of the price should be considered as rent for their use, and further that, upon default, L. should have the right to resume possession and remove the machinery. The machinery in question had previously been imbedded in foundations in a sawmill which had been sold separately to the defendants, and at the time of the agreement the boilers were still attached to the building, but the engine had been taken out and was lying in the mill-yard, outside of the building. While in this condition the defendants hypothecated the mill property to B. and the hypothecs were duly registered. The engine was subsequently replaced in the building and used for some time in connection with the boilers for the purpose of running the mill. The agreement respecting the engine and boilers was not registered. B. intervened in the action of revendication and claimed that the machinery formed part of the freehold and was subject to his hypothecs upon the lands:—Held, that the agreement between L. and the defendants could not be considered a lease, but was rather a sale subject to a resolutory condition, with a clause of forfeiture as regards the payments made on account. But whether the agreement was a lease or a sale on condition, L. having, as respects the boilers and their accessories, consented to their incorporation with the immovable and dealt with them while so incorporated, they became immovables by destination within the terms of article 379 of the Civil Code and subject to the duly registered hypothecs of the respondent: *Wallbridge* v. *Farwell* (18 S.C.R. 1) followed. *Lainé* v. *Beland*, 26 S.C.R., 419.

—Fire Insurance—Conditions in Policy—Breach—Waiver — Recognition of existing Risk after Breach—Authority of Agent.]—A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed, or the interest of the parties therein changed:—Held, affirming the decision of the Supreme Court of New Brunswick, that by a chattel mortgage given by the assured on said property, his interest therein was changed, and the policy forfeited under said condition:—Held, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach. *Torrop* v. *The Imperial Fire Insurance Co.*, 26 S.C.R. 585.

—**Specifications—Interpretation of—Allowance of Interest against Crown—Computation.**]—The suppliants entered into a contract with the Crown to "place a second-hand compound screw surface condensing engine" in a certain steamship belonging to the Dominion Government, and to convert the vessel from a paddle-steamer into a screw-propeller. By the specifications annexed to and forming part of the contract it was stipulated, *inter alia*, that the old engine and paddle-wheels were to be broken and taken out of the steamer at the contractors' expense, and that they should stop up all the holes, both in the bottom and side of the vessel; that the contractors were to make new any part of the engine or machinery, although not named in the specifications, which might be required by the Minister, etc., the whole to be completed and ready for sea, on a full steam pressure of 95 lbs. per square inch, ready to commence running on a certain date—the whole work to be of first class style to the entire satisfaction of the engineer appointed to superintend the work. It was further agreed that the steamer was to be put in perfect running order; that the alterations of any parts of the steamer, for the purpose of fitting up the new works, and any openings or cuttings or rebuilding, were to be executed and furnished at the cost of the contractors. It was also provided that the steamer was to have a satisfactory trial trip of at least four hours' duration, steaming full speed, before being handed over to the department. The vessel was built of iron and very old. The suppliants had taken the old engine out of the hull, and had grounded her, preparatory to placing her in a dry dock in order to complete their work under the contract Owing to the fact that the bottom of the vessel under the old engine seat had been eaten away by rust, it gave way and was broken in when she grounded. It was established that the accident did not occur through the negligence of the suppliants; but the Crown insisted that the suppliants were liable to repair this damage under the terms of the contract and specifications:—Held, that there was nothing to show by the terms of the contract and specifications that either party at the time of entering into the contract contemplated that the portion of the steamship lying below and hidden by the engine seat would require renewing; and that the stipulation in the specifications that "the steamer was to be put in perfect running order," was intended to apply only to the work the suppliants had expressly agreed to do, and should not be extended to other work or things which they did not agree to do, or to replace or renew. That in such a contract as this, neither by the law of England, nor by that of the Province of Quebec, is there any warranty to be implied on the part of the owner of the thing upon which the work is to be performed that the same shall continue in a state fit to receive the work contracted for:—Held further (following *St. Louis* v. *the Queen*, 25 S.C.R. 649), that interest may be allowed against the Crown upon a judgment on a petition of right arising *ex contractu* in the Province of Quebec, in the absence of any express undertaking by the Crown to pay the same, or any statutory enactment authorizing such allowance. But such interest should only be computed from the date when the petition of right is filed in the office of the Secretary of State. *Lainé* v. *the Queen*, 5 Ex.C.R. 103.

—**Public work—Contract—Progress estimate—Satisfaction of Engineer—How to be expressed—Dictum of Appeal Court.**]—By clause 25 of the claimant's contract with the Crown for the construction of a public work, it was, *inter alia*, provided: "Cash payments, equal to about 90 per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of which the certificate is granted, has been duly executed to his satisfaction, and stating the value of such work computed as above mentioned—and upon approval of such certificate by the Minister for the time being; and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said 90 per cent. or any part thereof." The certificate upon which the claimant relied was expressed in the following words: "I hereby certify that the above estimate is correct, that the total of work performed and materials furnished by G., contractor, up to the 30th November, 1895, is three hundred and seventy six thousand nine hundred and seventy and $\frac{40}{100}$ dollars; the draw back to be retained thirty seven thousand, six hundred and ninety and $\frac{40}{100}$ dollars; and the net amount due three hundred and thirty nine thousand, two hundred and eighty dollars, less previous payments." The terms of the clause and the form of the certificate above recited were the same as those discussed in the case of *Murray* v. *The Queen* (26 S.C.R. 203), in respect of which the opinion was expressed in the judgment of the court that the certificate was not sufficient to maintain the action:—Held, (following the expression of opinion in the case cited) that the certificate in this case was not sufficient. *Goodwin* v. *The Queen*, 5 Ex. C.R. 293.

—**Exchange of Properties—Payment of Taxes—Special Assessment—When Imposed.**]—On May 2, 1894, R. and H. exchanged their respective properties, entering into an agreement by writing, which provided that each would pay all taxes and assessments (*cotisations*) for which the property transferred to him might be liable from and after April 1, 1894. On May 7, 1894, a special assessment roll for the construction of a drain affecting the property transferred to H., was signed by the city inspector and deposited in the treasurer's office for collection. The construction of such drain had been ordered, and it had been made in 1893:—Held, that H. was liable to pay this assessment, which, notwithstanding the work had been done before, had only become due and formed a charge on the property from the date of the signing and deposit of the roll. *Rochon* v. *Hudon*, Q.R. 9 S.C. 300.

—**Marine Insurance—Voyage Policy—"At and from" a Port—Construction of Policy—Usage.**]
See INSURANCE, V.

—Railway Company—Railway Ticket—Right to stop over.]

See RAILWAYS AND RAILWAY COMPANIES, II.

—Contract of Insurance—Construction—Marine Insurance—Goods Shipped and Insured in bulk—Loss of Portion—Total or Partial loss.]

See INSURANCE, V.

(b) Implying Terms.

—Construction—Context—Surrounding Circumstances.]—Plaintiff sought to recover a sum of money for altering and lowering the grade of a sewer which he was constructing, under a contract with the defendant. The contract provided among other things that the work was to be carried out according to a certain plan and specification therein referred to, and the specification contained a clause, providing that "the sewer and walls must be built to such grade as the City Engineer may direct." A letter was handed to plaintiff by the Assistant City Engineer, giving directions as to the grade of the sewer, in which the word "grade" occurred twice, and at the trial evidence was offered by plaintiff, but not received, to show that the word was used in a different sense in one sentence from that in which it was admitted to have been used in the preceding sentence:—Held, that there being nothing in the context or in the surrounding circumstances to show that the word was used in the one instance in a different sense from that in which it was used in the other, the evidence was rightly excluded. *McDonald* v. *City of Halifax*, 28 N.S.R. 84.

—Guaranty—Mistake—Reforming Agreement—Evidence—New Trial—Practice.]—One of the clauses in a printed contract of agency provided that the agents "agreed to guarantee" payment of all notes taken in settlement of purchases of goods. In an action against the agents as guarantors of the payment of a promissory note taken by them under this agreement, the defendants pleaded that the above-mentioned clause was contrary to the actual agreement between them and their principals, and that the contract should be reformed by deleting such clause. The defendants further pleaded that no demand had ever been made upon them to sign any guaranty of any particular note:—Held, that the proper construction of the agreement was that it provided for the execution of some further instrument, and was not one of present guaranty of the notes to be given *in futuro*, and as this was not an action for neglect or refusal to enter into a guaranty, the plaintiffs were not entitled to a verdict or to have the judgment in favour of the defendants set aside to enable them to change the form of the claim.—In asking the Court to reform an instrument purporting to contain the agreement of the parties, the evidence to vary the language must be of the clearest and most satisfactory character, and overwhelmingly against the document, to enable the court to disregard its plain terms. *Sylvester* v. *Porter*, 11 Man. R. 98.

—Broker's "Bought Notes"—Parol Agreement conflicting with—Evidence.]

See EVIDENCE, VII.

IV. FORMATION OF CONTRACT.

—Constitutional Law—Powers of Executive Councillors—"Letter of Credit"—Ratification by Legislature—Obligations binding on the Province—Discretion of the Government as to Expenditure—Petition of Right—Negotiable Instruments—"Bills of Exchange Act, 1890"—"The Bank Act," R.S.C., c. 120.]—The Provincial Secretary of Quebec wrote the following letter to D., with the assent of his colleagues, but not being authorized by order in council: "J'ai l'honneur de vous informer que le gouvernement fera voter, dans le budget supplémentaire de 1891-92, un item de six mille piastres qui vous seront payées immédiatement après la session, et cela à titre d'accompte sur l'impression de la 'Liste des terres de la Couronne concédées depuis 1763 jusqu'au 31 décembre 1890,' dont je vous ai confié l'impression dans une lettre en date du 14 janvier 1891. Cette somme de six mille piastres sera payée au porteur de la présente lettre, revétue de votre endossement." D. indorsed the letter to a bank as security for advances to enable him to do the work:—Held, affirming the judgment of the Court of Queen's Bench, that the letter constituted no contract between D. and the Government; that the Provincial Secretary had no power to bind the Crown by his signature to such a document; and that a subsequent vote of the legislature of a sum of money for printing "liste des terres de la Couronne," etc., was not a ratification of the agreement with D., the Government not being obliged to expend the money though authorized to do so, and the vote containing no reference to the contract with D. nor to the said letter of credit. *The Jacques-Cartier Bank* v. *The Queen*, 25 S.C.R. 84.

—Insurance against Fire—Mutual Insurance Company—Notice rejecting application—Statutory Conditions—R.S.O. [1887] c. 167—Waiver—Estoppel—Evidence.]—B. applied to a mutual company for insurance on his property for four years, giving an undertaking to pay the amounts required from time to time and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of $46.50, being the premium for an insurance to the extent of $1,500 on the property described in his application of this date," and then providing that the company could cancel the contract at any time within fifty days by notice mailed to the applicant and that non-receipt of a policy within the fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B. and no policy was issued within the said time, which expired on March 4th, 1891. On April 17th B. received a letter from the manager asking him to remit funds to pay his note maturing on May 1st. He did so and his letter of remittance crossed another from the manager, mailed at Owen Sound, April 20th, stating the rejection of his application and returning the undertaking and note. On April 24th the insured property was destroyed by fire. B. notified the manager by telegraph and on April 29th the latter wrote returning the money remitted by B., who afterwards sent it again to the manager and it was again returned. B.

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—Order for Goods to Frauds—Proof—Art. mantels to be made a not within art. 1235, contract for the sale o in writing, signed by and applies to goods t or not ready for deliv contract may be prove *Leclaire*, Q.R. 5 Q.B. Review and restoring

V. PER

(a) Excuse for

—Contract—Retrospect Covenant—Lien on La tions.]—Plaintiff comp agricultural engine un signed by the defendan defendants agreed to p certain price and to giv therefor, and that the r on the defendants' land the contract the parties second-hand engine, a one mentioned therein. or express promise to contract, and the claim by the statute of lim company was not licen Corporations Act (Rev. s. 13) to take hold or ac the province:—Held, t retrospective operation, strued so as to prevent lizing a charge on la acquired before it was tract, being under seal, tion to enter into an a purchase money of th action for the money wo the expiration of ten yea accrued, notwithstandi

then brought an action, which was dismissed at the hearing, and a new trial ordered by the Division Court and affirmed by the Court of Appeal.—*Held*, affirming the decision of the Court of Appeal, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the Ontario Insurance Act (R.S.O. [1887] c. 167) governed such contract though not in the form of a policy; that if the provision as to non-receipt of a policy within fifty days was a variation of the statutory conditions, it was ineffectual for non-compliance with condition 115, requiring variations to be written in a different colored ink from the rest of the document, and if it had been so printed the condition was unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19, which provides that notice shall not operate until seven days after its receipt.—*Held*, also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract and were estopped from denying that B. was insured. *The Dominion Grange Mutual Fire Assurance Association* v. *Bradt*, 25 S.C.R. 154.

—**Order for Goods to be Made — Statute of Frauds—Proof—Art. 1235, C.C.**]—An order for mantels to be made and placed in a house is not within art. 1235, C.C., which requires a contract for the sale of goods for over $50 to be in writing, signed by the party to be charged, and applies to goods to be delivered in future, or not ready for delivery at the time. Such contract may be proved by witnesses. *Reid* v. *Leclaire*, Q.R. 5 Q.B. 32, reversing Court of Review and restoring 8 S.C. 32.

V. Performance.

(*a*) *Excuse for Non-performance.*

—**Contract—Retrospective Legislation—Implied Covenant — Lien on Land — Statute of Limitations.**]—Plaintiff company sold defendants an agricultural engine under a written contract signed by the defendants under seal, by which defendants agreed to purchase the engine for a certain price and to give their promissory notes therefor, and that the notes should be a charge on the defendants' land. After the making of the contract the parties agreed to substitute a second-hand engine at a lower price, for the one mentioned therein. There was no covenant or express promise to pay the money in the contract, and the claim on the notes was barred by the statute of limitations. The plaintiff company was not licensed, under the Foreign Corporations Act (Rev. Stats., Manitoba, c. 24, s. 13) to take hold or acquire any real estate in the province:—Held, that the statute had no retrospective operation, and could not be construed so as to prevent the plaintiffs from realizing a charge on lands which they had acquired before it was passed. That the contract, being under seal, and showing an intention to enter into an arrangement to pay the purchase money of the engine, the right of action for the money would not be barred until the expiration of ten years from the time it first accrued, notwithstanding that the remedy on the notes was barred. The promissory notes appeared to have been held by a bank at maturity, and the defendants claimed that the plaintiffs had no right of action upon them; but they had not raised this defence by their pleadings or at the trial:—Held, that effect could not be given to the defence so raised on appeal, and that plaintiffs might have been able to show that the notes had only been indorsed to the bank for collection, or had been taken up since by them. *Waterous Engine Works* v. *Wilson*, 11 Man. R. 287.

—**Contract — Covenant — Practice — Action.**]—A contract contained a covenant by A to assume, pay and discharge all moneys due and to become due from B to a third person, under an agreement, and to idemnify and save harmless the said B from payment of the same. No demand had been made on B for payment:—Held, that the covenant was one of indemnity and a demand of payment was a pre-requisite to B's right of action. Where the writ was specially indorsed to recover "$1,000 for principal money due under a covenant to pay," such sum and plaintiff's affidavit in support of a motion for speedy judgment set out the covenant as above, the variance was held fatal and the motion dismissed. *Baker* v. *Dalby*, 3 B.C.R. 289.

—**Principal and Surety—Guarantee Bond—Default of Principal—Non-disclosure by creditor.**]

See Principal and Surety, I.

—**Railway Company—Carriage of Goods—Connecting Lines—Special Contract—Loss by Fire in Warehouse—Negligence—Pleading.**]

See Railways and Railway Companies, I.

(*b*) *Place for Performance.*

—**Contract by Correspondence—Breach—Suit—Service out of Jurisdiction—Place for Performance.**]

See Practice, XXVII.

(*c*) *Time for Performance.*

—**Sale of Land—Rescission—Tender of Conveyance—Principal and Agent.**]—Where the vendee in a contract for the sale of land tenders a conveyance for execution to the general agent of the vendor, but who has no authority by deed under seal to execute deeds for his principal, the vendor is not bound by such tender. If the vendee after the contract is made discovers that the vendor has no title to the land, though he is in a position to procure it, he waives objection to the title unless he repudiates the contract at once, and after such a waiver he is bound to give the vendor a reasonable time to make title. *Williams* v. *Wilson*, 3 B.C.R. 613.

—**Sale of Land—Time for Completion—Extension—Waiver—Rescission.**]—A contract for the sale of land, the purchase money to be paid by instalments, and the conveyance executed when fully paid, contained a condition that the purchaser might pay up and receive his deed at any time. The first instalment was paid, and the purchaser entered and began to improve the land. The vendor had bought at a tax sale seven years previously, and was about to obtain a certificate of indefeasible title when

the original owner took action for recovery of the land, and filed a *lis pendens*. After this the land went down in value, and the purchaser could not sell for want of a clear title. He offered to pay the balance of the purchase money, and asked for a conveyance, but was put off by the vendor on the ground that it could not be given until the *lis pendens* was removed. The time for completion of the purchase was extended and interest waived by the vendor, but the land still going down the purchaser formally tendered the balance due, and a conveyance being refused brought action for rescission:—Held, that time was of the essence of the contract, and the purchaser had not, by agreeing to the extension to enable the vendor to make a good title, waived his right to rescission for non-performance. *Manson* v. *Howison*, 4 B.C.R. 404.

—Vendor and Purchaser—Sale of Lands—Waiver of Objections—Lapse of Time—Will, Construction of—Executory Devise over—Defeasible Title—Rescission of Contract.]

See SALE, II (*b*).
" WILL, I.

—Vendor and Purchaser—Agreement for Sale of Lands—Deviation from Terms—Giving Time—Secret Dealings—Arrears of Interest—Release of Lands—Discharge of Surety—Novation.]

See PRINCIPAL AND SURETY, I.
" SALE, II (*b*).

—Chartered Ship—Perishable Goods—Ship Disabled by Excepted Perils—Transhipment—Repairs—Reasonable Time—Carrier—Bailee.]

See CARRIERS.
" SHIPPING, II.

(d) Who may Enforce.

—Form of—Correspondence—Parties to Action—Relief—Damages.]—A contract for the sale of land consisted of letters between B the vendor, who was Land Commissioner of the C.P.R. Co., and the vendees, who accepted B's terms. The letters of B were written on forms headed "Can. Pac. Ry. Co. Land Dept." and were signed "B, Commissioner" and those sent to him were addressed to him by his official title:—Held, that the form of the writings did not import that B was contracting as agent for the C.P.Ry. Co.; that evidence was admissible to show that he was acting for unnamed principals: and that such principals being trustees could sue on the contract in their own names without joining their *cestuis que trust*:—Held also, in an action by the vendors on the contract, that they could not have a decree for both specific performance and rescission, and if the contract was rescinded they could not have damages. *Smith* v. *Mitchell*, 3 B.C.R., 450.

VI. STATUTE OF FRAUDS.

—Statute of Frauds—Memorandum in Writing—Repudiating Contract by.]—A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale. *Martin* v. *Haubner*, 26 S.C.R. 142.

VII. MISCELLANEOUS CASES.

—Contract—Subsequent Deed—Inconsistent Provisions.]—C., by agreement of April 6th, 1891, agreed to sell to the Erie County Gas Co. all his gas grants, leases and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On April 20th a deed was executed and delivered to the company transferring all the leases and property specified in said agreement, but containing no reservation in favour of C., such as was contained therein. The Erie Company, in 1894, assigned the property transferred by said deed to the Provincial Natural Gas and Fuel Co., who immediately cut off from the works of C. the supply of gas, and an action was brought to prevent such interference:—Held, affirming the decision of the Court of Appeal, that as the contract between the parties was embodied in the deed subsequently executed, the rights of the parties were to be determined by the latter instrument, and as it contained no reservation in favour of C. his action could not be maintained. *Carroll* v. *The Provincial Natural Gas and Fuel Company of Ontario*, 26 S.C.R. 181.

—Public Work—Progress Estimates—Engineer's Certificate—Revision by succeeding Engineer—Action for payment on monthly Certificate.]—A contract with the Crown for building locks and other work on a Government canal provided for monthly payments to the contractors of 90 per cent. of the value of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the Minister of Railways and Canals, that the work certified for had been executed to his satisfaction; the certificate so approved was to be a condition precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent. of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty to make any changes or alterations in the work which he should deem expedient. Held, that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed, had classified it and fixed the value, his decision was final, and could not be reopened and revised by a succeeding engineer. Held, also, that the contractors could proceed by action if payment on a monthly certificate was withheld and were not obliged to wait the final completion of the work before suing. *Murray* v. *The Queen*, 26 S.C.R. 203.

—Insanity—Suspension of Contract—Notoriety of Cause—Evidence—Arts. 335, 986, C.C.]—If a party to a contract is insane at the time it is entered into, such contract is void. (Art. 986 C.C.) Proof of notoriety of the causes of suspension for insanity does not annul *de plein droit* the *acte* done by the party before the

suspension; it is voidable and the court may take into account the nature of the *acte* and good faith of the party with whom the contract was made, and pronounce, or refuse to pronounce, it void at its discretion. To support an application under Art. 335 C.C., it will not suffice to establish certain insane acts; an habitual and notorious state of insanity must be proved. *Brady* v. *Dubois*, Q.R. 5 Q B. 407.

—**Service—Remuneration.**]—A contract for services may properly leave to the employer the right of fixing the remuneration. *Hancock* v. *McIntyre*, Q.R. 9 S.C. 25. Claim for services of architect in preparing plans, &c., for constructions of buildings is of a commercial nature, and in an action to recover same plaintiff may testify in his own behalf.—*Ibid.* Stated in report to be reversed on appeal.

—**Illegal Agreement—Sale of Timber Licenses—Agreement between Bidders.**]—An agreement between two persons intending to bid at a sale of crown land lumber licenses that as neither wanted the whole they would not oppose each other, but one should bid for their joint benefit, is not an illegal agreement. *Irving* v. *McWilliams*, 1 N.B. Eq. 217.

—**Payment for Services—Vested right of Action.**]—C. had for over three years performed services for a mining company, when a resolution was passed requesting him to accompany two members to England and assist them to sell the mines. The resolution provided that he be paid a fixed amount, "and such further sum as H. shall consider right, upon the sale of the mines, in consideration of his general services to the partnership." C. went to England and the mines were sold, but H refused to allow him anything beyond the fixed amount:—Held, that the resolution did not cover the prior services as to which C. had a vested right of action when it was passed, but as to subsequent services C was bound, by his acceptance of the terms of the resolution, to abide by the decision of H. *Croasdaile* v. *Hall*, 3 B.C.R. 384.

—**Company—Breach—Remedy for—Rescission.**]—An incorporated company, by agreement with R., a bookbinder, took over the business of the latter, who was to be manager and foreman at a salary; the profits and losses of the new business were to be equally divided between R. and the company. The purchase money was not paid to R., and the stipulation to furnish proper accounts and other terms of the contract were not complied with. R. brought an action for rescission and payment, asking for the appointment of a receiver and an account:—Held, that it was unneccessary to decide whether or not there was a partnership between the parties; that the contract should be rescinded, a receiver appointed, and an account taken. *Roedde* v. *The News-Advertiser Publishing Co.*, 4 B.C.R. 7.

—**Construction—Public Work—Mistake—Engineer's Certificate.**]—A municipal corporation called for tenders for a public work. The nature and amount of the work to be done was set out in specifications and bills of quantities, and tenderers were directed to give the price of each item therein. C. tendered in the form required and offered to do the work for a lump sum, and a contract was executed by which he agreed "to execute all works described in the specifications, bills of quantities and form of tender, which are hereby made parts of this contract * * for the sum of $——." It turned out that the bills of quantities largely over-estimated the work and in an action by C. to recover the lump sum mentioned:—Held, that the contract was to do the work by quantities at the prices specified and was not controlled by the sum mentioned. The contract provided for interim and final certificates by the engineer of the corporation of the work done under it:—Held, that the contractors could not compel the engineer to give the final certificate, and his only action against the engineer, if any, would be for damages for fraudulently, and in collusion with the corporation, withholding it. *Coughlan* v. *The City of Victoria*, 4 B.C.R. 20.

—**Debtor and Creditor—License to take possession—Bonâ Fide opinion as to the Debtor's Incapacity—Replevin—Conversion.**]

See DEBTOR AND CREDITOR, V.

—**Contract—Public Work—Final Certificate of Engineer—Previous decision—Necessity to follow.**]

See RES JUDICATA.

—**Municipal By-Law—Special Assessments—Drainage—Powers of Councils as to additional necessary works—Ultra Vires resolutions—Executed Contract.**]

See MUNICIPAL CORPORATIONS, II (*c*).

—**Joint Stock Company—Ultra Vires Contract—Consent Judgment on—Action to set aside.**]

See COMPANY, III.

—**Salvage Service.**]—See SHIPPING, VII.

—**Of Towage.**]—See SHIPPING, VIII.

—**General Hiring—Corporations—Implied Contract.**]—See MASTER AND SERVANT, I.

—**Contract of Married Woman—Separate Estate—Personal Articles.**]

See HUSBAND AND WIFE, V.

—**Evidence—Sale of Goods—Damages for Non-Delivery.**]—See SALE, I (*b*).

CONTRAINTE PAR CORPS.

See CAPIAS.

CONTRIBUTORY.

See COMPANY.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, I.

CONVERSION.

Tenants in Common—Property seized under Execution against Co-Tenant—Conversion by Purchaser at Sheriff's Sale.]—See TENANTS IN COMMON.

CONVEYANCE.

Fraudulent Conveyance—Will.]—See DEED.

CONVICTION.

Permitting Deer Hounds to run at Large—Scienter—Ontario Game Protection Act. s. 2, s.s. 2.]—See GAME LAWS.

—For Illegally Practicing Medicine—R.S.O., c.148, s. 45.]—See MEDICAL PRACTITIONER.

See also CANADA TEMPERANCE ACT.
" CRIMINAL LAW.
" DRUGGIST.
" JUSTICE OF THE PEACE.
" MALICIOUS PROSECUTION.

COPYRIGHT.

Compilation—Proprietor—Failure to reserve Compiler's Rights—Residence in England—Stereotyping—Infringement.]—By virtue of sec. 16 of the Copyright Act, R.S.C., c. 62, a person resident in England who procures, for valuable consideration, a book to be compiled for him, and the compiler does not reserve his rights, is the proprietor of the work, and entitled to obtain a copyright in Canada, either personally or through an agent: *Anglo-Canadian Music Publishers Association* v. *Winnifrith*, 15 Ont R. 164, approved.—Printing and publishing a book in Canada from stereotype plates imported from England is a sufficient printing within the meaning of the Act, although no typographical work is done in the preparation of the copies.—The defendants brought into Canada American reprints of the plaintiff's copyrighted book, added as an appendix to American reprints of the Bible:—Held, that such importation was an infringement of the plaintiff's rights. *Frowde* v. *Parrish*, 27 Ont. R. 526.

CORPORATIONS.

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

COSTS.

I. APPEAL AS TO COSTS.
II. GIVING AND WITHHOLDING.
  (*a*) *Generally.*
  (*b*) *Conduct of Parties.*
  (*c*) *Payment into Court.*
  (*d*) *Unnecessary Proceedings.*
III. SECURITY FOR COSTS.
IV. TAXATION AND RECOVERY OF COSTS.
  (*a*) *Appeals from Taxation.*
  (*b*) *Apportionment and Distraction.*
  (*c*) *Solicitor and Client.*
V. IN PARTICULAR MATTERS OR TO AND AGAINST PARTICULAR INDIVIDUALS.

I. APPEAL AS TO COSTS.

—Appeal—Mistake as to Principle.]—Though an appeal will not lie in respect of costs only, yet where there has been a mistake upon some matter of law, or of principle, which the party appealing has an actual interest in having reviewed, and which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. *Archbald* v. *deLisle*; *Baker* v. *deLisle*; *Mowat* v. *deLisle*, 25 S.C.R. 1.

—Solicitor's Costs—Taxation—Appeal—Rules 848, 851, 1226 (d), 1230, 1231 (Consol. Rules Ont.]—Upon an appeal to the Court of Appeal by the solicitor from the decision of the Queen's Bench Division, 16 Ont. P.R, 423, rendered on appeal from the taxation of his bill of costs against his client, under the common order for taxation. the Court was divided in opinion as to one of the grounds of appeal, viz., that the appeal was not properly before the Court below:—Held (per Hagarty, C.J O.), that whether the appeal was or was not regularly before the Court below, it had jurisdiction to interfere to prevent a gross abuse: *Storer* v. *Johnson*, 15 App. Cas. 203, followed. (Per Osler, J.A.) That where what is sought by the appeal is the review of certain items of a solicitor's bill of costs against his client, the appeal is as from a Master's report under Rules 848, 850, such being the effect of Rule 1226 (d). (Per Burton and Maclennan, JJ.A.). That such an appeal is regulated by the same rules and practice as apply to an appeal from a taxation of costs between party and party, and the provisions of Rules 1230 and 1231 not having been complied with, an appeal could not be taken under Rule 851. *Re Robinson, a Solicitor*, 17 Ont. P.R. 137.

II. GIVING AND WITHHOLDING.

(*a*) *Generally.*

—Non-suit by Judge ex Mero Motu—Costs—Appeal.]—Upon the trial of a County Court action, counsel for the defendants, at the close of the plaintiff's case, formally moved for a non-suit, and stated that he would renew the motion at the close of the defendants' case. Then he called and examined three witnesses, but. when a fourth was sworn, the Judge interposed and said he would take the responsibility of entering a non-suit. He heard argument from the plaintiff's counsel opposing this course, and the defendants' counsel said he proposed to tender his evidence and go on and complete the case. The Judge refused to hear further evidence, and entered a non-suit, which in term he refused to set aside, the defendants' counsel neither opposing nor assenting to the motion. The plaintiff appealed to the Court of Appeal. Upon the argument there, the defendants' counsel took the same position, but urged that the defendants should not be ordered to pay costs:—Held, that the fact that the Judge below had *ex mero motu* made an erroneous adjudication, was not a ground for absolving the defendants from the costs of the appeal. The defendants were ordered to pay the costs of the appeal, the lost trial, and the motion in term. *Mills* v. *Hamilton Street Ry. Co.*, 17 Ont. P. R. 74.

—Relief from—Liability to Solicitor—Taxation against opposite Party.]—Where, in virtue of an express contract, a party to an action is relieved from liability for costs to his solicitor, he cannot tax costs against the opposite party: *Jarvis* v. *Great Western Railway Co.*, 8 U.C.C.P

280, and *Stevenson* v. *City of Kingston*, 31 U.C. C.P. 333 approved. *Merriden Britannia Company* v. *Braden*, 17 Ont. P.R. 77.

—**C. S. N. B., c. 60, s. 42—Certificate—Action for Tort.**]—By sec. 42 of ch. 60, Consolidated Statutes of New Brunswick, if an action is brought in other than a justice's court, and the plaintiff does not recover more than twenty dollars (to which amount in actions on contract a justice has jurisdiction), he can have no costs unless the same are ordered by the trial judge or the court. If such action is in the Supreme or County Court, and the judge certifies that there was no reasonable cause for bringing it there, the defendant has costs. In actions for tort a justice has jurisdiction only to eight dollars. Held, that the above section applies to actions for torts as well as to actions *ex contractu*. *Gass* v. *Ford*, 33 N.B.R. 376.

—**Equity Suit—Offer to suffer Judgment—Several Issues.**]—In an equity suit an offer to suffer judgment must be general, and where there were several issues and judgment was given for the plaintiff on one only with damages to an amount less than the tender, he was allowed the costs of the whole suit up to the date of the offer. *Barclay* v. *McAvity*, 1 N.B. Eq. 146.

—**Interlocutory Application—Costs in the Cause—Counsel Fee.**]—In a suit for injunction and other relief the defendant unsuccessfully opposed a motion in chambers for an interlocutory injunction, but succeeded on appeal, where a decree for plaintiff, on the merits made at the hearing, was also set aside and the bill dismissed. The defendant was allowed costs of opposing the motion as costs in the cause. Defendant moved to dismiss the bill for want of prosecution. Before judgment on the motion the bill was served, and a judge's order gave him time to answer until such judgment was given. Being eventually successful, his costs of the motion were allowed as costs in the cause.—Where the judge who heard a suit retired before final judgment, another judge may allow a counsel fee, irrespective of 58 Vic., chap 14, sec. 3 (N. B.) *New Brunswick Railway Co.* v. *Kelly*, 1 N.B. Eq. 156.

—**Of Mortgagee—Redemption Suit—Dispute as to Amount.**]—A mortgagee, in a suit for redemption, and to restrain a sale under the mortgage, was not deprived of costs where the suit was necessary, only because of a dispute as to the rate of interest to which he was entitled, though he was allowed less than he claimed, his contention being *bonâ fide*, and adding nothing to the cost of litigation. *Thomas* v. *Girvan*, 1 N.B. Eq. 314.

(*b*) *Conduct of Parties.*

—**Summary Conviction—Game Act—Costs where Bona Fides of convicting Magistrate attacked.**]—Upon a motion to quash, for irregularity, a summary conviction against defendant for allowing deer hounds to run at large contrary to 56 Vict. (Ont.), c. 49, s. 2, sub-sec. (2), the bona fides of the magistrate was unsuccessfully attacked:—Held, that in such a case, while the conviction should be quashed, it should be without costs. *The Queen* v. *Crandall*, 27 Ont R. 63.

—**Slander—Attempt to prove at Trial Issue not raised in Pleadings—Judgment for Plaintiff withholding Costs—Appeal.**]—In an action for slander, the defendant by his defence denied speaking and publishing the words complained of. At the trial, although he had not framed his pleading to cover such a defence, he attempted to show that the plaintiff's reputation was bad, but failed. The trial judge gave the plaintiff judgment for five dollars, but withheld costs:—Held (on appeal therefrom), that the trial judge erred in withholding the costs. *Croft* v. *Fodrey*, 28 N.S.R. 78.

—**Suit Against Trustees—Wrongful appopriation of Trust Property—Following Property—Refusal to join in Suit.**]—C., one of three trustees under a will and manager of the business of the trust estate, also carried on business for himself and made an assignment in trust for the benefit of his creditors. It having been ascertained that C. had used property of the estate which he managed for the purposes of his own business, a suit was brought by one of his co-trustees against him and his trustees under the assignment for recovery of any of such assets in the hands of said trustees, and a reference was found necessary to identify the same:—Held, that the trustees of C. were not liable for the costs of the suit.—The third trustee refused to join in the suit and was made a defendant. The Court refused to order costs against him, the amount not being large and it appearing that he had good grounds for his refusal. *Belyea* v. *Conroy*, 1 N.B. Eq. 227.

—**Against successful Party—Indemnity—Causing Litigation.**]—Contractors for supplying school desks to a board of trustees, who had unknowingly infringed a patent in carrying out the contract, were held entitled to indemnity from the trustees:—Held, that as the contractors had not claimed indemnity in the suit, and so caused additional litigation, they should have no costs themselves and should pay the trustees' costs. *Victoria School Trustees* v. *Muirhead*, 4 B.C.R. 148.

—**Of Action for Negligence of Tug—Mutual Negligence**]

See SHIPPING, VIII.

(*d*) *Unnecessary Proceedings.*

—**Partition Suit—Non-Appearance at Hearing—Unsupported Answer—Doweress.**]—Where in a partition suit a defendant did not appear at the hearing and his answer was unsupported by evidence and considered unnecessary, he was held not entitled to costs. The doweress asked to be allowed to occupy a dwelling on the land, which would practically prevent partition before her death As her action largely increased the expense of the suit, she was deprived of costs. *Shields* v. *Quigley*, 1 N. B. Eq. 154.

III. SECURITY FOR COSTS.

—**Insolvent Plaintiff—Want of Beneficial Interest—Parties—Consent—Amendment—Discretion.**]—Where a defendant applies for security for costs it is not sufficient to entitle him to an order therefor to establish that the plaintiff is a man of no means, and that he has no

beneficial interest in the subject matter of the action; he must show facts that lead the court to the conclusion that the action is not really the plaintiff's action: *Gordon* v. *Armstrong*, 16 Ont. P.R. 432, explained. *Major* v. *McKenzie*, 17 Ont. P. R. 18.

—**Action for Penalty—Rule 1244—Time—Dismissal of Action — Indulgence.**]— An order, made under Ontario Rule 1244, for security for costs in an action for a penalty, may properly contain provisions limiting the time for giving security, and directing that in default of such security being given within such time, the action should stand dismissed with costs without further order, and not being appealed from, it is conclusive between the parties as to all its terms: *Thompson* v. *Williamson*, 16 Ont. P.R. 368, distinguished.—The action having been brought against two justices of the peace to recover a penalty for the non-return of a conviction made by the defendants, whereby the plaintiff was convicted of an assault, the error of the defendants being merely clerical, and not prejudicing the plaintiff:—Held, not a case in which the indulgence of extending the time for giving security should be granted to the plaintiff. *Ashcroft* v. *Tyson*, 17 Ont. P.R. 42.

—**Security for—Appeal—Ont. Judic. Act [1895], s. 77.**]—An action for the recovery of land, of which the defendants and those under whom they claimed had been in undisturbed possession for nearly thirty years, was dismissed by the trial judge. Two of the plaintiffs resided abroad. The defendants taxed their costs and issued execution against such of the plaintiffs as resided within the jurisdiction, and the execution was returned *nulla bona*. Upon an appeal by the plaintiffs to the Court of Appeal, the defendants moved under s. 77 of the Judicature Act, 1895, for an order for security for costs, showing upon affidavit that the plaintiffs had no property within the jurisdiction exigible under execution:—Held, that the case was one in which security ought to be ordered to the extent of $200. *Donnelly* v. *Ames*, 17 Ont. P.R. 106.

—**Security for—Appeal to Court of Appeal—Poverty of Appellant—Special Order—Ontario Judicature Act, [1895,] s. 77.**]—On an appeal being taken from an order of a Divisional Court to the Court of Appeal, the respondents (defendants) applied for an order for security for costs:—Held, that the appellant's poverty, *per se*, was not a circumstance within the meaning of sec. 77 of the Ontario Judicature Act, 1895, entitling the respondent to a special order for security for costs. *McCormick* v. *Temperance and General Life Assurance Company of North America*, 17 Ont. P. R. 175.

—**Security for—Class Suit—Insolvent Plaintiffs.**]—Where an action was brought by four ratepayers of a municipal corporation, on behalf of themselves and all others, against the corporation and reeve, for an account of moneys received by the latter from the former, an application for security for costs was refused, notwithstanding the financial incompetency of the plaintiffs, and the slight interest they possessed in the properties for which they were assessed, the action being virtually the plaintiffs' action, and not that of third persons who were alleged to be putting the plaintiffs forward, and there being no contention that the action was frivolous: *Clark* v. *St. Catharines*, 10 Ont. P.R. 205, distinguished. *McAllister* v. *O'Meara*, 17 Ont. P.R. 176.

—**Security for—Interpleader—Party Out of Jurisdiction.**]—In a certain action the plaintiff had obtained judgment against the defendants, and under an execution issued thereon the sheriff had seized certain railway ties. These ties were claimed by two foreign corporations. Upon the application of the sheriff, an interpleader order was made directing the trial of an issue as to the property in the ties, in which the foreign corporations should be plaintiffs, and the execution creditor defendant. The execution creditor, thereupon, applied for an order for security for costs of the issue, upon the ground that the plaintiffs therein were foreign corporations, resident out of the jurisdiction:—Held, that the case was one in which an order for security should be granted. *Knickerbocker Trust Company of New York* v. *Webster*, 17 Ont. P.R, 189.

—**Security for—Rule 1243, Consol. Rules Ont—Costs of former action unpaid—Solicitor's want of Authority.**]—The defendant in an action applied for security for costs, under Rule 1243, upon the ground that the costs of a former action brought against him by the plaintiff for the same cause, and discontinued, remained unpaid. The plaintiffs opposed the motion, on the ground that the former action was brought by a solicitor in his name without his authority, and that he was not liable therefor. Held, that as the plaintiff, with knowledge of the facts, had not taken the proper steps to get rid of the costs of the former action prior to bringing the second, the question of his liability therefor could not be brought forward incidentally in a motion under Rule 1243. *Lea* v. *Lang*, 17 Ont. P.R. 203.

—**Security for—Appeal—Rule 1487 (803) Consol. Rules Ont.**]—The words "appeal from a single judge" as used in Rule 1487 (803) mean from a judge presiding in court, and not one presiding at the trial of a cause. The Rule is directed to cases in which, but for the Rule, the sole right of appeal would be to the Court of Appeal, but by the Rule a new right of appeal is given to the Divisional Court as of concurrent appellate jurisdiction. In appeals of that sort the Court may require security to be given, but there is no intention to fetter or interfere with the previous and still existing right to appeal from the trial judge to the Divisional Court:—*Semble*, that where substantial questions arise and the action is of a penal character, security should not be specially ordered under the Rule upon an appeal by the defendant in such an action. *Wilson* v. *Manes*, 17 Ont. P.R. 239.

—**Practice—Security for Costs—Curator.**]—If an action is brought in the name of the curator to the estate of a person out of the jurisdiction, the defendant is entitled to security for costs. *Thorn* v. *Charbonneau*, Q.R. 9 S.C. 97.

—**Security for Costs—Surety.**]—Where some, but not all, of several plaintiffs in an action have

been ordered to give security for costs, one who has not been so ordered may become surety for his co-plaintiffs. *Felkin* v. *Scanlan*, Q.R. 9 S.C. 496.

—**Order for Security—Setting aside where Party coming to reside in Jurisdiction.**]—Where a plaintiff comes to reside within the jurisdiction of the court after an order for security of costs has been made against him, and applies to have such order rescinded he must satisfy the court that his coming within the jurisdiction is not a mere device to evade the obligation to give security, and that it is of a more permanent character than for the mere purpose of enforcing his claim before the court. *Cordingly* v. *Johnson*, 11 Man. R. 4.

—**Practice—Security for Costs.**]—The amount to be given for security for costs by a defendant without the jurisdiction is in the discretion of the Court. Where security has been given by deposit the amount will not be increased until the sum furnished is exhausted. *McLean* v. *Inland Construction and Development Co.*, 3 B.C.R. 307.

—**Practice — Residence Abroad — Judgment.**]—If the plaintiff in an action is resident out of the jurisdiction, but holds an unsatisfied judgment against the defendant for an amount sufficient to cover the costs, the latter is not entitled to an order for security. *Horsfall* v. *Phillips*, 3 B.C.R. 352.

—**Practice—Nominal Plaintiff—Motion to dismiss Action—Costs.**]—If the plaintiff is insolvent and sues for the benefit of assignees, he may be ordered to give security for costs. If security is not given within the time fixed in the order the plaintiff may be compelled to pay the costs of a motion to dismiss the action before being allowed to furnish it and proceed. *Cowan* v. *Patterson*, 3 B.C.R. 353.

—**Married Woman—Domicile of Husband.**]—If a suit is brought by a married woman temporarily residing abroad, but whose husband is domiciled within the jurisdiction, the defendant is not entitled to security for costs. *Cowan* v. *Cuthbert*, 3 B.C.R. 373.

—**Special Circumstances—Rule 684.**]—The respondent to an appeal to the Divisional or full Court is entitled as of right, and without showing special circumstances, to an order for security for costs of the appeal from the appellant *Ward* v. *Clark*, 4 B.C.R. 501.

—**Application for Security for Costs—Stay of Proceedings pending determination of application—Judgment by Default.**]

See PRACTICE AND PROCEDURE, V.

—**Bond for—Surety—Co-plaintiffs.**]

See PRACTICE AND PROCEDURE, XVII. (*b*.)

TAXATION AND RECOVERY OF COSTS.

(*a*) *Appeals from Taxation.*

—**Taxation — Defendants appearing by same Solicitor — Appeal — Extension of Time — Rules 1230, 1231 Consol. Rules Ont.**]—Where an action is against two defendants, who defend by the same solicitor, and is dismissed as against one with costs, but judgment is ordered to be entered against the other with costs, the taxing officer should allow the successful defendant the costs of services (if any) appertaining wholly to his own defence, and at most only a proportionate part of the costs of services appertaining to both defences: *Heighington* v. *Grant*, 1 Beav. 228, followed—Where, by mistake of the solicitor, an appeal from a taxation was taken in proper time to a wrong forum, and, after the time for appealing had expired, to the proper forum, the Court, as a matter of discretion, extended the time for making the appeal.—Where the principle on which the taxing officer proceeds is objected to, he may review his taxation under Rule 1231 without the party proposing to appeal carrying in written objections before the officer, as provided for by Rule 1230. *Clark* v. *Virgo*, 17 Ont. P.R. 260.

—**Costs where Defendant Succeeds upon one Ground.**]—Where in an action upon a building contract it was adjudged that the plaintiff should pay to the defendants so much of the costs of the action, reference and appeal as were occasioned by reason of the plaintiff claiming to be allowed as against the defendants, for extra work, anything in addition to the sums allowed therefor by the architect:—Held, that the taxing officer was wrong in not allowing the defendants the costs of witnesses called to show the value of the extras that had been disallowed by the architect's certificate, which was attacked by the plaintiff. The defendants were not called upon in the litigation to stand upon a single item of evidence, though in the end it might appear that the item would have been sufficient for their purposes. *Lockard* v. *Waugh*, 17 Ont. P.R. 269.

(*b*) *Apportionment and Distraction.*

—**Judgment for Costs—Claim and Counter-claim—Taxation.**]—Where plaintiff has judgment upon his claim for costs, and defendant upon his counter-claim with costs, and the Court directs such costs to be set off, the claim and counter-claim are, for the purposes of taxation, to be treated as separate and independent actions, and the costs of each taxed in favor of the successful party. *Summerfeldt* v. *Johnston*, 17 Ont. P. R. 7.

—**Appeal and Cross-appeal—Common Factum.**]—Where a factum filed by a party to an appeal has by permission of the Court been made common to such appeal, and a cross-appeal in the case, said party having succeeded in both, the disbursements for the factum were, on taxation of costs, divided between the two appeals. *Esplin* v. *McLaren*, Q.R. 5 Q.B. 420.

—**Distraction—Capias.**]—Distraction of costs to an attorney vests in him the right to claim the same, and the client cannot include the amount of such costs in the demand for which he issues a writ of capias, unless he has become legally subrogated to the attorney's rights. *Goldberg* v. *Glazer*, Q.R. 9 S.C. 220.

—**Taxation—Execution of Judgment—Contrainte par Corps—Payment of Debt—Costs Distraits.**]—It is not necessary that the taxation by the prothonotary of costs incurred by execution of a judgmen and established by the record

should be made on opposition of the party condemned.—There may be imprisonment (*contrainte par corps*) on demand of attorneys *distraits* for costs of a judgment for damages for personal injuries after the debt has been paid by the defendant. *Cordeau* v. *DeLaval*, Q. R. 9 S. C. 482.

(c) *Solicitor and Client.*

—**Solicitor and Client—Reference—R.S.O. c. 147, sec. 32—Unsuccessful Application—Counsel Fees—Quantum—Discretion.**]—By the judgment in an action it was ordered that the plaintiffs should recover against the defendant the amount found to be due to them on the taxation of their solicitors' bills of costs of, and incidental to, certain litigation, as between solicitor and client, and such bills were referred for taxation in this manner:—Held, that the matter was to be treated as if the taxation had been directed on an application by the defendant, as the person chargeable, under sec. 32 of R.S.O. c. 147.—That the decision of the taxing officer in allowing to the solicitors the costs of an unsuccessful interlocutory application, undertaken in the exercise of an honest and fair discretion, ought not to be interfered with. —That the payment by the solicitors to the opposite party in the litigation of a sum for interlocutory costs which the plaintiffs were ordered to pay, while not properly such a disbursement as should be included in the bill of costs of the action, was a proper payment on behalf of the clients, to which payments credited on the reference might have been applied, and should be treated as so applied. That while the general rule of the tariff is that no greater fee can be taxed for business for which the tariff makes provision, between solicitor and client, than upon a taxation between party and party, there is an exception in the case of counsel fees, and that where the taxing officer had allowed larger counsel fees than the tariff prescribed, his discretion as to the amount thereof should not be interfered with. *Re Geddes and Wilson*, 2 Ch. Chamb., 447, followed. *Smith* v. *Harwood*, 17 Ont. P.R. 36.

—**Third Parties—Indemnity.**]—The plaintiff sued the defendants on a policy of insurance upon the life of his mother. The defendants had previously paid the amount to the executors of the mother's will, taking from them a bond of indemnity. The defendants brought in the executors as third parties, and subsequently the executors paid the plaintiff the amount claimed by him and the costs of the action:—Held, that the defendants were entitled to be paid by the third parties their costs of defence, to be taxed as between solicitor and client; and the costs of their claim over against the third parties to be taxed as between party and party. *King* v. *Federal Life Assurance Co.*, 17 Ont. P.R. 65.

—**Solicitor—Special Journey—Authority—Ratification—Costs—Block Charge—Taxation—Appeal.**]—A solicitor acted for a municipal corporation as solicitor and sole counsel in a matter in litigation which was contested in the High Court, Court of Appeal, and Supreme Court of Canada. The municipal council passed a resolution authorizing an application for leave to appeal to the Privy Council, a copy of which was forwarded to the solicitor, who thereupon, without specific instructions, proceeded to England for the purpose of obtaining leave, and while there drew upon the treasurer of the corporation a bill for a part of his expenses, which was honoured:—Held, that the resolution, the payment on account of expenses and other acts of ratification, without protest as to the solicitor's course, were sufficient authority to him; and he was entitled to tax against the corporation his expenses in transit and in residence in England, an allowance for services rendered in England as solicitor and counsel, and a *per diem* charge for waiting, having regard to his being absent from his own business.—The solicitor made a block charge of $1,400 for his services, time, and expenses:—Held, that it should be resolved into details and taxed in items.—An appeal from the certificate of taxation of a bill of costs between solicitor and client is to the Court as if it were an appeal from a Master's Report. *Re Mowat*, a *Solicitor*, 17 Ont. P.R. 180.

V. In Particular Matters or to and Against Particular Indivipuals.

—**Non-suit by Judge ex Mero Motu—Costs—Appeal.**]—Where the judge below had, *ex mero motu*, made an erroneous adjudication by way of non-suit, it was held not to be a ground for absolving the defendants from the costs of the appeal. Defendants were ordered to pay the costs of the appeal, the cost trial, and the motion in term. *Mills* v. *Hamilton Street Ry. Co.*, 17 Ont. P.R. 74.

—**Action by Liquidator—Liability for Costs—R.S. Eap. 129, sec. 31 (a)—Claim and Counterclaim.**]—The liquidator of a company who has brought suit in the name of the company, under the Winding-up Act (R.S.C., c. 129, sec. 31 (*a*)) and is not otherwise a party to it, is not personally liable for the costs.—Where the plaintiff succeeds on the claim and the defendant on the counterclaim, the former is to receive the costs of the action and the latter those of the counterclaim. *Ontario Forge and Bolt Co.* v. *Comet Cycle Co.*, 17 Ont. P.R. 156.

—**Receiver—Ex parte Order appointing—Costs—Review.**]—Where costs are given to the applicant on an *ex parte* order for the appointment of a Receiver, the court will not review the direction as to costs upon a motion to continue the Receiver: *McLean* v. *Allen*, 14 Ont. P R. 84, distinguished. *Stark* v. *Ross*, 17 Ont. P.R. 237.

—**Attorney's Lien.**]—An attorney has a lien for his costs of action and execution when the debtor, after seizure, has assigned his goods for the benefit of his creditors. *In re Greaves*, Q.R. 9 S.C. 516.

—**Abandonment of Proceedings—Re-commencement.**]—The rule under art. 453, C.C P., that a party who has abandoned a proceeding cannot re-commence without first paying the costs of his adversary incurred therein, is not dilatory, but imperative. Non-payment is a ground not

only for the suspension of the new proceeding, but for its dismissal as a nullity. *Leboutillier* v. *Carpenter*, Q.R. 9 S.C. 530.

—**Costs—Amendment, where treated as made.**]—Where a suit has been tried, as if an amendment, which was not asked for until the argument, were then on the record, the Court held that the amendment should not affect the costs. *Bauld* v. *Challoner*, 28 N.S.R. 205.

—**Witness Fees—Mileage—Affidavit for.**]—The Clerk of the Supreme Court of New Brunswick, on taxation of a bill of costs in a cause, is authorized to tax witness fees, including mileage, on an affidavit of the necessity and materiality of, and distance traveled by, the witness:—Held, that such affidavit should be positive and certain, and where counsel swore that he verily believed that the witness had travelled a distance of 720 miles for the purpose of attending and giving evidence in the cause, the clerk was not justified in taxing witness and mileage fees thereon. *Lovitt* v. *Snowball*, 33 N.B.R. 368.

—**Two Actions in respect of the same subject matter — Staying Proceedings until Costs of former action paid.**]—Before the Manitoba Queen's Bench Act, 1895, came into force, the plaintiff had brought an action to recover the value of land alleged to have been improperly sold for taxes when none were in arrear; to the declaration in this action defendants had demurred, and recovered judgment for their costs on the demurrer. After the passage of the above Act, plaintiff brought another action against the defendants, claiming a declaration of right to compensation and damages under sub-section 5 of section 8 thereof in respect of such tax sale. He had not paid the costs of the former action before the second was brought:—Held, following *Cobbett* v. *Warner*, L.R. 2 Q.B. 108, that the relief sought was substantially the same as in the former action, and that proceedings should be stayed until the costs of it were paid. *Clemons* v. *Municipality of St. Andrews*, 11 Man. R. 245.

—**Canada Temperance Act—Conviction—Distress Warrant—Solicitor's Costs.**]

See CANADA TEMPERANCE ACT.

—**Canada Temperance Act—Irregularity—Certiorari—Costs—Penalty.**]

See CANADA TEMPERANCE ACT.

—**Rule as to Costs in Proceedings by Way of Habeas Corpus and Certiorari.**]

See PRACTICE AND PROCEDURE, VII.

—**Tender—Condition—Subsequent Costs.**]

See PRACTICE AND PROCEDURE, XVII. (*b*.)

—**Settlement of Action—Stay of Proceedings—Summary Trial—Costs.**]

See PRACTICE AND PROCEDURE, XXI.

—**Maritime Law—Costs of Action benefiting all Claimants against the Res.**]

See SHIPPING, V (*a*).

—**Account Between Co-owners of Ship—Proportion of Costs to be Paid by Co-owners.**]

See SHIPPING, V (*b*).

COTISATION SPECIALE.

See ASSESSMENT AND TAXES.

COUNTY COURT.

Jurisdiction — New Trial — Setting aside Judgment.]—Under section 308 of the Manitoba County Courts Act, a Judge of the County Court has no jurisdiction to set aside a judgment or entertain an application for a new trial or rehearing after six months from the date when the judgment or decision was pronounced or given. *Grundy* v. *Macdonald*, 11 Man. R. I.

—**Appeal from—Transfer of Action to Queen's Bench—Jurisdiction.**]—See APPEAL, III (*g*).

—**Prohibition—Jurisdiction.**]—See PROHIBITION.

COVENANT.

See CHOSE IN ACTION.
" LANDLORD AND TENANT.
" PRACTICE AND PROCEDURE, I (*a*).

CREANCES, VENTE DE.

See SALE, I (*f*).

CREANCIER.

See SOULTE.

CREDITORS' RELIEF ACTS.

Ontario Act—Division Court—Execution.]—The Ontario Creditors' Relief Act applies to moneys received by the sheriff upon Division Court executions. *In re Young* v. *Ward*, 27 Ont. R. 588.

See also EXECUTION.

CRIMINAL CODE.

See CRIMINAL LAW.
" GAMING.
" GAME LAW.

CRIMINAL CONVERSATION.

See PRACTICE AND PROCEDURE, III.

CRIMINAL LAW.

I. Evidence.

(a) *As to Specific Offences.*

Murder — Manslaughter — Criminal Code, s. 229 — Provocation — Assault — New Trial.]—A prisoner, tried upon an indictment for murder, did not deny the killing, but contended that by sec. 229 of the Criminal Code, the offence was reduced to manslaughter, because it was committed "in the heat of passion, caused by sudden provocation." It was shown that just before the killing the prisoner had called at the house of the deceased to see the latter, who ordered him out and immediately laid hands on him and put him out of the house, when prisoner drew a revolver and shot deceased. The trial judge directed the jury that deceased was, at the time he was killed, "doing that which he had a legal right to do," and that there was, therefore, no provocation and no question of fact to be submitted to the jury to reduce the crime to manslaughter:—Held, that there was misdirection; for whether or not the deceased at the time he was shot was doing what he had a legal right to do depended upon whether, if the jury accepted as true the statement of the defendant given in evidence as to the circumstances attending the shooting, the deceased had, before laying hands upon him, ordered him to leave his house, and whether if violence was used in putting him out, it was greater than was necessary; and the deceased was clearly not doing what he had a legal right to do if the facts were found in favour of the prisoner's contention on these points. New trial directed, upon an appeal under sec. 744 of the Criminal Code. *The Queen* v. *Brennan*, 27 Ont. R. 659.

—False Pretences—Obtaining Credit—Evidence of Belief—Subsequent facts.]—On trial of an indictment for obtaining credit from a bank by false representations, it is not necessary to examine any of the bank directors to show that they acted on a belief of the truth of the statement on which the credit was obtained, if the same could be proved by other competent testimony. Evidence was properly admitted of facts subsequent to the granting of the credit to prove that the prisoners knew at the time that it was false. *The Queen* v. *Boyd*, Q.R. 5 Q.B. 1.

(b) *Procuring Attendance or Evidence of Witnesses.*

—Foreign Commission—Order for—Time—Criminal Code, s. 683.]—An order for a commission, under sec. 683 of the Criminal Code, to take the evidence of any person residing out of Canada who is able to give material information relating to an indictable offence, or relating to any person accused thereof, may be made any time after an information is laid charging such offence, and such evidence may be used at any stage of the inquiry at which evidence may be given. Such order ought to provide that the commission be returned to the Court out of which it issues, and ought not to limit the use of the evidence: *The Queen* v. *Chetwynd*, 23 N.S.R. 332; *The Queen* v. *Gibson*, 16 Ont. R. 704, referred to. *The Queen* v. *Verral*, 17 Ont. P.R. 61.

II. Practice and Procedure.

—Swearing Jury—Direction to Stand by.]—On a trial for an indictable offence the Crown can direct any number of jurors to stand by, but when the panel is exhausted they cannot be stood by a second time. Crim. Code, sec. 667 (4).—On an indictment for having obtained by false pretence something capable of being stolen, the prisoner cannot be convicted on proof of having obtained credit at a bank by means of a false statement of his financial affairs. *The Queen* v. *Boyd*, Q.R. 5 Q.B. 1.

—Fraudulent Conversion—Crim. Code, s. 308—Offence begun in one and completed in another District—Jurisdiction.]—H. resided in District of Bedford. D., residing in Iberville, gave H. for collection a note made by another resident of Bedford. H. collected the note, and fraudulently converted the proceeds to his own use:—Held, that information was properly laid against H. before a magistrate in Iberville, and H. having been brought to the latter district on a warrant issued upon such information and committed for trial after preliminary inquiry, such committment was regular, and a conviction, on trial by the court sitting at Iberville, was sustained on a reserved case. *The Queen* v. *Hogle*, Q.R. 5 Q.B. 59.

—Criminal Procedure—Preferring Indictment—Order of Court.]—Where on a preliminary investigation before two justices on information for a criminal offence the justices signed a declaration to the effect that they were unable to agree and the accused was discharged;—Held, that this was not a reason for the Court of Queen's Bench ordering an indictment to be preferred against him, but the prosecutor would have to apply to the Attorney-General, *Ex parte Hanning*, Q.R. 5 Q.B. 549.

—Summary Conviction—Appeal—Jurisdiction.]—No appeal lies to the Court of Queen's Bench (Crown side), under sec. 870 Crim. Code, relating to summary convictions, from any summary conviction in respect to an offence over which the Parliament of Canada has no legislative authority. *Corporation of Scottstown* v. *Beauchesne*, Q.R. 5 Q.B. 554.

—Threatening Letter — Information — Criminal Code, s. 406—Application to Provincial Penal Acts.]—Information was laid before the Stipendiary Magistrate of the city of Halifax, charging defendant with writing a letter threatening to accuse another of selling liquor in violation of the provisions of the Nova Scotia Liquor License Act, with intent to extort money:—Held (dismissing a motion for a writ of prohibition, to prevent the magistrate from trying the information) that the word "offence" as used in the Criminal Code,

applies to offences against Local as well as Dominion Acts, and is not confined to offences against the Code. *The Queen* v. *Dixon*, 28 N.S.R. 82.

—**Demand with Menaces—Reasonable or Probable Cause—Misdirection.**]—On the trial of an indictment, under sec. 403 of the Criminal Code, for delivering a letter demanding property with menaces, it is as much incumbent on the Crown to show that the demand was made without reasonable or probable cause, as that it was made with menaces. So where on such a trial the jury were charged that they might consider the letter as a demand, delivery having been proved and no reasonable cause shown :—Held, a misdirection, and that there should be a new trial. *The Queen* v. *Collins*, 33 N.B.R. 429.

—**Criminal Code—Summary Trials—Appeals from Magistrates.**]—Where a prisoner had been convicted of theft under section 783, sub-section (*a*) of the Criminal Code, 1892, the court refused, under section 808 of the Code, an application for a mandamus to compel the magistrate to take a recognizance on appeal from such conviction. *The Queen* v. *Egan*, 11 Man. R. 134.

— **Summary Trial—Discretion of Magistrate — Disorderly House—Crim. Code, s. 783 (*f*).**]—On information, under sec. 783 (*f*), Crim. Code, for keeping a disorderly house, it is optional with the justices to proceed summarily or commit. A *mandamus* will not lie to compel a summary trial. *In re Macrae. Ex parte Cook*, 4 B.C.R. 18.

—**Speedy Trial — Re-election — Crim. Code, ss. 765, 769.**]—A prisoner who has elected to be tried by a jury and committed to custody until the next assizes, may abandon such election, and have a speedy trial before a judge. *The Queen* v. *Prevost*, 4 B.C.R. 326.

—**Conviction—Rule for Certiorari—Amendment.**]—A rule *nisi* for certiorari to quash a conviction for improperly imposing imprisonment with hard labour will be discharged on its being shown that the sentence of hard labour was struck out before the conviction was acted on : *Reg.* v. *Hartley* (20 Ont.R. 481) followed. As the original conviction was bad the rule was discharged without costs, following *Re Plunkett* (3 B.C.R. 484). *The Queen* v. *McAnn*, 4 B.C.R. 587.

— **Summary Conviction — Certiorari — Duty of Court as to Reviewing Evidence.**]—See PRACTICE AND PROCEDURE, VII.

—**Procedure — Warrant—Want of Written Information—Liability of Magistrate.**]—See JUSTICE OF THE PEACE.

III. SPECIFIC OFFENCES.

—**The Criminal Code, s. 575 — Persona Designata—Officers de Facto and de Jure—Chief Constable—Common Gaming House — Confiscation of Gaming Instruments, Moneys, Etc.—Evidence—The Canada Evidence Act, 1893, ss. 2, 3, 20 and 21.**]—Sec. 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the city of Montreal.

The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable, though he was not such *de jure*.—In an action to revendicate the moneys so seized the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf in the province of Quebec.—Per Strong, C.J. A judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of revendication. *O'Neil* v. *The Attorney-General of Canada*, 26 S.C.R. 122.

—**Gaming—Betting—Criminal Code, ss. 197-198.**]—A bank, a telegraph office, and another office were simultaneously opened in a town. Moneys were deposited in the bank by various persons, who were given receipts therefor in the name of a person in the United States, which receipts were taken to the telegraph office, where information as to horse races being run in the United States was furnished to the holders of the receipts, who telegraphed instructions to the person there for whom the receipts were given to place, and who placed bets equivalent to the amounts deposited on horses running in the races, and on their winning the amounts won were paid to the holders of the receipts at the third office by telegraphic instructions from the persons making the bets in the United States :—Held, on the evidence and admissions to the above effect, that the defendant, who kept the telegraph office, was properly convicted of keeping a common betting house under 197-198 of the Criminal Code. *The Queen* v. *Osborne*, 27 Ont. R. 185.

— **Malicious Prosecution — Assault — Criminal Code, p. 53.**]—A trespasser upon land of which another is in peaceable possession is not guilty of an assault under sec. 53 of the Criminal Code, 1892, merely because he refuses to leave upon the order or demand of the other. Nor does the latter part of the section apply unless there is an overt act on the part of the person in possession towards prevention or removal, and an overt act of resistance on the part of the trespasser. *Pockett* v. *Poole*, 11 Man. R. 275.

—**Abduction of Girl under Sixteen—Parents' Control—Crim. Code, s. 283.**]—B. having come to Victoria, B.C., from a town in the United States, wrote to a girl under sixteen living with her parents in said town, urging her to come and join him, and receiving in reply her consent he sent her money to pay her expenses. From the place where the girl lived she could come to Victoria by steamer in a few hours, and B. met her on the arrival of the boat, and took her to a boarding house where they passed the night together. On an indictment against B. for abduction under s. 283 of the Criminal Code :—Held, Davie, C.J., and Crease, J., dissenting, that when she met B. at Victoria the girl had abandoned the possession and control

of her father, and the prisoner was not guilty of taking her out of such control, which is the offence mentioned in that section:—Held, per McCreight and Walkem, JJ., that the reception of the prisoner's letters was the motive cause of her abandoning her father's possession, and a material factor in the offence which took place without the jurisdiction. *The Queen* v. *Blythe*, 4 B.C.R. 276.

CROWN.

I. Liability.

Claim for Services rendered to a Parliamentary Committee.]—The Crown is not liable upon a claim for services rendered by any one to a committee of the House of Commons, at the instance of such commitee. *Kimmitt* v. *The Queen*, 5 Ex. C.R. 130.

—Wrongful Arrest of Merchant Ship by Crown—Behring Sea Award Act, 1894—Damages—Interest.]—See Behring Sea Award Act, 1894.

II. Prerogative.

(a) *In Judicial Proceedings.*

—Maritime Lien—Crown's Right to Enforce—Bound by ordinary Procedure.]—Where the Crown invokes the aid of a Court of Admiralty to enforce a maritime lien, it is in no higher position than an ordinary suitor, and its rights must be determined in such Court by the rules and principles applicable to all claims and suitors alike. Where the Crown had sued the owners of a steamship for damages to a Government canal occasioned by the ship colliding with the gates thereof, but had obtained judgment subsequent in date to one obtained by the master of the ship upon a claim for wages and disbursements accrued and made after time of such collision, the latter judgment was accorded priority over that held by the Crown.—Semble, where the Crown pursues its remedy by Writ of Extent against the owners of a ship, it can only take under the writ the property of the debtor at the time of its issue. If the debtor has assigned his property before that, the Crown can realize nothing under the writ in respect of the *res*. *The Queen* v. *The City of Windsor*; *Symes* v. *The City of Windsor*, 5 Ex. C.R. 223.

—Crown Suit—Forum—Procedure Available to Crown—Jury Notice.]—The Crown may select as its forum any Court in Ontario; and when it comes into one of such Courts as a suitor the same procedure is open to it as is available in analogous cases between subject and subject: *Attorney-General* v. *Walker*, 25 Gr. 233, referred to. (Per Osler, J.A.) That where before the trial the Court or a Judge has ordered that the action may be tried without a jury, the trial judge cannot direct that, notwithstanding such order, the issues shall be tried by a jury. *The Queen* v. *Gra[illegible]*, 17 Ont. P.R. 165.

—Compensation—Action by Crown for Personal Tax.]—Where the Crown brings an action to recover the amount of a personal tax from a subject, the latter cannot claim compensation by a debt due him from the Crown, which would be equivalent to an action without the consent or fiat of the Lieutenant-Governor. *Fortier* v. *Langelier*, Q.R. 5 Q.B. 107.

—Crown Grant—Adverse Possession—Information of Intrusion—Imperial Statute 21, Jac. 1, c. 14.]—The Imperial Statute 21, Jac. 1, c. 14, is in force in the province of New Brunswick; therefore a grant of land, of which the Crown has been out of possession for twenty years prior to the issue thereof, is invalid, without the title of the Crown being first established by information of intrusion. *Murray* v. *Duff*, 33 N.B.R. 351.

—Prerogative—Res Judicata—Chose Jugée—Effect of when Pleaded against the Crown.]—See Res Judicata.

(b) *In Other Matters.*

See Contracts.
" Negligence.
" Petition of Right.
" Public Works.
" Railways and Railway Companies.

III. Proprietary Rights.

—Constitutional law—Navigable Waters—Title to soil in bed of—Dedication of Public Lands—Presumption of Dedication—User—Obstruction to Navigation—Public Nuisance—Balance of Convenience.—The title to the soil in the beds of navigable rivers is in the Crown in the right of the Provinces, and not in the right of the Dominion: *Dixson* v. *Snetzinger* (23 U.C.C.P. 235) discussed. The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication.—If a province before confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.—An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance, though of very great public benefit and the obstruction of the slightest possible degree. *The Queen* v. *Moss*, 26 S.C.R. 322.

—Ordnance Lands—Chain Reserve along Niagara River.]—The "chain reserve" along the bank of the Niagara River, and the slope between the top of the bank and the water's edge, were not originally set apart for military or ordnance purposes, and on Confederation did not pass to the Dominion Government as "Ordnance Lands," but remained part of the public domain of the province of Ontario. *Commissioners of Niagara Falls Park* v. *Howard*, 23 Ont. A.R. 355.

—Locatee—Partition—Jurisdiction—Declaratory Relief—Judicature Act, R.S.O., c. 44, s. 21, s. s. 7—Statute of Limitations.]—While, when the fee is in the Crown, partition is not the proper form of relief, yet, by sub-sec. 7, s. 21, R.S.O., c. 44, jurisdiction is conferred upon the court to decree the issue of letters patent from the Crown to rightful claimants; and in pursuance of that power, declaratory relief may in a suitable case be given which will work, practically, the result of a partition of the property if the Crown is willing to act upon the judgment of the court.—A locatee of Crown lands left the Province of Ontario in 1868, and was last heard of in 1877. The defendant, a son of his, had resided continuously on the property since 1881, cultivating and improving it, and the plaintiff, a daughter, resided on it also from time to time, till 1877. There were two other children who had not been in possession of the land for more than ten years before action, which was brought in 1895:—Held, that the locatee must be presumed to have been dead by 1884; that the statute of limitations could be invoked because the rights involved upon the record were merely private ones and not affecting the sovereignty of the Crown; that, the the defendant had acquired, therefore, a title by possession as against the children other than the plaintiff, whose claim to one-quarter was as good as his; and that in making the partition the Crown should recognize his right to the improvements. *Pride* v. *Rodger*, 27 Ont. R. 320.

CURATEUR.

See BANKRUPTCY AND INSOLVENCY, II.
" COSTS, III.

CUSTOMS LAWS.

See REVENUE.

DAMAGES.

Defamation—Libel—Damages—Evidence.]—It is not proper in an action for libel to ask a witness whether in his opinion the alleged libel is likely to cause injury to the plaintiffs' business, but the Court refused to interfere because of the admission of the opinion of one witness, where in the charge to the jury special stress was laid on the fact that they were to form their own opinion as to the damages, and the damages allowed were small. *Journal Printing Company* v. *MacLean*, 23 Ont. A.R. 324.

—Extension of Cemetery—Exercise of Legal right.]—Where the extension of a cemetery was duly authorized by law, although such extension was prejudicial to the interests of the owner of land adjoining the cemetery, and depreciated the value of said land, he could not recover damages therefor in the absence of evidence that any legal or conventional right pertaining to him had been invaded. *Robert* v. *Les Curé et Marguilliers de l' Oeuvre et Fabrique de la Paroisse de Notre Dame de Montreal*, Q.R 9 S.C. 489.

—Agent—Liability for Loss—Measure of Damages.]—See PRINCIPAL AND AGENT, I.

—Appeal—Cross-appeal—R. S. O. [1887], c. 44. s. 47, 48—Supreme Court Rule 61.]

See APPEAL, V.

—Public Work—Wharf Property Injuriously Affected—Evidence.]—*The Queen* v. *Robinson*, 25 S.C.R. 692.

—Nuisance—Livery Stable—Offensive Odours—Noise of Horses.]

See NUISANCE.

—Action of Warranty—Negligence—Obstruction of Street—Assessment of Damages—Questions of Fact.]

See APPEAL, I.

—Constitutional Law—Municipal Corporation—Powers of Legislature—License—Monopoly—Highways and Ferries—Tolls—Navigable Streams—By-laws and Resolutions—Intermunicipal Ferry—Disturbance of Licensee—Club Associations, Companies and Partnerships—Northwest Territories Act, R.S.C., c. 50, ss. 13 and 24—B.N.A. Act (1867), s. 92, s.s. 8, 10 and 16—Rev. Ord. N.W.T. (1888), c. 28—N.W. Ter. Ord. No. 7 of 1891-92, s. 4.]

See CONSTITUTIONAL LAW, II (*b*).

—For Wrongful Arrest of Ship.]—

See SHIPPING, IX.

—Landlord and Tenant—Lease—Breach—Repudiation—Damages.]

See LANDLORD AND TENANT, IV.

—Street Railway—Limited Tickets—Expulsion for non-payment of Fare.]

See STREET RAILWAY.

—Street Railway—Negligence—Excessive Speed—Demurrer.]

See PLEADING, II.

—Hospital—Infectious Disease—Communication of—Negligence.]

See NEGLIGENCE, III.

—Measure of—Injury to Land—Cutting Wood—Hypotheque.]

See CAPIAS.

—Collection Agency—Posting Debtors.]

See COLLECTION AGENCY.

—Libel in Plea—Charge of Unprofessional Conduct.]

See LIBEL AND SLANDER, III.

—Bailiff—Escape of Prisoner.]

See NEGLIGENCE, VI.

—Reduction of—Contributory Negligence.]

See MASTER AND SERVANT, IV (*b*).

—Non-Delivery of Goods—Measure of Damages—Proof by Writing.]

See SALE, I (*b*).

—Defamation.]

See LIBEL AND SLANDER.

—Dam—Water and Watercourses—Rivers and Streams Act—Mills and Dams Act—R.S.O., c. 118—R.S.O., c. 120, s. 20.]

See WATER AND WATERCOURSES.

See also PUBLIC WORK.

" RAILWAYS AND RAILWAY COMPANIES.

DEBTOR AND CREDITOR.

I. ACCORD AND SATISFACTION.

Vendor and Purchaser—Agreement for sale of lands—Assignment by Vendee—Principal and Surety—Deviation from terms of Agreement—Giving Time — Creditor depriving Surety of Rights—Secret dealings with Principal—Release of Lands—Arrears of Interest—Novation—Discharge of Surety.]

See PRINCIPAL AND SURETY, I.

—Novation—Release—Joint Debtors.]

See NOVATION.

II. ARREST OF DEBTOR.

—Arrest of Defendant about to Leave Province—Motion to set aside—Order 44, Nova Scotia Rules—Facts to be shown justifying Arrest.]—A defendant in a civil suit was arrested upon an order granted under Order 44, Nova Scotia Rules of Practice. He applied to set aside the order, alleging in an affidavit used in support of such application, that he had not any intention of leaving the province, that his regular business would require him to be there several months, that his home was in Halifax, and that his wife was residing there. The affidavit used by plaintiff in opposing the application was founded upon a statement alleged to have been made by the defendant at the trial, when he was examined as a witness in his own behalf, that it was his intention to make Hamilton, Ontario, his home, and that he was employed by a person doing business there:—Held, that it was necessary for plaintiff to show facts from which it could be inferred with reasonable certainty and clearness that it was the intention of defendant to leave almost immediately after the trial, and not to return again until after judgment would be recovered in the ordinary course. The statement that defendant intended to make Hamilton his future place of residence, in the absence of anything to show when that residence was to begin, having regard to the character of defendant's business, which required him to travel considerably, was insufficient; plaintiff should have made out a strong case to justify the arrest under the circumstances. *Travers* v. *Dimock*, 28 N.S.R. 217.

—Judgment Debtor—Warrant of Commitment—"Backing"—Arrest outside of County—R.S.O., c. 51, ss. 242 and 243.]

See DIVISION COURTS.

III. ATTACHMENT FOR DEBT.

—Creditor's Rights to Property acquired from Debtor prior to Sheriff's levy under Execution—Costs.]—Under attachments issued against an absent and absconding debtor, the sheriff had levied upon a chattel which by a contract of sale between the debtor and one of his creditors prior to the levy had become the property of the latter. There was no direct evidence that the creditor at the time of entering into the contract and taking possession of the chattel, had notice of the writs of attachment, but he had knowledge that the effects of the debtor were likely to be levied on, and there was the further fact that he had taken the chattel out of the sheriff's bailiwick and kept it away therefrom until he had acquired title:—Held, that the plaintiff was entitled to recover as against the sheriff levying subsequently under the attachments:—Held, also, that under the circumstances plaintiff was not entitled to his costs. *Mahon* v. *Crowe*, 28 N.S.R. 250.

—Execution — Exemptions — Chattel ordinarily used in Debtor's occupation.]—

See EXECUTION, III.

" also ATTACHMENT OF DEBTS.

IV. DISCHARGE OF DEBTOR.

—Debtor and Creditor—Security for Debt—Security realized by Creditor—Appropriation of Proceeds—Res judicata.]—If a merchant obtains from a bank a line of credit on terms of depositing his customers' notes as collateral security, the bank is not obliged, so long as the paper so deposited remains uncollected, to give any credit in respect of it, but when any portion of the collaterals is paid it operates at once as payment of the merchant's debt, and must be credited to him. *Cooper* v. *The Molsons Bank*, 26 S.C.R. 611.

—Debtor and Creditor—Joint Debtors—Release of one.]—On the dissolution of a partnership S. carried on the business, and returned to a creditor, without acceptance, a draft drawn on the firm and his own note instead. The note was not paid at maturity, and the creditor drew on S. for the amount. S. did not accept, but sent four of his own notes, representing in the aggregate the same amount. The creditor held the notes, and sent them for collection at maturity. They were not paid, and an action was brought against the former members of the firm on the original account:—Held, that in the absence of evidence that the creditor had expressly agreed to take, and did take, the notes of S. in satisfaction of the debt of the firm, he was entitled to recover from the retiring partner. It was immaterial that he had not expressly reserved his rights against the latter. *Gurney* v. *Braden*, 3 B.C. R. 474.

V. MISCELLANEOUS CASES.

—Agreement—Conditional License to take possession of Goods — Creditor's Opinion of Debtor's incapacity—Bona fides of—Replevin—Conversion.]—F., a trader, having become insolvent, and being indebted, among others, to the firm of T. M. & Co., composed of T. and M., arranged to pay his other creditors 50 per cent. of their claims, T. M. & Co. indorsing his notes for securing such payment, they to be paid in full, but payment to be postponed until a future named day. T. M. & Co. were secured for indorsing by an agreement under seal, by which it was agreed that if F. should at any time, in the opinion of T. M. & Co., or either of them, become incapable of attending to his business, the debt due T. M. & Co. should at once become due and they could take possession of the stock in trade, book debts and property of F. and sell the same for their claim, having first served on F. a notice in writing, signed by the firm name, stating that in their opinion F. was so incapable; and that on a change in the firm of T. M. & Co. the agreement should enure to the benefit of the firm as changed, if it assumed the liabilities of, and took over T.'s indebtedness to, the old firm. This arrangement was carried out, and some time after the date for payment to T. M. & Co., payment not having been made, a bank to which F. was indebted failed, and T. M. & Co., then consisting of T. and N., M. having retired, persuaded F. to assign his book debts to them, and afterwards served on him a notice as required by the agreement, and took possession of his place of business and stock. F. then agreed to act for T. M. & Co. until a certain day after, and resumed possession, but when T. M. & Co. returned on said day he disputed their right and ejected them from the premises. Two days after he assigned to the official assignee for the benefit of all his creditors, and T. M. & Co. issued a writ to replevy the goods from him and the assignee:—Held, affirming the decision of the Court of Queen's Bench, Gwynne, J., dissenting, that F. and the assignee were guilty of a joint conversion of the property replevied. Gwynne, J., held that there was no conversion by either. Held, also, affirming said decision, Gwynne, J., dissenting, that if T. M. & Co. formed an honest opinion that F. was incapable such opinion must govern, though mistaken in point of law or fact, illogical or inconclusive; that they were justified in believing from his loose business methods, waste of time over small matters, financial embarrassments, and acting under the direction of his creditors, that F. was worn down by the worry and generally unfit for business; that the fact that the notice would not have been given if certain demands of T. M. & Co. had been complied with, did not necessarily show *mala fides;* and that the change in the firm of T. M. & Co. did not vitiate the notice, as one of the original members clearly formed the opinion, if one was formed, and conveyed it to F. *Francis* v. *Turner*, 25 S.C.R. 110.

—Principal and Surety—Giving time to Principal—Reservation of rights against Surety.]—Where a creditor gives his debtor an extension of time for payment a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given: *Wyke* v. *Rogers* (1 DeG.M. & G. 408) followed. *Gorman* v. *Dixon*, 26 S.C.R. 87.

—Composition and Discharge—Acquiescence in—New Arrangement of terms of Settlement—Waiver of time clause—Principal and Agent—Deed of Discharge—Notice of withdrawal from Agreement — Fraudulent Preferences.]—Upon default to carry out the terms of a deed of composition and discharge, a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented:

Held, that a creditor who had benefited by the realization of the assets and by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it. The debtor's assent to such repudiation and the grant of better terms to the one creditor would be a fraud upon the other creditors, and as such inoperative and of no effect. *Howland, Sons & Co.* v. *Grant*, 26 S.C.R. 372.

—Debtor and Creditor—Payment by Debtor—Appropriation—Preference—R.S.O. [1887] c. 124.]—A trader carrying on business in two establishments mortgaged both stocks in trade to B. as security for indorsements on a composition with his creditors, and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favor of B., who received, out of the proceeds of the sale of the goods under an order of the court, the balance remaining due on his mortgage. *Horsfall* v. *Boisseau* (21 Ont. A. R. 663). The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors:—Held, affirming the decision of the Court of Appeal, that there was no preference to B. within R.S.O. [1887] ch. 124. s. 2; that his position was the same as if his whole debt, secured and unsecured, had been overdue, and there had been one sale of both stocks of goods, realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set off as to the unsecured debt under sec. 23 of the Act; and that the only remedy

of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off. *Stephens* v. *Boisseau*, 26 S.C.R., 437.

—Debtor and Creditor—Cheque.]—If a cheque is given in payment and the holder procures its acceptance by the bank, the latter then becomes the holder's debtor instead of the drawer. If the bank fails before the cheque is paid the holder must bear the loss. *Légaré* v. *Arcand*, Q.R. 9 S.C. 122.

—Insolvent Estate—Administration Order—Priority.]—C.S.B.C., c. 68, s. 4, does not take away the priority of a creditor who has obtained judgment against an executor prior to the making of the administration decree, but payment out of court may be postponed until the final distribution of the estate, if it appears that the funds may not be sufficient to satisfy prior claims. *Wilson* v. *Marvin*, 3 B.C.R. 327.

—Bill of Sale—Existing Debt—Consideration—Purchase by Creditor.]

See BILLS OF SALE, V.

—Execution—Sales under Execution—Equitable Rights—Unregistered Transfers—Registration—Real Property Act—R.S.C. c. 51; 51 Vic. (D.) c. 20.]

See EXECUTION, V.

—Fraudulent Conveyance—13 Eliz. c. 5—Intention to defeat Action for Tort—Creditor—Preference.]

See FRAUDULENT CONVEYANCE.

—Judgment Debtor—Examination—Answers—Gambling Transactions.]

See JUDGMENT.

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

See MANDATE.

—Principal and Surety—Guarantee Bond—Default of Principal—Non-disclosure by Creditor—

See PRINCIPAL AND SURETY, I.

DECLARATION

See PRACTICE AND PROCEDURE.

DECLARATORY RELIEF.

Locatee—Partition—Jurisdiction—R.S.O. c. 44, s. 21, s.s. 7.]

See CROWN, III.

DECRET.

See SALE, III.

DEDICATION.

Constitutional Law—Navigable Waters—Title to bed of Stream—Crown—Dedication of Public Lands by—Presumption of Dedication—User—Obstruction to Navigation—Public Nuisance—Balance of Convenience.]

See CONSTITUTIONAL LAW, III.

DEED.

Mortgage of Trust Estate—Equity running with Estate—Equitable recourse—Construction of Deed—Description of Lands—Falsa Demonstratio—Water Lots—Accretion to Lands—After acquired Title—Contribution to Redeem—Discharge of Mortgage—Parol Evidence to explain Deed—Estoppel by Deed.]—On the dissolution of the firm of A. & Co. by the retirement of C. D. A. the business was carried on by the remaining partners, T. A. and B. A., on the same premises, which were the property of C. D. A., the continuing partners agreeing to pay off a mortgage thereon as one of the old firm's debts. They neglected to pay, and the property was sold by the sheriff under a foreclosure decree, when they purchased and took a deed describing the lands as in said mortgage, one side being bounded by "the windings of the shore" of Sydney Harbour, and including a "water lot," part of which was known as the "Stone ballast heap," in front of the shore lands. They immediately re-mortgaged the lands by the same description, adding a further or alternative description, and, at the end, the following words:—"Also all and singular the water lots and docks in front of the said lots," although in fact they then owned none except those covered by the description in the deed from the sheriff, and they gave at the same time a collateral bond to the mortgagees for the amount of their mortgage. They then conveyed the equity to C. D. A., giving him a bond of indemnity against the mortgage they had so executed. Some time afterwards T. A. and B. A. acquired by grant certain other water lots in front of the mortgaged property and used and occupied them as part of their business premises along with the mortgaged lands. C. D. A. sold the equity of redemption subject to the mortgage, and T. A. and B. A. settled their obligation under the indemnity bond by a compromise with the assignees of C. D. A., paying $8,000, and obtained their discharge. Upon proceedings being taken by the assignees of the mortgagees to foreclose the mortgage, and against T. A. and B. A. upon the collateral bond, T. A. and B. A. paid the amount due and the foreclosure proceedings were continued for their benefit:—Held, that the liability of the mortgagors was fully satisfied and discharged by the compromise, and as they were afterwards obliged to pay the outstanding encumbrance they were entitled to take an assignment and enforce the mortgage by foreclosure proceedings against the lands.—Per Gwynne, J. The mortgagors were only entitled to foreclosure for the realization of the amount actually paid by them in compromising their liability under the indemnity bond.—Held further, that as the construction of the mortgage depended upon the state of the property at the time it was made, parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be affected: that as there was no specified descriptions or recitals tending to show that any other property was intended to be covered by the mortgage beyond what would be satisfied by including the water lot described as the "Stone ballast heap," the after-acquired water lots would not be charged or liable to contribute ratably towards redemp-

tion of the mortgage; that even admitting that the description was sufficient to include the after-acquired property, such property was not liable to contribute towards payment of the mortgage debt. *Imrie* v. *Archibald*, 25 S. C.R. 368.

— Contract — Subsequent Deed — Inconsistent Provisions.]—C., by agreement of April 6th, 1891, agreed to sell to the Erie County Gas Co. all his gas grants, leases and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On April 20th a deed was executed and delivered to the company transferring all the leases and property specified in said agreement, but containing no reservation in favour of C. such as was contained therein. The Erie Company, in 1894, assigned the property transferred by said deed to the Provincial Natural Gas and Fuel Company, who immediately cut off from the works of C. the supply of gas and an action was brought by C. to prevent such interference:—Held, affirming the decision of the Court of Appeal, that as the contract between the parties was embodied in the deed subsequently executed, the rights of the parties were to be determined by the latter instrument, and as it contained no reservation in favor of C. his action could not be maintained. *Carroll* v. *Provincial Natural Gas and Fuel Company of Ontario*, 26 S.C.R. 181.

—Registry Laws — Registered Deed—Priority over earlier Grantee—Postponement—Notice.]—To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable. *The New Brunswick Railway Co.* v. *Kelly*, 26 S.C.R. 341.

—Delivery—Operation.]—By deed dated the 2nd March, 1887, the defendant, as surviving trustee under a will, conveyed the lands retained by him as the share of the plaintiff's husband, to his brothers and sisters as his heirs and heiresses-at-law. This deed was, on the day of its date, signed and sealed by the defendant, and delivered by him to a person acting on behalf of the grantees, and wholly left the possession of the defendant on that day, and there was nothing to show that he did not intend it to operate immediately:—Held, by the Divisional Court, that it took effect from the day of its date. *Stephens* v. *Beatty*, 27 Ont. R. 75.

—Locus regit actum—Lex domicilii—Lex rei sitæ—Form of Instruments executed abroad.]
See WILL, IV.

— Agreement to charge lands — Statute of Frauds.]
See MORTGAGE, III.

DEFAMATION.

See LIBEL AND SLANDER.

DEFAULT.

See LANDLORD AND TENANT.
" PRACTICE AND PROCEDURE.

DEFENCE EN DROIT.

See PLEADING.
" PRACTICE AND PROCEDURE.

DELAY.

See PRACTICE AND PROCEDURE.
" SALE, I (*c.*)

DELIVERY.

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

DEMURRER.

Arbitration and Award—Expropriation Proceedings—Mandamus—Demurrer.]—See ARBITRATION AND AWARD, II.

—Striking out Pleas — Amendment — Manitoba Queen's Bench Act, [1895]—Rule 318.]—See PLEADING, VI.

—Right of Action against Municipality—Land Improperly Sold for Taxes—Demurrer.]—See TAX SALES.

—Expropriation Proceedings—Demurrer—Estoppel—Waiver.]—See PLEADING, II.

DEPARTMENTAL STORE.

Selling Drugs without Certificate under Pharmacy Act.]—See DRUGGIST.

DEPOSIT.

Inscription in Review—Delay.]
See PRACTICE AND PROCEDURE, XVII (*b.*)

—From Bidders at Sale—Arts. 678, 679 C.C.P.]
See SALE, II.

—In Court—Application to Withdraw—Attorney ad Litem—Mandate.]—See ATTORNEY.

—In Court—Effect of Withdrawal.]
See PRACTICE AND PROCEDURE, XVII (*b.*)

—As Security for Costs.]
See ATTORNEY-GENERAL.

DEPOSITIONS.

—Production of.]
See PRACTICE AND PROCEDURE, XVII (*b.*)

DESCRIPTION OF LANDS.

Mortgage of Trust Estate—Equity running with Estate—Equitable Recourse—Construction of Deed—Description of Lands—Falsa Demonstratio—Water Lots—Accretion of Lands—After-acquired Title—Contribution to redeem—Discharge of Mortgage—Parol Evidence to explain Deed—Estoppel by Deed.]—See DEED.

DESISTEMENT.

Re-commencing Proceedings — Payment of Costs.]—See COSTS, V.

DESTITUTION DE TUTEUR.

See TUTOR.

DEVICE.

Patent of Invention—Illuminant Device—Infringement.]—See PATENTS OF INVENTION.

DEVISE.

Will—Construction of—Executory devise over—Contingencies—"Dying without issue"—"Revert"—Dower—Annuity—Conditions in restraint of Marriage.]—See WILL, II.

—Will—Devise to two sons—Devise over of one's share—Condition—Context—Codicil.]—See WILL, II.

DEVOLUTION OF ESTATES ACT (ONTARIO).

See DOWER.

DICTUM.

Dicta in Previous Cases.

See CHOSE IN ACTION.
" CONTRACT, III. (*a*).

DILATORY EXCEPTION.

Grounds of Motion.]—See PLEADING.

DIRECTORS.

Power of Directors of incorporated Company to repeal By-law.]—See COMPANY, I.

DISBURSEMENTS.

Masters' Wages and Disbursements.]
See SHIPPING, V (*b*).

DISCOVERY.

Examination of Party for Discovery—Criminal Conversation—Alienation of Wife's Affections—R.S.O. c. 61, s. 7.]
See PRACTICE AND PROCEDURE, IX.

DISCRETION.

Security for Costs—Parties—Consent—Amendment.]—See COSTS, III.

—Taxation of Costs—Counsel Fees—Quantum.]
See COSTS, IV (*b*).

—Jury Notice—Striking Out—Local Judge—Powers of—Equitable Issues.]
See PRACTICE AND PROCEDURE, XIV.

DISEASE.

Public Health Act—R.S.O. c. 205, s. 84—Infectious Disease—Lack of Isolation—Damages—Municipal Corporations.]
See MUNICIPAL CORPORATIONS, IX.

DISINFECTION.

Hospital—Liability for damages.]
See NEGLIGENCE, III.

DISORDERLY HOUSE.

Adjoining leased promises—Resiliation of Case.]
See LANDLORD AND TENANT, V.

DISTRACTION DE DEPENS.

See COSTS.

DISTRESS.

Landlord and Tenant—R.S.O. [1887], c. 143, s. 28—Construction of Statute—Distress—Goods of Person Holding "under" Tenant—Estoppel.]—The Ontario Landlord and Tenant Act (R.S.O., [1887], c. 143, s. 28) exempts from distress for rent the property of all persons except the tenant or persons liable. The word "tenant" includes a sub-tenant, assignees of the tenant and any person in actual occupation under or with consent of the tenant:—Held, reversing the judgment of the Court of Appeal, that persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress. *Farwell* v. *Jameson*, 26 S.C.R. 588, reversing 23 Ont. A.R. 517 and 27 Ont. R. 141.

DISTRESS WARRANT.

See CANADA TEMPERANCE ACT.
" JUSTICE OF THE PEACE.
" LANDLORD AND TENANT.

DIVISION COURTS.

Jurisdiction—Prohibition—Promissory Note—Instalments.]—An action was brought in a Division Court for the recovery of the first instalment due upon a promissory note for $400,

payable in three annual instalments. Judgment by default was obtained there, and subsequently the defendant applied for a writ of prohibition against enforcing such judgment, upon the ground that the claim was beyond the jurisdiction of the Division Court:—Held, that the action having been brought for the first instalment before the second became due, was for an amount ascertained by the signature of the defendant upon which an action would lie, and in respect of which the Division Court had jurisdiction. *In re Babcock* v. *Ayers*, 27 Ont. R. 47.

—Garnishee—New Trial—R.S.O. c. 51, s. 145.]—Garnishee proceedings do not come within the provisions of sec. 145 of the Ontario Division Courts Act as to applying for a new trial within fourteen days: *Re McLean* v. *McLeod*, 5 Ont. P.R. 467, followed; *Re Tipling* v. *Cole*, 21 Ont. R. 276, distinguished. *Hobson* v. *Shannon*, 27 Ont. R. 115.

— Garnishee Proceedings—"Cause"—"Action."]—A garnishee summons before judgment in a Division Court may be issued out of the division in which the garnishee lives or carries on business, notwithstanding that the cause of action does not arise, and the primary debtor does not reside or carry on business there.—A garnishee proceeding under sec. 185 of the Division Courts Act is an "action" or "cause" within the meaning of sec. 87, and may be transferred from a wrong to the proper forum, under the last-mentioned section. *Re McCabe* v. *Middleton; the Ancient Order of United Workmen, Garnishees*, 27 Ont. R. 170.

—Judgment Debtor—Commitment—"Backing" Warrant—Arrest Outside of County—R.S.O. c. 51, ss. 242 and 243.]—The proceeding by judgment summons in a Division Court, and its consequences, are of a strictly local character.—A warrant of commitment must be directed to a bailiff of the county in which the proceedings are taken, and is not effectual beyond the limits of the county within which it is issued, nor does the "backing" of the warrant by a magistrate in another county give it any force or validity there. *Re Hendry*, 27 Ont. R. 297.

—Postponement of formal Judgment in Division Court—Appeal to Divisional Court.]—At the trial of a cause in a Divisional Court two of the defendants did not press their defence, and judgment was given against them, although not formally entered until judgment which was reserved against the other defendant was subsequently given against him. Afterwards, the two defendants moved for a dismissal of the action, which was refused on the ground that judgment having been given against them at the trial they were too late:—Held, that they could not appeal to the Divisional Court against the judgment. *Kinnard* v. *Tewsley*, 27 Ont.R. 398.

—Garnishee Plaint—Application to remove into High Court—Judgment against Primary Debtor only—R.S.O., c. 51, s. 79.]

See PRACTICE AND PROCEDURE, V.

DIVISIONAL COURT.

Appeal to Divisional Court from Trial Judge—Stay of Proceedings—Ont. Rule 799 a. (1484).]—A Divisional Court has jurisdiction to allow an appeal from the judgment of a trial judge to be set down upon short notice of motion, and to stay proceedings pending the appeal. *Todd* v. *Rusnell*, 17 Ont. P.R. 127.

—Security for Costs—Appeal to Divisional Court—Judgment at Trial—Ont. Rule 1487 (803).]

See COSTS, III.

—Jurisdiction—Judgment Appealed from—Final or Interlocutory.]—See APPEAL, VII.

— Appeal — Master's Certificate — Divisional Court.]—See APPEAL, I.

—Appeal—Court of Appeal—Judgment on Preliminary Issue—Order of Divisional Court—Leave to Appeal—Ont. Judicature Act, 1895, ss. 72, 73.]—See APPEAL, VIII.

—Appeal—Divisional Court—Order of Judge—Persona Designata.]—See APPEAL, I.

—Appeal from Judge in Chambers granting Interlocutory Order.]—See APPEAL, VII.

—Appeal from Division Court to Divisional Court.]—See DIVISION COURT.

DIVORCE.

Provincial Legislation—Appeal—Jurisdiction of Court.]—See APPEAL, III (*h*).

DOCUMENTS.

Production.]

See PRACTICE AND PROCEDURE, XXII.

DOMICILE.

Maker of Note—Venue.]

See PRACTICE AND PROCEDURE, XXV.

DONATIO MORTIS CAUSA.

In Cause of Death—Promissory Note.]—The gift of a promissory note, payable to the donee or bearer one year after date, is a *don manuel* and legal and valid as such. It does not fall within the prohibition in art. 758 C.C. of gifts to take effect only after death, even where the donor accompanied the gift with the expression of his wish that the note should not be presented for payment until after his death, and the donee promised to comply, and did comply, with the wish so expressed. *Darling* v. *Blakely*, Q.R. 9 S.C. 517.

—Delivery—Symbolical or actual—Time of Gift becoming effective.]—The delivery to the donee of the subject of a *donatio mortis causâ* may be either actual or symbolical, but must be made with the intention of taking effect before the death of the donor. Mere words, however strong, will not make a gift complete. Whe re the cattle, the subject of the gift, were at the time of the gift in the possession of the donee as custodian for the donor, and the donor declared that "the cattle will be where

they are, and will be John's" (the donee):—Held, that the facts did not constitute a good *donatio mortis causâ*.—Semble, that it would have been sufficient if the donor had directed some one to go and make a formal delivery in his name. *McKinnon* v. *McKinnon*, 28 N.S.R. 189.

DONATION.

Creating Substitution before the Code—Revocation of.]—A donation made before the code creating a substitution may be revoked by consent of the donor and donee before the opening of the substitution or its acceptance by the substitutes. *Meloche* v. *Simpson*, Q.R. 5 Q.B. 490.

—To Husband by Ascendants of Wife — Community—Propre—Arts. 1260, 1265 C.C.

See HUSBAND AND WIFE, III.

—By Marriage Contract—Hypothèque of Wife—Arts. 2029, 2044, C.C.]

See HUSBAND AND WIFE, II.

DON MANUEL.

Promissory Note—Gift after Death.

See DONATIO MORTIS CAUSA.

DOWER.

Ontario Devolution of Estates Act—Widow—Dower—Election—Money in Court.]—The provisions of sec. 4, sub-sec. 2 of the Ontario Devolution of Estates Act, requiring a widow who desires to take her interest in the proceeds of her husband's undisposed of real estate in lieu of dower, to signify her election by an attested instrument in writing, must be complied with, notwithstanding that the lands have been sold under an order of the Court at her instance, free from her dower, and the proceeds are in Court. *Re Galway*, 17 Ont. P.R. 49.

—Allowance to Widow in lieu of—Dower—Devolution of Estates Act (Ont.)—Creditors.]—Under the Devolution of Estates Act, land of an intestate was sold by the administrator, with the approval of the official guardian, and, by consent of the widow, freed from her dower, upon the understanding that she was to get a sum in gross in lieu of dower out of the proceeds of the sale. The estate was practically insolvent, and but little was left for the sustenance of the widow and children. The creditors opposed the widow's claim:—Held, that the claim of the widow to a gross sum in lieu of dower should be allowed; and that the creditors should have annual payment on the funded capital—the residue to be distributed on the widow's death. *Re Rose*, 17 Ont. P. R. 136.

—Admeasurement—Report of Commissioners—Reference back.]—Where commissioners to admeasure dower reported that it was difficult and not advisable to set off the widow's dower in the premises, the report was referred back to them to have it stated what the value of her dower was and the amount due for arrears. *In re Cushing*, 1 N.B. Eq. 163.

—Construction of Will—Executory Devise over—Contingencies—"Dying without issue"—"Revert"—Annuity—Election by Widow—Devolution of Estates Act, 49 V. (O.) c. 22—Conditions in restraint of Marriage—"The Wills Act of Ontario," R.S.O. [1887] c. 109, s. 30.]—See WILL, II.

DRAINAGE.

Municipal By-law — Special Assessments — Powers of Councils as to Additional Necessary Works—Ultra Vires Resolutions—Executed Contract.]—See MUNICIPAL CORPORATIONS, II.

—Municipal Corporations—Drainage By-laws—Initiating Township—Contributing Township.

See MUNICIPAL CORPORATIONS, II.

DROIT CONSTITUTIONNEL.

See CONSTITUTIONAL LAW.

DROIT D' ACTION.

See ACTION.

DROIT DE PASSAGE.

See SERVITUDE.

DROIT MUNICIPAL.

See MUNICIPAL CORPORATIONS.

DROITS FUTURS.

See EVOCATION.

DRUGGIST.

—Departmental Store—Selling Drugs without Certificate—Pharmacy Act, R.S.O., c. 151, s. 24.]—The defendant opened a place for selling and dispensing drugs, as a branch of his departmental store, and placed it under the sole control of a duly qualified and registered chemist who sold the drugs in the defendant's name, receiving therefor a weekly salary and a percentage of the profits. The defendant was not a duly qualified and registered chemist:—Held, that defendant was guilty of an offence against sec. 24 of the Ontario Pharmacy Act, R.S.O. c. 151. *The Queen* v. *Simpson*, 27 Ont. R. 603.

"DYING WITHOUT ISSUE."

Will, Construction of—Executory Devise over—Conditional Fee—Life Estate—Estate Tail.]—A testator died in 1856 having previously made his last will, divided into numbered paragraphs, by which he devised his property amongst certain of his children. By the third clause he devised lands to his son F. on attaining the age of 21 years,—"giving the executors power to lift the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of 21 years," and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors." F. attained the age of 21 years and died in 1893, unmarried

and without issue:—Held, that neither the form nor the language used in the will would authorize a departure from the general rule as to construction according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to all the property devised to the testator's sons and daughters by the preceding clauses of the will:—Held, further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee, who thus took an estate in fee subject to the executory devise over. *Crawford* v. *Broddy*, 26 S.C.R. 345.

—Construction of Will—Executory devise over—Contingencies—"Revert"—Dower—Annuity—Election by Widow—Devolution of Estates Act—48 V. (O.) c. 28—Conditions in restraint of Marriage—"The Wills Act of Ontario," R.S.O. [1887] c. 109, s. 30.]—See WILL II.

—Will—Devise to two Sons—Devise over of one Share—Condition—Context—Codicil.]
See WILL, II.

EASEMENT.

Lane—Abandonment—Sale—By Plan.]—The owner of certain property over which a right of way existed, with the knowledge of the owner of the easement, erected a certain building on part of the right of way. There was also a fence existing at the time such building was erected, which closed up a portion of the right of way over which the building did not extend. Fifteen years before action was brought, the owner of the servient tenement, with the knowledge of the owner of the easement, constructed another building on the site of the one so erected, and certain other buildings, which had the effect of completely obstructing the right of way:—Held, that the owner of the dominant tenement could not have the right of way opened: *Mykel* v. *Doyle*, 45 U.C.Q.B. 65, considered.

(Per Maclennan, J. A.)—A conveyance made in pursuance of the Short Forms Act (Ontario), of a lot according to a registered plan upon which a lane is laid out, does not pass any interest in the lane when it has not in fact been opened on the land, and has not been used or enjoyed, with the lot in question. *Bell* v. *Golding*, 23 Ont. A.R. 485.

—Way—Conveyance of "Road"—Effect of.]—M. by deed conveyed to W., amongst other lands, "a road forty feet wide," (describing it) "not included in the above quantity of land":—Held, that this was merely a grant of an easement of the right of way over the land so described, and that the fee in the freehold therein did not pass to the grantee. *Fisher* v. *Webster*, 27 Ont. R. 35.

—Trespass—Damages—Equitable Interest—Municipal By-law—Registration—Notice—R.S.O. [1877] c. 114.]
See MUNICIPAL CORPORATIONS, II.

—Way—Easement—Unity of Possession and Seizin—Lost Grant—Tenancy—Estoppel.]
See WAY.

—Right of Way—Leased Premises.]
See LANDLORD AND TENANT, VI.

ECCLESIASTICAL CORPORATION.

See CHURCH.

ECRIT.

See EVIDENCE.

EGOUT.

See ASSESSMENT AND TAXES.

EJECTMENT.

Evidence of Title—Presumption—27 & 28 V. (Can.), c. 29, s. 1.]—Proof of possession, in an action for the recovery of land, is *primâ facie* evidence of title. If there is no proof of title in another, it is evidence of seizin in fee: *Doe d. Hughes* v. *Dyeball*, Moo. & M. 346; *Doe d. Carter* v. *Barnard*, 13 Q.B. 945; *Eccles* v. *Patterson*, 22 U.C.Q.B. 167, followed.—The plaintiff must succeed upon the strength of his own title, and if it appear that the title is in another, he must fail, although the defendant in possession does not claim under or in privity with that other. Where, in such an action, the plaintiffs claimed to have acquired a title by thirty-five years possession, originally that of a squatter commencing in 1851, on land then patented and in a state of nature, such possession being without the knowledge of the patentee, or those claiming under him:—Held, that in order to bar the right of the patentee under the provisions of the act of the Province of Canada 27 & 28, Vict. c. 29, sec. 1, forty years possession was necessary; and that the plaintiffs could not succeed against the defendant in possession. *Donnelly* v. *Ames*, 27 Ont. R. 271.

ELECTION.

Municipal Elections.]
See MUNICIPAL CORPORATIONS, VI.

—Widow's Election.]—See DOWER.

ELECTRIC WIRE.

See NEGLIGENCE, III.

EMINENT DOMAIN.

See MUNICIPAL CORPORATIONS, VII.
" RAILWAY AND RAILWAY COMPANIES, VI.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

EMPLOYMENT.

Married Woman Carrying on Trade or Business—Husband's "Proprietary Interest" in.]—See HUSBAND AND WIFE, V.

ENGINEER'S CERTIFICATE.

Under Contract for Construction of Public Work.]—See CONTRACT, III (*a*) AND VII.

ENQUETE.

Delay—Production of depositions.]
See PRACTICE AND PROCEDURE, XVII. (*b*.)

ENREGISTREMENT.

See SOULTE.
" SERVITUDE.

ENTREPENEUR.

Responsibility of—Railway Construction.]—See MASTER AND SERVANT.

ENTREPOSITAIRE.

Duty of—Perishable Goods—Agreement—Risk.]
See CONTRACT, I.

EQUITABLE ASSIGNMENT.

Assignment—Equities.]—Where a non-negotiable chose in action is absolutely transferred by writing for value, and the transferee again absolutely assigns it for valuable consideration to another person, who takes without notice, he obtains a valid title to it, free from any latent equity between the original assignor and assignee: *In re Agra and Masterman's Bank*, L.R. 2 Ch., at p. 397, referred to. *Quebec Bank* v. *Taggart*, 27 Ont. R. 162.

—Attorney for Sale of Lands — Advances—Acknowledgment—Notice—Registry Act—Attorney subsequently becoming Purchaser—Lien—Personal obligation.]—The attorney under an irrevocable power from the owner, for the "sale or other disposition" of certain lands, subject to several charges, and who by agreement for value was entitled on the sale thereof, after payment of such charges, to a portion of the surplus, agreed in writing in the event of a sale to pay out of such surplus a further charge on the lands made by the owner subsequent to the giving of the power. The document creating the further charge was registered on the affidavit of a witness thereto, together with the agreement of the attorney to pay and a statement by the plaintiff that he had advanced, and an acknowledgment by the chargee and transfer by her to the plaintiff of the amount of the subsequent charge, the latter documents being registered without proof. Afterwards the owner of the lands conveyed, for value to himself and others, his equity of redemption to the attorney:—Held, that any defect in the proof for registration of the documents was cured by sec. 80 of the Registry Act, R.S.O, c. 114, and that the attorney was affected with notice of the whole transaction:—Held, also, that the plaintiff had a lien upon the lands for the amount of his advance and interest, and that the effect of the transaction as to the further charge was to equitably assign to him so much of the proceeds of the intended sale of the lands as was equal to his advance, and that he was entitled to redeem the encumbrances existing at the time of his advance. Held, further, that the attorney was personally liable for the amount of the further charge. *Armstrong* v. *Lye*, 27 Ont. R. 511.

—Chose in Action — Equitable Assignment—Building Contract—Default—Bill of Exchange.]
See BILLS OF EXCHANGE AND PROMISSORY NOTES, II.

EQUITABLE ISSUES.

Equitable and Legal Issues.]—Semble, that where there are both legal and equitable issues on the record, in the absence of an order under sec. 114 of the Ontario Judicature Act, 1895, a party has the right to have the legal issues tried by a jury: *Baldwin* v. *McGuire*, 15 Ont. P. R. 305, commented on. *Fox* v. *Fox*, 17 Ont. P.R. 161.

EQUITY OF REDEMPTION.

Mortgage—Owner of Equity of Redemption—Agreement between Mortgagee and Purchaser of Mortgaged Premises—Interest—Reservation of Remedies.]—See MORTGAGE, VII.

—Conveyance of Equity of Redemption to one of several Joint Mortgagees.]
See CHOSE IN ACTION.

EQUIVALENT.

—Patent of Invention—Process Patent.]
See PATENT OF INVENTION.

ESCAPE.

Negligence of Bailiff—Damages.]
See NEGLIGENCE, VI.

ESTATE.

See CONTRACT.
" DEED.
" WILL.

ESTOPPEL.

Acquiescence in Judgment—Act of Attorney—Registration of judgment.]—By a judgment of the Superior Court a married woman was

granted separation from her husband with an alimentary allowance. The husband afterwards brought action to recover real property which he had transferred to his wife during the coverture, and obtained a judgment in the court of first instance. After this judgment the attornies for the wife applied for a sum of money deposited in court by the husband as being due to the wife on surrender of the real estate, and they also registered the previous judgment against said property. The wife inscribed in review from the judgment for the return of the real estate:—Held, that the authority of the wife's attorney terminated with the judgment rendered, and as she had given no directions therefor the application to withdraw the money from court was unauthorized, and no acquiescence by her in the judgment:—Held further, that the registration of the judgment was a mere conservatory act which would not have shown acquiescence even if done by the wife herself. *Tabb* v. *Beckett*, Q.R. 9 S.C. 159.

—Question of Fact—Finding of Jury.]—Whether or not there is an estoppel is a question of fact for the jury, and where they found that there was an estoppel the court refused to disturb it. *True* v. *True*, 33 N.B.R. 403.

—Foreign Judgment—Res Judicata—Judgment Obtained after Action begun—R.S.N.S. (5 ser.) c. 104, s. 12.]

See FOREIGN JUDGMENT.
" RES JUDICATA.

— Fire Insurance — Contract — Termination — Notice—Statutory Conditions — Waiver—Estoppel.]—See INSURANCE, II.

—Trustees and Administrators—Fraudulent Conversion—Past due Bonds—Debentures Transferable by Delivery—Equity of Previous Holders—Implied Notice—Innocent Holder for Value.]

See PLEDGE.

—Estoppel by Deed.]—See DEED.

—Canada Temperance Act—Search Warrant—Magistrate's Jurisdiction—Constable—Justification of Ministerial Officer—Goods in Custodiâ Legis—Replevin—Res Judicata—Judgment Inter Partes.]

See CANADA TEMPERANCE ACT.

—Nova Scotia Probate Act—R.S.N.S. (5th ser.) c. 100 and 51 Vic. (N.S.) c. 26—Executors and Administrators—License to Sell Lands—Res Judicata.]—See RES JUDICATA.

—Ontario Trustee Act [1891] s. 13, s.s.1—Balance in Trustee's hands—Acknowledgment—Estoppel.]

See TRUSTS AND TRUSTEES.

—Tenancy—Unity of Possession—Lost Grant—Tenancy—Estoppel.]—See WAY.

—Will—Widow—Dower—Estoppel.] -See WILL.

—Divisional Court — Judgment Directing New Trial—Estoppel where not Appealed from.

See DIVISIONAL COURT.

—Arbitration and Award—Effect of Submission—Estoppel.]—See ARBITRATION AND AWARD, IV.

—Bill of Sale—Fraud Against Creditors—Good Faith—Locus Standi.]

See BILLS OF SALE, IV. (*b.*)

—Arbitration and Award—Expropriation—Estoppel—Waiver—Municipal Law.]

See ARBITRATION AND AWARD, II.

—Plea of—Particulars.]—See PLEADING, IV.

—Bill of Sale—Fraud.]

See BILLS OF SALE, IV (*b*).

EVIDENCE.

I. ADMISSIBILITY.

—Negligence of Servant—Deviation from Employment—Resumption — Contributory Negligence—Infant.]—If in a case tried without a jury evidence has been improperly admitted, a Court of Appeal may reject it and maintain the verdict if the remaining evidence warrants it. *Merritt* v. *Hepenstal*, 25 S.C.R. 150.

—Proper Question — Defamation — Libel — Evidence—Witness.]—It is proper to ask witnesses in a libel action, who, in their opinion, is aimed at by the libel in question. It is not proper in such an action to ask a witness whether, in his opinion, the alleged libel is likely to cause injury to the plaintiff's business, but the court refused to interfere because of the admission of the opinion of one witness, when in the charge to the jury special stress was laid on the fact that they were to form their own opinion as to the damages, and the damages allowed were small. *Journal Printing Company* v. *Maclean*, 23 Ont. A.R. 324.

—Will—Letters Probate—R.S.O., cc. 61 and 108—Testamentary Capacity.]—Neither the provisions of sec. 38 of R.S.O. c. 61, nor those of sec.— of R.S.O. c. 108, operate so as to make letters probate of a will issued by a court of competent jurisdiction conclusive evidence, so far as real estate is concerned, of the testamentary capacity of the testator, and in an action against the devisee of certain lands under the will to recover the amount of a legacy charged thereon, the defendant is entitled to show want of testamentary capacity on the part of the testator. *Sproule* v. *Watson*, 23 Ont. A.R. 692.

—Notarial Act — Proof of Attendant Circumstances—Variation of Terms.]—A party will be permitted to prove the circumstances under which a notarial *acte* has been passed to enable the judge to determine whether or not it truly represents the intention of the parties to it.

But where an *acte* contains an admission of receipt of money the party making such admission cannot give evidence as to the reimbursement of such money, of which no mention is made in the *acte*. *Hudon* v. *Hudon*, Q.R. 9 S.C. 162.

—**Witness—Evidence by Defendant on his own Behalf—Commercial Matter.**]—An action for damages in consequence of plaintiff's name having appeared as a debtor of defendant in a list published by a commercial agency is based on a commercial transaction, namely, the sale and delivery of goods and collection of their price, and defendant may give evidence on his own behalf. *Gauvreau* v. *Bernard*, Q. R. 9 S. C. 323.

—**Rev. Stats., Nova Scotia, c. 107—Evidence of person making Claim against Estate of Deceased Person.**]—Where a claim was made against the estate of a deceased person for services rendered deceased in his life-time, and the claim was allowed by the Surrogate Judge of Probate, upon the evidence of the claimant:—Held, that under Rev. Stats., c. 107, the evidence of the claimant was inadmissible, and should not have been received. *In re Estate of John Condon*, 28 N.S.R. 208.

—**Will—Proof of.**]—Held, per Tuck, J., under 55 V., c. 11, s. 2 (N.B.), a will proved before a notary public and registered as a conveyance while the testator is alive, was properly admitted in evidence in an action of trespass. *Murray* v. *Duff*, 33 N.B.R. 351.

—**Negligence—Injury by—Other Accidents from same cause.**—In an action for negligently obstructing a public street with a hydrant and posts, whereby plaintiff was injured, evidence of other accidents from the same cause was properly admitted. *Glidden* v. *the Town of Woodstock*, 33 N.B.R. 388.

—**Transfer of Property—Absolute in form—Evidence of right to Redeem.**]—Evidence is admissible to show that notwithstanding a transfer of property is absolute in its terms, it was intended that the transferor should have a right to redeem, but such evidence must be of the clearest and most conclusive character to override terms of the deed. *McLeod* v. *Weldon*, 1 N.B. Eq. 181.

—**Interpleader Issue—Garnishment—Assignment for Creditors.**]—Interpleader issue to decide the title to a sum of money claimed by the plaintiff under an assignment from H. for the benefit of his creditors as against the defendant, a judgment creditor of H., who claimed the money under a garnishing order attaching it in the hands of C., who had paid it into court:—Held, that evidence of the admissions of the judgment debtor was not admissible as against the garnishing creditor either on account of any privity between them, or as evidence of declarations made by a party against his own interest (there being no proof of his death); and that, as there was no other evidence to show that the money in question belonged to the estate of H., a verdict should be entered for the defendant for costs. *Bertrand* v. *Heaman*, 11 Man. R. 205.

—**Partnership—Agency—Misdirection.**]—In an action declaring against B. and M. as partners on promissory notes, signed by B., the trial judge directed the jury that the only question for consideration in reference to M.'s liability was whether or not she was a partner:—Held, a misdirection; that the liability depended on a mere question of agency, and that M. could only be liable on the supposition that B. was her mandatary to sign the note:—Held, further, that evidence of statements by B. before the trial that M. was his partner were inadmissible, as it was founded on the implied authority of B., arising from the relationship, to make such statements, which was the matter in issue. *British Columbia Iron Works Co.* v. *Buse*, 4 B. C.R. 419.

—**Rejection of Evidence by Arbitrators—Revocation of Submission to Arbitration.**

See ARBITRATION AND AWARD, I (b).

—**Municipal Law—By-law—Ultra vires—Uncertainty—Delegation of Powers—Evidence—Directory or Imperative Requirements of Statutes.**]

See MUNICIPAL CORPORATIONS, II *(c)*.

—**Execution of Will—Attesting Witness—Letters after Execution—Admissibility.**]—

See WILL, V.

II. CORROBORATION.

—**R.S.O. c. 61, s. 10—Material Corroborative Evidence—Action by Administratrix.**]—Sec. 10 of R.S.O. c 61, enacts that in any action by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict or judgment on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other "material evidence":—Held, that such "material evidence" may be either direct or circumstantial. *Green* v. *McLeod*, 23 Ont. A.R. 676.

III. EXPERT TESTIMONY.

—**Warranty—Defect in construction—Satisfaction by Acceptance and User—Variation from design—Demurrage—Evidence—Onus of Proof—Expert testimony—Concurrent Findings.**]—In an action where the defendants counterclaimed damages caused by the defective construction of a boiler for their steamer, which had collapsed:—Held, reversing the decision of the Supreme Court of British Columbia, that conclusive effect should not be given to the evidence of witnesses, called as experts as to the cause of the collapse, who were not present at the time of the accident; whose evidence was not founded upon knowledge, but was mere matter of opinion; who gave no reasons and stated no facts to show upon what their opinion was based, and where the result would be to condemn as defective in design and faulty in construction all boilers built after the same pattern, which the evidence showed were in general use. The judgment therefore allowing the counterclaim was set aside, though against the concurrent findings of two courts below. *The William Hamilton Manufacturing Co.* v. *The Victoria Lumbering and Manufacturing Co.*, 26 S.C.R. 96.

IV. Foreign Commission.

—Indictable Offence—Foreign Commission—Criminal Code. s. 683.]—An order for a commission under s. 683 of the Criminal Code, to take the evidence of any person residing out of Canada, who is able to give material information relating to an indictable offence, or relating to any person accused thereof, may be made at any time after an information has been laid charging such offence, and such evidence may be used at any stage of the inquiry at which evidence may be given. *The Queen* v. *Verral*, 17 Ont. P.R. 61, affirming 16 Ont. P.R. 444.

—Evidence—Affidavit.]—An affidavit for an order to examine witnesses abroad must state the names of the witnesses proposed to be examined. *Hermann* v. *Lawson*, 3 B.C.R. 353.

V. Presumptions and Onus of Proof.

—Evidence—Presumptions—Omnia Præsumuntur Contra Spoliatorem.]—St. L. filed a petition of right to recover from the Crown the balance alleged to be due on the contract for certain public works. On the hearing it was shown that certain time books and the original documents from which his accounts had been made up and also his books of account had disappeared. The judge of the Exchequer Court found as a fact that these books and documents had been destroyed in view of proceedings before a commission appointed some time prior to the filing of the Petition of Right to inquire into the manner in which the works done under the contract had been carried on, and he dismissed the petition:—Held, reversing the judgment of the Exchequer Court, that the evidence did not warrant the finding that the documents had been destroyed with a fraudulent intent and to prevent inquiry; that all that could have been proved by what was destroyed had been supplied by other evidence; and that the rule *omnia præsumuntur contra spoliatorem* did not justify the learned judge in assuming that if produced the documents destroyed would have falsified St. L.'s accounts, the evidence on the trial showing instead that the accounts would be corroborated. *St. Louis* v. *The Queen*, 25 S.C.R. 649.

—Master and Servant—Negligence—"Quebec Factories Act"—R.S.Q. arts. 3019-3053—art. 1503 C.C.—Civil Responsibility—Accident, Cause of—Conjecture—Evidence—Onus of Proof—Statutable Duty, Breach of—Police Regulations.]—The plaintiff's husband was accidentally killed whilst employed as engineer in charge of defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial, and left the manner in which the accident occurred a matter to be inferred from the circumstances proved:—Held, that in order to maintain the action it was necessary to prove by direct evidence, or by weighty, concise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed. *The Montreal Rolling Mills Co.* v. *Corcoran*, 26 S.C.R. 595.

—Constitutional Law—Navigable Waters—Title to Bed of Stream—Crown—Dedication of Public Lands by—Presumption of Dedication—User—Obstruction to Navigation—Public Nuisance—Balance of Convenience.]

See Constitutional Law, III.

—Action for Recovery of Land—Possession—Evidence—Presumption.]—See Ejectment.

—Ontario Workmen's Compensation for Injuries Act, 1892—"Superintendence"—Evidence of Negligence—Onus.]

See Master and Servant, IV (*a*).

VI. Varying and Explaining Written Documents.

—Parol Evidence—Variation of written Agreement—New Trial.]—Defendant agreed in writing to accept a specified quantity of flour and middlings in payment of two acceptances by plaintiff. This agreement was carried out by plaintiff. Plaintiff was subsequently sued by an indorsee on one of the acceptances, and was obliged to pay the same. This action was brought to recover from the defendant the amount of the acceptance so paid by plaintiff. At the trial defendant offered evidence of an oral agreement between him and plaintiff at the time the written agreement was made to the effect that the goods were not to be accepted as payment in full of the said acceptances, but only in part payment thereof. The trial judge admitted such evidence:—Held, that he erred in so doing.—*Seeley* v. *Cox*, 28 N.S.R. 210. Affirmed on appeal to Supreme Court of Canada, May 6th, 1896.

—Will—Capacity of Testator—Rejection of Evidence—Declarations inconsistent with Will—Discretion.]—At the trial of an issue touching the testamentary capacity of the testator, after evidence in rebuttal had been put in, evidence was tendered to prove declarations made by deceased a year or two before the date of the will, and inconsistent therewith. This evidence was rejected by the trial judge on the ground that it should have been produced when the party offering it was making out his case:—Held (per Henry, J.), that this was a matter clearly within the discretion of the judge, and, therefore, was not a valid ground for appeal. *Re Estate of John A. P. McLellan*, 28 N.S.R. 226. Affirmed, 26 S.C.R. 646.

—Parol Agreement conflicting with Written Statement—Broker's "Bought Notes."]—Plaintiff employed defendants to purchase certain shares on the Montreal Stock Exchange on margin. He knew that defendants would employ a broker in Montreal as their agent, and that the latter would make the actual purchases, advance the balance of the money required, and hold the shares in his own name as security. He paid the defendants certain sums as margins on the purchases made, and afterwards brought an action against defendants to recover these sums as money paid on a consideration which had wholly failed, and relied on the terms of the "bought notes" received from defendants, commencing: "We have this day bought for your account shares

stock," as evidence that the defendants should have purchased and held the shares in their own names:—Held, that evidence of the true agreement between the parties could be given, notwithstanding the language of the "bought notes," and that the plaintiff could not recover, although the defendants had not acquired any of such shares. *Jackson* v. *Allan*, 11 Man. R. 36.

—**To rectify written Agreement — Guaranty — Mistake.**]—See CONTRACT, III (*b*).

—**Sale of Goods—Parol Evidence received in variation of written Agreement.**]—See SALE, II

VII. MISCELLANEOUS CASES.

—**Action—Bar to—Foreign Judgment—Estoppel—Res Judicata—Judgment obtained after Action begun—R.S.N.S. (5 ser.) c. 104, s. 12, s.s. 7; orders 24 and 70, rule 2; order 35, rule 38.**]—The provision of R.S.N.S. (5 ser.) c. 104, order 35, rule 38, that evidence of a judgment recovered in a foreign country shall not be conclusive in an action on such judgment in Nova Scotia, of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favor of the defendant in Nova Scotia who has brought an unsuccessful action in a foreign court against the plaintiff. *Law* v. *Hansen*, 25 S.C.R. 69.

—**Contract, Construction of—Inconsistent Conditions — Dismissal of Contractor — Architect's powers—Arbitrator—Disqualification—Probable bias—Evidence, rejection of—Judge's Discretion as to Order of Evidence.**]—A contract for the construction of a public work contained the following clause: "In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows; "In case the works from the want of sufficient or proper workmen or materials are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion (with the consent in writing of the Court House Committee, or Commission, as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor":—Held, that this last clause was inconsistent with the above clause of the contract, and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the committee.—At the trial the plaintiff tendered evidence to show that the architect had acted maliciously in the rejection of materials, but the trial judge required proof to be first adduced tending to show that the materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question whether malice was necessary to be proved, and if necessary what evidence would be sufficient to establish it. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for the defendants:—Held, that this ruling did not constitute a rejection, but was merely a direction as to the marshalling of evidence within the discretion of the trial judge. *Neelon* v. *City of Toronto*, 25 S.C.R. 579.

—**Rules of Evidence—"The Canada Evidence Act, 1893."**]—Gambling instruments and certain moneys were seized in a gaming-house under a warrant issued under sec. 575 of the Criminal Code, and confiscated by the judgment of a Police Magistrate sitting in the city of Montreal. An action was brought against the Attorney-General of Canada for the recovery of the money so seized and confiscated:—Held, that in an action to revendicate the moneys so seized the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf. *O'Neil* v. *The Attorney-General of Canada*, 26 S.C.R. 122.

—**Railway Company—Negligence—Sparks from Engine or "Hot-box"—Damages by Fire—Evidence—Burden of Proof—Art. 1053 C.C.—Questions of fact.**]—In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was no sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shown that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding. *Sénésac v. Central Vermont Railway Co.*, 26 S.C.R. 641.

—**Summary Conviction under R.S.O. c. 148, s. 45—Illegally practising Medicine.**]—Upon a motion to make absolute a rule *nisi* to quash a summary conviction by a magistrate under R.S.O., c. 148, s. 45, for illegally practising medicine for hire, it appeared that when the complainant went to the defendant he told him his symptoms; that then he did not know what was the matter with himself; that he left it to the defendant to choose the medicine, after learning the symptoms; and that, upon the advice of the defendant, he took his medicine, went under a course of treatment extending over some months, and paid the price agreed upon:—Held, that there was evidence to support the conviction: *Reg.* v. *Coulson*, 24 Ont. R. 246, distinguished; *Reg.* v. *Howarth*, 24 Ont. R. 561, followed. *The Queen* v. *Coulson*, 27 Ont. R. 59.

—**Sale of Land—Declarations as to Property Rights—Interrogatories upon Articulated Facts—Transaction.**]—W. D. brought an action against his son L. D. to revendicate certain property which the latter held as an heir of his mother. The father denied the mother's right

to said property and no title was produced, but he invoked, among other things, admissions by his son resulting from his failure to answer interrogatories upon articulated facts (*sur faits et articles*) and a declaration that the son was heir of his mother, who had left the immovable in question in her succession, this declaration having been inserted in an *acte* of sale of the inherited rights of the son to his father, accepted by the latter, which *acte*, however, had been passed to put an end to all troubles and avoid litigation between the father and son on the subject of this property and was subsequently annulled by the Court:—Held, that the declarations in the *acte* of sale made by the father constituted no proof against the son, who had no interest in opposing them since his father acquired all his rights, and the *acte* being, moreover, a *transaction* between the parties, intended to put an end to their mutual contestations and to vest in the father the rights of property which were contested against him by the son:—Held, further, that the fact that interrogatories upon articulated facts had been declared established because of the failure of a party to answer, could not be invoked in another cause as constituting an admission by such party. *Durocher* v. *Durocher*, Q.R. 5 Q.B. 458, reversing 9 S.C. 443. Affirmed by the Supreme Court of Canada on May 1st, 1897.

—Company—Agreement—Proof of.]—A contract between two companies, applying to transactions in the past can only be proved by a resolution of the directors or by an agreement in writing, and not by the mere verbal evidence of the president of the company sought to be charged. *Young* v. *Consumers' Cordage Co.*, Q.R. 9 S.C. 471.

—Decision of Harbour Commissioners—Appeal from—Mode of Proof—Stenographer.]—As the law does not prescribe the mode of taking the depositions of witnesses in proceedings by the Quebec Harbour Commissioners against pilots, it is necessary that the proof should be by writing and *en forme probante*. As the taking of the depositions by stenography is not authorized, that mode is not *probant*. *Lachance* v. *Quebec Harbour Commissioners*, Q.R. 9 S.C. 542.

—Foreign Judgment—Proof of—Order XIV. (B.C.)]—Order XIV., which allows affidavits to be used instead of oral evidence at a trial, does not supersede the rules of evidence requiring foreign judgments to be proved only by documents duly authenticated. *Denny* v. *Sayward*, 4 B.C.R. 212.

— Fire Insurance — Contract — Termination — Notice—Waiver—Estoppel.]

See INSURANCE, II.

—Fraudulent Statement—Proof of Fraud—Presumption—Assignment of Policy—Fraud by Assignor—Reversal on Questions of Fact.]

See INSURANCE, II.

—Public Work—Wharf Property injuriously affected—Damages.]—*The Queen* v. *Robinson*, 25 S.C.R. 692.

—Statute of Frauds—Memorandum in Writing—Repudiating Contract by.]

See FRAUDS, STATUTE OF.

—Will—Execution of—Testamentary Capacity.]

See WILL, IV.

—Distress for Rent and Interest—Mortgage—Attornment—Evidence—Admission.]

See MORTGAGE, II.

—Maritime Law—Salvage Agreement—Validity—Undue Influence—Quantum meruit—Evidence.]

See SHIPPING, VII.

EVOCATION.

Future Rights—Evocation.]—An action in the Circuit Court on a promissory note for $25, part of the price of a piano sold for $320, was transferred to the Superior Court as affecting future rights of the parties. *Bernard* v. *Ouellet*, Q.R. 9 S.C. 318.

—Future Rights—Relief Asked.]—A demand before the Circuit Court, in which the plaintiff claimed $60, and concluded by asking that he be declared a member and secretary of the defendant company, is *évocable* to the Superior Court as affecting future rights. *Paquin* v. *Société Bienveillante de St. Roch*, Q.R. 9 S.C. 405.

EXCEPTION A LA FORME.

See PRACTICE AND PROCEDURE, XVII (*b*).

EXCEPTION DECLINATOIRE.

See PRACTICE AND PROCEDURE, XVII (*b*).

EXCHEQUER COURT OF CANADA.

Revenue Law—R.S.C. c. 34, s. 334—Infringement—Penalty—Jurisdiction of Exchequer Court—The Colonial Courts of Admiralty Act, [1890] (Imp.)]—The jurisdiction conferred upon the Vice-Admiralty Courts in Canada by sec. 113 of The Inland Revenue Act (R.S.C. c. 34) in respect of actions for penalties prescribed by such Act, is not disturbed by The Colonial Courts of Admiralty Act, 1890, (Imp.) The latter Act (s. 2, s.s. 3) vests the jurisdiction of the Vice-Admiralty Courts in any colonial court of Admiralty, and by The Admiralty Act, 1891, the Parliament of Canada made the Exchequer Court the Court of Admiralty for the Dominion, and by sec. 9 thereof conferred upon the Local Judges in Admiralty all the powers of the Judge of the Exchequer Court with respect to the Admiralty jurisdiction thereof. *The Queen* v. *Annie Allen*, 5 Ex.C.R. 144.

—Unregistered Mortgage—Action by Mortgagee against freight and cargo—Jurisdiction.]

See SHIPPING, IV.

EXECUTIONS.

I. Creditors' Relief Act.

Creditors' Relief Act—Fund in Court—Distribution.]—The surplus of the sale of mortgaged lands had been paid into Court by the mortgagees, and certain execution creditors who, at the time of the sale, had executions against the lands of the mortgagor in the hands of the sheriff, applied for an order for payment of their claims out of the fund in Court:—Held, that the fund in Court should be paid to the sheriff for distribution in accordance with the provisions of sec. 24 of the Creditors' Relief Act, R.S.O., c. 65: *Dawson* v. *Moffatt*, 11 Ont. R. 484, followed. *Re Bokstal*, 17 Ont. P.R. 201.

II. Equitable Execution.

—Equitable Execution—Pending Action—Unliquidated Damages.]—See Receiver.

III. Exemptions.

—Trade Exemptions—Abandonment of Trade—R.S.O. c. 64, s. 2.]—Where under the provisions of s. 2, sub-sec. 6 of R.S.O. c. 64, certain tools of trade are exempted from seizure under execution, the exemption ceases on the execution debtor abandoning the trade. Such abandonment is a question of fact. Semble: That an execution debtor may while the exemption continues sell a chattel exempt under the said section, provided the sale be made in good faith and without fraudulent purpose. *Wright* v. *Holinshead*, 23 Ont. A.R. 1.

—Goods Seized—Exemptions—Choice by Debtor—Art. 556, C.C.P.]—In execution of a judgment against a carter the bailiff left with him a horse and a carriage and seized all his other effects, which were sold. After the sale the bailiff seized another carriage which had been left with another person for repairs and of which he knew nothing at the time of the first seizure. The debtor then made a declaration that he would choose and keep the carriage last seized, and offered to return the one formerly left with him to be sold in its place. The bailiff having refused this offer, the debtor signified to his creditor an opposition *afin d'annuler*:—Held, that the debtor, though he had stated to the bailiff in regard to the carriage left at the first seizure that he had nothing but that to enable him to gain a living, had not exercised the choice accorded to him by art. 556 C.C.P., and was entitled to make such choice when the second carriage was seized.—The signature of the debtor to the *procès verbal* does not establish a choice by him, and if there is no choice the bailiff should seize all the effects, leaving it to the debtor to exercise his rights before the sale, but at his own expense. *Filion* v. *Chabot*, Q.R. 9 S.C. 327.

—Exemption from Seizure—Notice of—Homestead Act [1888], s. 10.]—By sec. 10 of The Homestead Act, [1888] goods and chattels of a debtor at his option, to the value of $500, are exempt from forced seizure or sale:—Held, that to get the benefit of this provision a debtor must within a reasonable time notify an assignee who has lawfully taken possession of his goods. He cannot claim the exemption after conversion unless prevented by act of the assignee from doing so before. *Pilling* v. *Stewart*, 4 B.C.R. 94.

—Homestead Act—Exemption from Seizure—Book-debts.]—Book-debts are not exempt from forced seizure and sale by process under C.S. B.C. [1888], c. 57, s. 10. *Hudson's Bay Co.* v. *Hazlett*, 4 B.C.R. 450.

IV. Issuing Execution.

—Seizure of Immovable — Opposition Afin d' Annuler—Amount of Judgment—Interest and Cost.]—The amount of the judgment (*somme du jugement*) which, by art. 1, 102 C.C. must exceed forty dollars to permit of execution against immovables, means the amount to be levied in virtue of the judgment, and comprises interest and costs as well as the debt. Thus where the judgment ordered defendant to pay $39 and costs, which were afterwards taxed at $9, the creditor was allowed to seize an immovable on execution. *Tapp* v. *Turner*, Q.R 5 Q.B. 538.

V. Priority over other Creditors.

—Real Property Act—Registration—Execution—Unregistered Transfers — Equitable Rights—Sales under Execution—R.S.C. c. 51; 51 V. (D.) c. 20.]—The provisions of sec. 94 of the Territories Real Property Act (R.S.C. c. 51) as amended by 51 Vict. (D.) c. 29, do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees, but merely protect the lands from intermediate sales and dispositions by the execution debtor. If the sheriff sells, however, the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers. *Jellett* v. *Wilkie*. *Jellett* v *the Scottish Ontario and Manitoba Land Co*. *Jellett* v. *Powell*. *Jellett* v. *Erratt*, 26 S.C R., 282.

—Seizure of Goods to satisfy Judgment—Diligence.]—Where a judgment creditor had seized goods of his debtor and advertised them for sale on a certain day, and another creditor subsequently seized the same goods and attempted to sell them on the same day but at an earlier hour, the Court ordered the sheriff's officer to suspend all proceedings in the latter sale until the former had terminated. *Monfort* v. *Rivard*, Q.R. 9 S.C. 64.

—Statute—C.S.B.C. [1888], c. 42, s. 21—Receiver—Execution.]—By C.S.B.C. [1888], c. 42, s. 21, any clerk, servant, etc., of a person against whom, or whose goods or lands a writ of fi. fa. issues, may on application to a judge in cham-

bers, be paid out of the proceeds in priority to the execution creditor:—Held, that the appointment of a receiver to the estate of the judgment debtor at the instance of the creditor does not entitle the clerk or servant to such payment. *Aspland* v. *Hampson*, 3 B.C.R. 299.

—**Execution Act—Priority of Payment—Wages.**]—Where a judgment was obtained against the administratrix of an estate, wages due from her personally for management of the estate property, will not be paid in priority to the judgment creditors, under C.S.B.C. c. 42, s. 211. *Gilmour* v. *Gilmour*, 3 B.C.R. 397.

—**Creditor's Rights to Property Acquired from Debtor Prior to Sheriff's Levy under Execution—Costs.**]—See DEBTOR AND CREDITOR, III.

—**Crops—Sale of Land—Execution—Priority.**]
See SALE, III (*a*).

VI. SPECIAL MATTERS.

—**Free Grant Lands in Ontario—Fi. fa. upon a Judgment Recovered against Locatee prior to Location—Devisee—Sale—R.S.O., c. 25.**]—The vendors were executors and devisees in trust under a will of F., who was in his life time the patentee in fee of certain lands under the Free Grant and Homesteads Act, R.S.O., c. 25, and they had contracted to sell them. In making title it was discovered that a writ of fi. fa. against lands on a judgment recovered against F. in respect of a debt he had incurred before he had located the lands, was in the sheriff's hands, and the question was whether such writ attached upon the lands under the provisions of sec. 20 of the Act:—Held, that the execution in question being in respect of a debt incurred before the period of "twenty years next after the date of location," as mentioned in the said section, it did not stand in the way of the vendors conveying the land free from incumbrance. *Re Beatty and Finlayson*, 27 Ont. R. 642.

—**Opposition—Delay for Return.**]—When an opposition is pending to a seizure the writ of execution is not exhausted by the expiration of the delay fixed for its return. *Leboutillier* v. *Carpenter*, Q.R. 9 S.C. 530.

—**Loss of Writ.**]—Where a writ of execution after renewal was lost in transmission to the sheriff through the mail, an order was made for the issue of a new writ, *nunc pro tunc*, to bear the same indorsements and evidence of renewal as the original writ,—the order further directing that the substituted writ should have the same force and effect as the original. *Fairchild* v. *Crawford*, 11 Man. R. 330.

—**Sheriff's Sale—Registry of Judgment.**]—Where a judgment was not registered before a writ of fi. fa. against lands thereon was delivered to the sheriff, the sale of the judgment debtor's land under said writ was a nullity. *Spiers* v. *The Queen and Corbould*, 4 B.C.R. 388.

—**Ca. sa.—Arrest on—Modes of enforcing Judgment.**]—See CAPIAS.

—**Costs—Taxation—Opposition to.**]
See COSTS, IV.

—**Præcipe for—Act of Officer of Court.**]
See PRACTICE AND PROCEDURE, XXVII.

—**Tenants in Common—Execution against one.**]
See TENANT IN COMMON.

VII. STAYING AND SETTING ASIDE.

—**Seizure of Several Articles—Debt Satisfied by Sale of Part—Opposition.**]—Where two pianos were seized under execution, and the sale of one produced sufficient to satisfy the debt and costs, an opposition to the seizure of the other was dismissed as unnecessary, the bailiff not being allowed to proceed further with the sale, and the opposant not having proved any interest. *Cyr* v. *Sarazin*, Q.R. 9 S.C. 407.

EXECUTORS AND ADMINISTRATORS.

Payment of Claim against Estate—Death of Administrator—Administration de bonis non—Unadministered Asset.]—If an administrator, on competent advice, pays a claim *bonâ fide* made against the estate, the money paid is not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator *de bonis non* a right of action to recover it back. *Mayhew* v. *Stone*, 26 S.C.R. 58.

—**Payments by—Promissory Notes—Consideration—Gifts—53 V. (D.) c. 33—R.S.O. c. 110, s. 31.**]—Shortly before his decease the testator made and delivered to the payees mentioned therein two promissory notes. There was some question as to consideration for the notes; the evidence showing that the testator insisted upon signing them, and as to one of them said he would pay the money if he got better, and if not his executors would. There was a memorandum at the foot of the other as follows: "If this note is unpaid at my decease, my executors are requested to pay it." The Court, however, found that each of the notes was made without consideration, and was intended as a gift to the payee. The executors paid the notes:—Held, that the payment of such notes by the executors, with notice of the want of consideration, could not be treated as protected either by the *primâ facie* presumption of a valuable consideration raised by the 30th section of the Bills of Exchange Act, 53 Vict. (D.), or by the provisions of sec. 31 of R.S.O., c. 110, making it lawful for "executors to pay any debts or claims upon any evidence that they may think sufficient." *Re Williams*, 27 Ont. R. 405.

—**Distribution by Administratrix pari passu—Action to Recover Excess—Locus Standi—R.S.O., c. 110, s. 36.**]—An administratrix duly published the notice required by the statute for filing claims against the estate of her deceased husband. After the expiry of the period limited for such purpose, she assumed from the claims then filed that the assets of the estate were sufficient to pay all creditors, and she paid to a certain creditor a large claim

against the estate in full. Subsequently further claims against the estate were brought to her notice, which rendered it apparent that the estate was insolvent, and she brought an action against the creditor she had so paid in full, to recover a portion of the money back as an overpayment:—Held, that she had no *locus standi* to maintain the action. *Leitch* v. *Molsons Bank*, 27 Ont. R. 621.

—**Insolvent Estate — Administration Decree — Priority of Payment—Final distribution—C.S.B.C. c. 68, s. 4.**]—After judgment was obtained against the executor of an insolvent estate an administration decree was made. Plaintiff applied for payment to the amount of his judgment out of funds in court, the proceeds of the estate, and a Judge in Chambers granted his application, holding that C.S.B.C. c. 68, s. 4, did not take away the right of a judgment creditor, whose judgment was obtained before the administration decree to be paid. On appeal to the full court this order was set aside, the court being of opinion that it was doubtful if there would be funds enough to pay the judgment in full after satisfying prior claims. Payment was therefore postponed until final distribution of the estate under the decree. *Wilson* v. *Marvin*, 3 B.C.R. 327.

—**Trustees and Executors—Legacy in Trust—Discretion of Trustees—Vagueness or Uncertainty as to Beneficiaries—Poor Relatives—Public Protestant Charities—Charitable Uses—Persona Designata.**]—See WILL, II.

—**Nova Scotia Probate Act—R.S.N.S. (5 ser.) c. 100 and 51 V. (N.S.) c. 26—License to Sell Lands—Estoppel—Res judicata.**]—See RES JUDICATA.

—**Tenant for Life — Remission of Rent to Executor or Tenant—Apportionment.**]

See TENANT FOR LIFE.

—**Devise to Infants—Issue of Different Marriages—Usufruct—Duty of Executor.**]

See WILL, II.

—**Action for Debt of Succession—Appeal—Consent of Heirs.**]—See APPEAL, I.

—**Right of Executors under Will as against Beneficiary under "Bequeathment Certificate."**]

See INSURANCE, IV.

—**Application for Administration after grant of Probate to Executrix—Failure of Executrix to Account—Summary Order.**]

See PRACTICE AND PROCEDURE, V.

EXEMPTIONS.

Exemptions under Judgments Act, R.S. Man. c. 80.]—Where the creditor of a deceased debtor had recovered a judgment against his executor, and applied under Rule 804 of the Manitoba Queen's Bench Act, 1895, for an order for the sale of a parcel of land vested in the executor, upon which the widow and minor children of debtor were then living, the court held that the exemption provisions contained in s. 12 of the Manitoba Judgments Act did not apply, as neither the defendant nor his family resided upon such land or cultivated it, and the protection of such section did not enure to the benefit of the wife and children of the deceased debtor. *The London and Canadian Loan and Agency Co* v. *Connell*, 11 Man. R. 115.

—**From Seizure.**]—SEE EXECUTION, III.

EXPERTS.

Fees of.]—Experts have a recourse for the fee due to them in connection with a pending cause against a defendant *en arrière garantie*, and more particularly when the said defendant availed itself of the report of the experts by taking communication thereof. *Beaudry* v. *Town of St. Henri*, Q.R. 9 S.C. 406.

EXPRESS COMPANY.

Bailees—Common Carriers—Receipt for Money Parcel—Conditions Precedent—Formal Notice of Claim—Pleading — Money had and Received—Special pleas.]—See ACTION, VII..

EXECUTIVE POWER.

Order in Council—Jurisdiction of Courts over.]

See CONSTITUTIONAL LAW, I (*b*).

EXPROPRIATION OF LAND.

See ARBITRATION AND AWARD.
" MUNICIPAL CORPORATIONS.
" PUBLIC WORK.
" RAILWAY AND RAILWAY COMPANIES.

EXTRADITION.

Form of Commitment—Functions of Judge—40 V, c. 25 (d)—52 V. c. 36 (d)—R.S.C. c. 142.]—A committment under the Extradition Act R.S.C. c. 142, is good if it follows the form prescribed in said Act —On an application to a judge for extradition, while he must hear evidence produced by the accused against the charge, he is only called upon to decide whether or not a *primâ facie* case has been made out for holding the accused for extradition. *Ex parte Lanctot*, Q.R. 5 Q.B. 422.

FACTORY.

Injury to Employee—Damages.

See NEGLIGENCE, II.

FAITS ET PROMESSES.

Guaranty Against.]—See SALE I (*a*).

FALSE ARREST.

See CAPIAS.

FEES.

See COSTS.
" EXPERTS.
" REFEREE.

FEMME MARIEE.

See HUSBAND AND WIFE.

FERRIES.

Constitutional Law—Municipal Corporation—Powers of Legislature — License — Monopoly — Highways and Ferries — Navigable Streams—By-laws and Resolutions—Intermunicipal Ferry—Tolls—Disturbance of Licensee—North-West Territories Act R.S.C. c. 50, s.s. 13 and 24—B.N.A. Act (1867) s. 92, s.s. 8, 10 and 16—Rev. Ord. N. W. Ter. [1888] c. 28—Ord. N.W.T. No. 7 of 1891-92, sec. 4—Companies, Club Associations and Partnerships.]

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

FIRE.

Use of Fire for Agricultural Purposes—Negligence—Damages.]—See NEGLIGENCE, VI.

—Negligence—Prairie Fire—Damages.]
See NEGLIGENCE, VI.

—Sparks from Engine—Origin.]
See RAILWAYS AND RAILWAY COMPANIES, III.

—Negligence—Fire—Trespasser on Crown Lands—Right of Action.]—See TRESPASS.

FIRE INSURANCE.

See INSURANCE, II.

FIRM.

See PARTNERSHIP.

FISHERIES.

Canadian Waters—Property in Beds—Public Harbours—Erections in Navigable Waters—Interference with Navigation—Right of Fishing—Power to grant—Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta—Provincial Legislation R.S.O. [1887] c. 24, s. 47—55 V. c. 10, s.s. 5 to 13, 19 and 21 (O.)—R.S.Q. arts. 1375 to 1378.] Riparian proprietors before confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal, lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. *Robertson* v. *The Queen* (6 S.C.R. 52) followed.—The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers. Where beds of such waters have not been granted, the right of fishing is public and not restricted to waters within the ebb and flow of the tide.—Where the provisions of Magna Charta are not in force, as in the province of Quebec, the Crown, in right of the province, may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which, as in public harbours, the Crown in right of the Dominion may grant the beds and fishing rights, Gwynne, J. dissenting.—Per Strong, C.J. and King and Girouard, J.J.: The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec), unless repealed by legislation, but such legislation has probably been passed by the various provincial legislatures; and these provisions of the charter so far as they affect public harbours have been repealed by Dominion legislation.—The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters the beds and banks of which are assigned to the provinces under the British North America Act.—The legislative authority of Parliament under section 91, item 12 is confined to the regulation and conservation of sea-coast and inland fisheries, under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personal, conferring qualification, and give no exclusive right to fish in a particular locality.—Section 4 and other portions of Revised Statutes of Canada, c. 95, so far as they attempt to confer exclusive rights of fishing in provincial waters, are *ultra vires*. Gwynne, J., contra.—Per Gwynne, J.: Provincial legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by British North America Act, section 91, item 12, including the grant of leases or licenses for exclusive fishing.—Per Strong, C.J., Taschereau, King and Girouard, JJ.: R.S.O., c. 24, s. 47, and ss. 5 to 13 inclusive of the Ontario Act of 1892, are *intra vires*, but may be superseded by Dominion legislation. R. S. Q., arts. 1375 to 1378, inclusive, are *intra vires*. Per Gwynne, J.—R.S.O., c. 24, s. 47, is *ultra vires* so far as it assumes to authorize the land covered within public harbours. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. The Act of 1892 and R.S.Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*. *In re Jurisdiction over Provincial Fisheries*, 26 S.C.R. 444.

—Fishing Bounty — R.S.C., c. 95 — Fishing by Traps and Wears—Right to Bounty.]—Defendants prosecuted fishing by means of brush wears and traps. The wears were formed by brush leaders from the shore with a pound at the extreme end. At low water the wears were dry, and at neap-tide there would be some

four feet of water therein. The traps were constructed by means of a leader from the shore, and a pound at the end formed by netting stretched on poles or stakes set upright in the bed or bottom of the water. Boats were sometimes, but not always, used to take the fish from the wears and traps:—Held, that fishing by such means was not "deep-sea fishing" within the meaning of R.S.C., c. 95, and the Regulations made thereunder by the Governor-General in council and the instructions issued by the Minister of Marine and Fisheries in the year 1891; and that the defendants were not entitled to bounty as provided by the said Act. *The Queen* v. *Eldrige*, 5 Ex. C.R. 38.

—Illegal Fishing by American ship within the three-mile Limit — Seine Fishing.] —The crew of a fishing vessel owned in the United States had thrown her seine more than three miles off Gull Ledge in the Province of Nova Scotia, but before they had secured all the fish in the seine both it and the vessel had drifted within the three mile limit, where the vessel was seized by a Canadian cruiser while her crew was in the act of bailing out the seine:—Held, that the vessel was guilty of illegal "fishing" within the meaning of the Treaty of 1818 and Imperial Act 59 Geo. III, c. 38, and also under the provisions of chapter 94 of the Revised Statutes of Canada. *The Queen* v. *The Ship Frederick Gerring, Jr.*, 5 Ex.C.R., 164. Affirmed on appeal to the Supreme Court of Canada, May 1st, 1897.

—Three-mile Limit—Fishing without License—Forfeiture—Burden of Proof—R.S.C. c. 93, s. 3.]—*The Henry L. Phillips* v. *The Queen*, 25 S.C.R. 691, affirming 4 Ex.C.R.

—Behring Sea Award Act, 1894—Seal Fishing (North Pacific) Act, 1893—Infraction—Presence within Prohibited Waters—Bona Fides—Statutes in Pari Materiâ.]

See BEHRING SEA AWARD ACT, 1894.

—Behring Sea Award Act, 1894—The Merchant Shipping Act, 1854—Violation.

See BEHRING SEA AWARD ACT, 1894.

FIXTURES.

Mortgage—Mining Machinery—Registration—Interpretation of Terms—Bill of Sale—Personal Chattels—Delivery—R.S.N.S. (5 ser.) c. 91, ss. 1, 4 and 10 (Bills of Sale)—55 V. (N.S. c. 1, s. 143 (The Mines Act)—41 & 42 V. (N.S.) c. 31, s. 4.]

See MORTGAGE, IV.

—Property Real and Personal—Immovables by Destination — Movables Incorporated with the Freehold — Severance from Realty—Contract—Resolutory Condition—Conditional Sale—Arts. 379, 2017, 2083, 2085, 2089, C.C. — Hypothecary Creditor—Unpaid Vendor.]

See CONTRACT, III (*a*).

—Landlord and Tenant—Fixtures—Short Forms of Leases Act—R.S.O. c. 106—Forfeiture.]

See LANDLORD AND TENANT, VII.

—In Mining Properties—Mortgage—Rights of Execution Creditor.]

See MINES AND MINERALS.

FORECLOSURE.

Of Proceedings—Enquête.]

See PRACTICE AND PROCEDURE, XVII (*b*).

FOREIGN COMMISSION.

See EVIDENCE, V.
" PRACTICE AND PROCEDURE, II.

FOREIGN CORPORATIONS.

Attachment of Debts — Ontario Rule 935 — Garnishee "within Ontario"—Foreign Insurance Company—55 V. (Ont.), c. 39, s. 14, 17.]

See ATTACHMENT OF DEBTS.

—Nova Scotia Consolidated Mines Act, 1892—Filing Mortgages—Foreign Corporations.]

See MINES AND MINERALS.

FOREIGN JUDGMENT.

Action—Bar to—Estoppel—Res judicata—Judgment Obtained after Action begun—R.S.N.S. (5 ser.) c. 104, s. 12, s.s. 7; orders 24 and 70, rule 2; order 35, rule 38.]—A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada.—Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained: *The Delta* (1 P. D. 393) distinguished.—The combined effect of orders 24 and 70 rule 2, and s. 12, s.s. 7 of c. 104 R.S.N.S. 5 ser., will permit this to be done in Nova Scotia. The provisions of R.S.N.S. 5 ser., c. 104, order 35, rule 38, that evidence of a judgment recovered in a foreign country shall not be conclusive, in an action on such judgment in Nova Scotia, of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favour of the defendant in Nova Scotia who has brought an unsuccessful action in a foreign court against the plaintiff. *Law* v. *Hansen*, 25 S.C.R. 69.

—Ontario Rule 739—Appearance—Jurisdiction—Ontario Judicature Act [1895] s. 124.]

See PRACTICE AND PROCEDURE, XIII.

FORFEITURE.

Of Goods—Inland Revenue Act.

See REVENDICATION.

FORUM.

Judgment — Petition to open up — New Evidence—Proper Forum—Ont. Rule 782.]

See JUDGMENT.

FRAIS.

See COSTS.

FRAUD.

Preferences—Badge of Fraud—Authority.]—In an assignment for benefit of creditor authority to the assignee not only to prefer parties to accommodation paper, but also to pay all "costs, charges and expenses to arise in consequence" of such paper, is a badge of fraud. *Kirk* v. *Chisholm*, 26 S.C.R. 111.

—Fraudulent Statement—Proof of Fraud—Presumption — Assignment of Policy — Fraud by Assignor—Reversal on questions of fact.]

See INSURANCE, II.

— Trustees and Administrators — Fraudulent Conversion—Past due Bonds—Negotiable Security—Commercial Paper— Debentures Transferable by Delivery—Equity of Previous Holders—Estoppel—Brokers and Factors—Pledge—Implied Notice—Innocent Holders for Value—Principal and Agent.]

See PLEDGE.

—Debtor and Creditor—Composition and Discharge — Acquiescence — New Arrangement of Terms—Waiver—Principal and Agent—Deed of Discharge—Notice of Withdrawal — Fraudulent Preference.]

See DEBTOR AND CREDITOR, V.

—Bill of Sale—Registration—Retention of Possession—Inference.]

See BILLS OF SALE, II.

—Landlord and Tenant—Distress—Withdrawal—Fraud of Tenant.]

See LANDLORD AND TENANT, IV.

FRAUDS, STATUTE OF.

Memorandum in Writing—Repudiating Contract by.]—A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale. *Martin* v. *Haubner*, 26 S.C.R. 142.

—Promise to answer for debt of another—29 Car. II, c. 3, s. 4—Indemnity.]

See GUARANTEE.

— Hiring and Service — Quantum Meruit — Joint Creditors.]—See MASTER AND SERVANT, I.

—Sale of Land—Quantum Meruit.]

See SALE, III (*a*).

FRAUDULENT CONVEYANCE.

13 Eliz., c. 5—Intent to defeat Action for Tort—Creditor—Preference.]—The defendant in an action for slander, while the action was pending, and of which his daughter was aware, conveyed to her certain lands in satisfaction of a *bonâ fide* pre-existing debt to the extent of the full value of the land. After the plaintiff in the slander suit had recovered judgment, and some three months after the date of the conveyance, the said plaintiff brought action on behalf of herself and all other creditors of the defendant, to set aside such conveyance:—Held, that inasmuch as the plaintiff was a subsequent creditor by judgment in an action of tort, she could not successfully attack a prior deed for adequate value where no debts still unpaid were existing at the time of the execution of the deed: *Cameron* v. *Cusack*, 17 Ont. A.R. 489, followed.—Held, also, that so far as the Statute of Elizabeth is concerned, there is nothing to prevent a person indebted *bonâ fide* conveying property to satisfy one of his creditors, in preference to holding it subject to the contingencies of pending litigation for tort: *Middleton* v. *Pollock*, 2 Ch. D. 108; *McMaster* v. *Clare*, 7 Gr. 558, referred to.—Held, further, that a plaintiff suing for a tort is not a "creditor" within the meaning of the Ontario Statute as to preferences: *Ashley* v. *Brown*, 17 Ont. A.R. 500, followed. *Gurofski* v. *Harris*, 27 Ont. R. 201.

Business Difficulties existing at Time of Conveyance—Burden of Proof.]—In an action to set aside as fraudulent and void as against creditors certain deeds made by R. to defendant, it appeared that at the time the deeds were made R. was in business difficulties, and was considerably in debt to various persons, but that at the time of action brought all these debts had been paid, with the exception of a small balance due to one creditor, and, as to this, the evidence was not clear whether the debt was contracted before or after the making of the deeds. The indebtedness to plaintiff was not incurred for several years after the making of the deeds:—Held, that plaintiff, not being a creditor at the time the deeds were made, must prove (1) that a debt due at the time remained unpaid; or (2) that circumstances existed from which it would be inferred that the deeds were made with the intention of hindering, delaying or defeating subsequent creditors: *Munro* v. *McDonald*, 26 N.S.R. 349, distinguished. *Hayward* v. *McKay*, 28 N.S.R. 152.

FRAUDULENT PREFERENCES.

Assignment for benefit of Creditors—Preferences—R.S.N.S. c. 92, ss. 4, 5, 10—Chattel Mortgage—Statute of Eliz.]—An assignment is void under the statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member, and provides for allowance of interest on the claim of the said firm until paid, and the assignee is permitted to continue in the same possession and control of business as he previously had, though no one of these provisions taken by itself would have such effect.—A provision that "the assignee shall only be liable for such moneys as shall come into his hands as such assignee, unless there be gross

negligence or fraud on his part" will also avoid the assignment under the statute of Elizabeth. *Kirk* v. *Chisholm*, 26 S.C R., 111.

—**Voluntary Settlement—Hazardous Enterprise—Bona Fides.**]—See BILLS OF SALE, IV.

—**Pressure—Intent to Prefer—C.S.B.C. [1888], c. 51, s. 2.**]—See BILLS OF SALE, IV.

FREE GRANT LANDS.

Execution—Debt Incurred before Location—Devisee—Sale.]—See EXECUTION, VI.

FREIGHT.

Owner of Unregistered Mortgage — Action against Freight and Cargo.]—See SHIPPING, IV.

FUTURE RIGHTS.

See EVOCATION.

GAGE.

Pledge by Lessee—Saisie-gagerie par Droit de Suite.]—See LANDLORD AND TENANT, IV.

GAME LAWS.

Summary Conviction — Hounds Running at Large — 56 V. (Ont.) c. 49, s. 2, s.s. (2) — Scienter—Criminal Code, sec. 889.]—Where a summary conviction of the owner of deer hounds for permitting such hounds "to run at large in a locality where deer are usually found, contrary to the statute in that behalf," omits to state that the dogs were "known by the defendant to be accustomed to pursue deer," it is bad; and it is not a case falling within the curative provisions of sec. 889 of the Criminal Code unless the evidence shows knowledge on the part of the owner of such habit of the dogs. *The Queen* v. *Crandall*, 27 Ont. R. 63.

—**Game Protection Act [1895] s. 16 (B.C.)—Exemption—Killing Deer—Agent.**]—Sec. 16 of The Game Protection Act [1895] provides that "nothing in this Act shall be construed as prohibiting any resident farmer from killing, at any time, deer that he finds depasturing within his cultivated fields:"—Held, that the privilege in this section of killing deer is not confined to the resident farmer personally, and a conviction against S., the manager and agent of an absent owner of a farm, for killing deer found depasturing a cultivated field, part of the farm, was quashed. *The Queen* v. *Symington*, 4 B.C.R. 323.

GAMING.

Criminal Code, s. 575—Persona designata—Officers de facto and de jure—Chief Constable—Common Gaming House—Confiscation of Gaming Instruments, Moneys, etc.—Evidence—The Canada Evidence Act, [1893], ss. 2, 3, 20 and 21.]—Sec. 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the city of Montreal. —The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable, though he was not such *de jure*.—In an action to revendicate the moneys so seized the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf in the Province of Quebec. Per Strong, C. J.—A judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of revendication. *O'Neil* v. *Attorney-General of Canada*, 26 S.C.R. 122.

—**Judgment Debtor—Examination—Answers—Gambling Transactions.**]—See JUDGMENT.

—**Betting—Telegraph Office—Criminal Code, ss. 197, 198—Conviction**]—See CRIMINAL LAW, III.

GARANTIE.

See SALE, I (*f*).

GARNISHMENT.

See ATTACHMENT OF DEBTS
PRACTICE AND PROCEDURE, V.

GOVERNMENT RAILWAYS.

See RAILWAYS AND RAILWAY COMPANIES.

GUARANTEE.

Principal and Surety—Guarantee Bond—Default of Principal—Non-disclosure by Creditor.]—W. was appointed agent of a company in 1891 to sell its goods on commission, and gave a bond with sureties for faithful discharge of his duties. His appointment was renewed year after year, a new bond with the same sureties being given to the company on each renewal. His agreement with the company only authorized W. to sell for cash, but at the end of each season he was in arrear in his remittances, which he attributed to slow collections, and which he settled by giving an indorsed note, retiring the same before the bond for the next year was executed. After the season of 1894 the company discovered that W. had collected moneys of which he had made no return, and brought an action to recover the same from the sureties.—Held, reversing the decision of the Court of Appeal, that each year there was an employment of W. distinct from, and independ-

ent of, those of preceding years; that the position of the sureties on re-appointment was the same as if other persons had signed the bond of the preceding year; and that the company was under no obligation, on taking a new bond, to inform the sureties that W. had not punctually performed his undertakings in respect of previous employment, nor did the non-disclosure imply a representation to the sureties when they signed a new bond that they had been punctually performed. *Niagara District Fruit Growers' Stock Co.* v. *Stewart*, 26 S.C.R. 629.

—Indemnity—Surety—Oral Promise—Statute of Frauds (29 Car. II. c. 3) s. 4.]—A promise made by a third party to a creditor to pay or to see paid the debt due by him to his debtor, is a promise to answer the debt of the debtor, whether the promise is conditional or unconditional, and is within the 4th section of the Statute of Frauds. The defendant, who was the president of an incorporated company, verbally promised the plaintiff, who was the holder of a promissory note made by the said company, and was pressing for payment thereof, that he would see the plaintiff paid if he would forbear to sue and would renew the note:—Held, that this was not a promise of indemnity, but of guarantee, and therefore required by the 4th section of the Statute of Frauds to be in writing: *Guild & Co.* v. *Conrad* [1894] 2 Q.B. 885, distinguished. *Beattie* v. *Dinnick*, 27 Ont. R. 285.

—Agreement by Agent to Guarantee Promissory Notes — Reforming same—Mistake—Evidence—New Trial—Practice.]—See CONTRACT, III (*b*).

HABEAS CORPUS.

Costs upon—When to be Allowed.]—Semble, that the power to allow costs upon *habeas corpus* proceedings should only be exercised in very extreme cases, if at all. *Re Walter Murphy*, 28 N.S.R. 196.

— Canada Temperance Act — Imprisonment—Discharge under Habeas Corpus—Costs.]

See CANADA TEMPERANCE ACT.

—Conviction for two Offences—Concurrent Sentences.]—See CANADA TEMPERANCE ACT.

HARBOURS.

Canadian Waters—Property in Beds—Public Harbours — Erections in Navigable Waters — Interference with Navigation—Right of Fishing —Power to Grant—Riparian Proprietors—Great Lakes and Navigable Rivers — Operations of Magna Charta—Provincial Legislation—R.S.O. [1887] c. 24, s. 47-55 V. c. 10, ss. 5 to 13, 19 to 21 (O.) — R.S.Q. arts. 1375 to 1378.]—The beds of public harbours not granted before Confederation are the property of the Dominion of Canada: *Holman* v. *Green* (6 S.C.R. 707) followed. The beds of all other waters not so granted belong to the respective provinces in which they are situate, without any distinction between the various classes of waters.—Per Gwynne J. The beds of all waters are subject to the jurisdiction and control of the Dominion Parliament so far as required for creating future harbours, erecting bacons or other public works for the benefit of Canada under British North America Act, s. 92, item 10, and for the administration of fisheries.—R.S.C. c. 92, "An Act respecting certain works constructed in or over navigable rivers," is *intra vires* of the Dominion Parliament.—The Dominion Parliament has power to declare what shall be deemed an interference with navigation, and to require its sanction to any work in navigable waters.—A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with R.S.C. c. 92.—Where the provisions of Magna Charta are not in force, as in Quebec, the Crown in right of the province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours, in which, as in public harbours, the Crown in right of the Dominion, may grant the beds and fishing rights. Gwynne, J., dissenting. Per Gwynne, J.—R.S.O. c. 24, s. 47, is *ultra vires* so far as it assumes to authorize the sale of land covered with water within public harbours. The margins of navigable rivers may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. The Act of 1892 and R.S.Q. arts. 1375 to 1378, are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*. *In re Jurisdiction over Provincial Fisheries*, 26 S.C.R. 444.

HARBOUR COMMISSIONERS.

See APPEAL, III (*f*).

HIGHWAYS.

See MUNICIPAL CORPORATIONS, IV.

HIRE RECEIPT.

Property, Real and Personal—Immovables by Destination—Movables Incorporated with Freehold—Severance from Realty—Contract—Resolutory condition—Conditional sale — Hypothecary Creditor—Unpaid vendor—Arts. 379, 2017, 2083, 2085, 2089 C.C.]—See CONTRACT, III (*a*).

HOLOGRAPH WILL.

See WILL, V.

HOMOLOGATION.

Avis de Parents—Family Council—Tutor ad hoc.]—See COMMUNITY.

HONORAIRES.

Substitute of Attorney-General.]—The fees of a substitute of the Attorney-General are not seizable. *Robinson* v. *Quinn*, Q.R. 9 S.C. 240.

HOSPITAL.

Communication of Disease.]
See NEGLIGENCE, VI.

HUISSIER.

Duty of.]—See EXECUTION, III.

HUSBAND AND WIFE.

I. ALIMONY.

—**Alimony—Judgment for—Subsequent Judgment for arrears in County Court—Effect of.**]—See ALIMONY.

—**Alimony—Cruelty—Condonation of—Subsequent Misconduct.**]—See ALIMONY.

—**Writ of Summons—Service out of Jurisdiction—Alimony.**]—See ALIMONY.

II. ANTE-NUPTIAL CONTRACT.

—**Marriage Contract—Donation—Hypothec of Wife—Arts. 2029, 2044, C.C.**]—By a contract of marriage the father of the future wife made her a donation of certain movables to be delivered immediately after the celebration of the marriage, and a sum of $500 payable by instalments. It was stipulated that on the dissolution of the community, by death or otherwise, the future wife could renounce and take all that she had brought into the marriage and all that might come to her while it existed by donation, legacy or otherwise. It was also agreed that the wife should have hypothec upon the goods of the husband, and especially upon land which the latter received from his father by the same contract. The marriage contract was registered:—Held, that the possession of the wife, in regard to the movables given to her by her father, was guaranteed—in default of the conventional hypothec which could not be invoked, the value of the effects not having been determined in the *acte*—by the legal hypothec of the wife; that in order to enable her to appear on the judgment of the price of the immovable judicially sold, the wife was not bound to prove that she had actually received these effects:—Held, further, that a donation by marriage contract is conditional and only takes effect upon the marriage; therefore the provisions of art. 2029 C.C., which gives to the wife a legal hypothec, every claim and demand she can have against her husband by reason of what she has been able to receive or acquire during the marriage, by succession, inheritance or donation, applies to a donation made by marriage contract. *Théorêt* v. *Paquin*, Q.R. 9 S.C. 305.

III. COMMUNITY.

—**Donation by Ascendants—Arts. 1260, 1265 C.C.**—An immovable donated to a husband by the ascendants of the wife must be treated as if it had been a transfer of the property directly from the wife, and where an advantage to the husband is not negatived it is contrary to the provisions of arts. 1260 and 1265 C.C., which forbid consorts to advantage each other. The immovable so donated, therefore, does not fall into the community, but is a *propre* of the wife. *Lemay* v. *Lemay*, Q.R. 9 S.C. 285. Confirmed in Review 31st March, 1896.

—**Domicile—Marriage in Ontario—Formalities—Presumption—Public Officer.**]
See MARRIAGE LAW.

IV. PROCEEDINGS BY AND AGAINST MARRIED WOMEN.

—**Mortgage—Representation by Infant.**]—An infant married woman executed a mortgage of her lands to secure a loan made to her husband. Her husband represented to the mortgagor that she was of full age, but she was no party to the fraud, nor did she benefit in the proceeds of the loan—her husband abandoning her almost immediately after the transaction was completed:—Held, that in order to make her liable upon the mortgage it was necessary to show that she had made some actual misrepresentation as to her age—the execution of the mortgage not constituting of itself a sufficient representation. R.S.O., c. 134, simply does away with the disability of coverture; it does not validate deeds executed by infant married women. *Confederation Life Association* v. *Kinnear*, 23 Ont. A.R. 497.

—**Practice—Saisie-gagerie—Service of Declaration.**]—If husband and wife are separated as to property, the leasing of premises to the wife who carries on business as a *marchande publique* for the purposes of her trade, is a matter of administration as to which she may sue or be sued without authorization of her husband. If the husband is brought into the suit against the wife merely for the purpose of authorizing her, it is no ground of exception that he was not served with the declaration, as he might have been left out. If the action is accompanied by saisie-gagerie service at the office of the prothonotary, three days after the writ was served, it is good, notwithstanding damages are also claimed in lieu of future rent. *Guy* v. *Dagenais*, Q.R. 9 S.C. 44.

—**Action against Wife—Error.**]—See ACTION, I.

—**Master and Servant—Hiring of Husband and Wife—Joinder of Action.**]
See MASTER AND SERVANT, I.

—**Crim. Con.—Discovery—R.S.O., c. 61, s. 7.**]
See PRACTICE, IX.

—**Advance to Wife—Charge on her Estate—Covenant of Husband and Wife—Ordinary Legal Rights.**]—See PRINCIPAL AND SURETY, II.

—**Simulation—Advantage to Wife—Art. 776 C.C.**]
See SIMULATION.

V. Separate Estate and Business.

—**Husband and Wife—Married Woman's Property Act, R.S.O., c. 132, s. 5—Proprietary Interest—Construction.**]—The "proprietary interest" which a husband may have in any property gained or acquired by his wife in any "employment, trade or occupation in which she is engaged or carries on," under sec. 5 of R.S.O., c. 132, must be deemed to be an "interest as owner" thereof, or the "legal right or title thereto."—Where a husband was employed by his wife to manage and work a farm rented by her:—Held, that he had no "proprietary interest" in the produce of the farm, and it was not liable to the claims of his creditors. *Cooney* v. *Sheppard*, 23 Ont. A.R. 4.

—**Desertion of Wife—Separate Property—Board and Lodgings—"Employment or Occupation"—R.S.O. c. 132, s. 5.**]—Where a married woman, who was deserted by her husband, but earned money by letting lodgings in a house furnished by the husband, and by supplying board and other necessaries to the lodgers, the court held that she was entitled to such moneys as her separate estate without any order for protection, and that she could recover the same in an action in her own name as moneys acquired by her in an employment and occupation in which her husband has no "proprietary interest," under the 5th section of the Married Woman's Property Act, R.S.O. c. 132. *Young* v. *Ward*, 27 Ont. R. 423.

—**Indorsement of Promissory Notes by Wife—Contract—Separate Estate—Personal articles and wearing apparel.**]—In an action against a married woman as indorser of certain promissory notes, the question was raised as to whether the defendant was possessed of separate estate at the time of her indorsement of the notes, with reference to which she could be deemed to have contracted. The evidence showed that at the time of the indorsement the only property she possessed was an engagement ring, a wedding ring a silver watch and chain and her wearing apparel:—Held, that this was not separate estate with respect to which she could be reasonably deemed to have contracted. *Abraham* v. *Hacking*, 27 Ont. R. 431.

—**Marital rights—Property of wife—Wife living apart.**]—A married woman, the owner in fee of land before her marriage, was compelled to live apart from her husband, not wilfully and not by her fault:—Held, that during such separation the husband might be restrained by injunction from interfering with her use and occupation of the land. *Johnston* v. *Johnston*, 1 N.B. Eq. 164.

—**Constitutional Law—Marital Rights—Married Woman—Separate estate—Jurisdiction of N. W. Territorial Legislature—Statute—Interpretation of—40 V., c. 7, s. 3, and amendments—R.S.C. c. 50—N. W. Ter. Ord. No. 16 of 1889.**]

See Constitutional Law, II (*b*).

HYPOTHEC.

Immovable—Member of Firm or Company—Mandate—Form—Proof.]—One member of a partnership or company cannot give a hypothec of an immovable of the society, except by express mandate. Such mandate, notwithstanding art. 2040 C.C., need not be in authentic form. The existence of the mandate may be presumed from documents and circumstances in the cause, art. 1205 C.C. The presumptions are left to the discretion of the tribunal, art. 1242 C.C. *Société de Prêts* v. *Lachance*, Q.R. 5 Q.B. 11.

—**Prejudice to—Fraudulent Sale—Chose Jugée—Action Paulienne.**]—The revocation of a sale made in fraud of the vendor's creditors does not prejudice a *hypothèque* agreed to by the purchaser, though while the proceedings for revocation were pending, in favour of a third person in good faith who has advanced the purchase money, the judgment in the action for revocation (*action paulienne*) not having the authority of *chose jugée* in respect to this creditor: *Normandin* v. *Les Religieuses Carmelites d' Hochelaga* (3 Dor. Q.B. 329) and *Lefebvre* v. *Goyette* (Q.R. 2 S.C. 203) approved. *Barsalou* v. *The Royal Institution for the Advancement of Learning*, Q.R. 5 Q.B. 383.

—**Will—Payment of Legacy—Sum certain.**]—Where a will names a residuary legatee with a charge to pay a specified legacy, but not creating a hypothec for such payment, and the residuary legatee makes a declaration that an immovable received from the testator shall be affected by hypothec for payment of such legacy, but without mentioning the amount, the hypothec professed to be created by such declaration is null. *Auclair* v. *Girard*, Q.R. 9 S.C. 213.

—**Hypothecated Property—Cutting Wood—Damages.**]—See Capias.

—**Priority of—Community—Consent—Tutor ad hoc.**]—See Community.

—**Conditional sale—Unpaid Vendor—Hypothecary Creditor—Immovables and Movables—Severance from Freehold.**]

See Contract, III (*a*).

—**Of Married Woman—Donation by Marriage Contract.**]—See Husband and Wife, II.

—**Property Subject to—Railway Company.**]

See Railways and Railway Companies, VII.

ILLUMINANT DEVICE.

Patent of Invention—Infringement—Process—Re-issue—Equivalents—Manufacturer—Importation—Price.]

See Patent of Invention.

IMMOVABLES.

Property, Real and Personal—Immovables by Destination—Movables Incorporated with Freehold—Severance from Realty—Contract—Resolutory Condition—Conditional Sale—Hypothecary Creditor—Unpaid Vendor—Arts. 379, 2017, 2083, 2085, 2089 C.C.]—See Contract, III (*a*).

IMPENSES.

Sale—Garantie—Damages.]—See SALE I (*f*)

IMPORTATION.

Importation of Patented Invention into Canada.]—See PATENT OF INVENTION.

—When Importation of Goods is Complete for Purposes of Assessing the Duty.]
See REVENUE.

IMPROBATION.

Holograph Will—Copies—Variance.]
See WILL, V.

IMPRUDENCE.

Accident to Child—Responsibility.]
See NEGLIGENCE, IV.

IMPUTATION OF THEFT.

See LIBEL AND SLANDER, III.

INDEMNITY.

Costs—Third Parties—Indemnity.]
See COSTS, IV (*c*).

—Indemnity—Third Party Procedure—Breach of Contract—Ontario Rule 328.]
See PARTIES, II.

—Promise to Answer for debt of Another—Statute of Frauds.]—See GUARANTEE.

—Street Level—Change—Injury by.]
See MUNICIPAL CORPORATIONS, V.

INDIAN TREATIES.

Constitutional Law — Province of Canada — Surrender of Indian Lands—Annuity to Indians—Revenue from Indian Lands—Increase of Annuity —Charge upon Lands—British North America Act, 1867, s. 109.]
See CONSTITUTIONAL LAW, III.

INDICTMENT.

See CRIMINAL LAW.
" NUISANCE.

INFANT.

I. CUSTODY.

Custody of—Marital Duty—Paternal Right—53 V., c. 4, ss. 182, 183 (N. B.).]—On application under secs. 182 and 183 of the Equity Act, 1890, by a mother for the custody of one or more of her children and access to those left in the custody of the father:—Held, that the Court would consider the superior right of the father, the manner in which both parents have observed their marital duty, and above all the interest and welfare of the child. As it appeared that both parents were to some extent in fault, but the evidence did not show that the father was unfit to take care of the children, he was awarded the custody, the mother to have access to them at least once a fortnight. *In re Armstrong*, an infant, 1 N.B., Eq. 208.

II. ESTATE.

—Interest in Land—Sale of—53 V., c. 4, s. 175 (N.B.)]—Under s. 175 of the Act relating to the Supreme Court in Equity (53 V., c. 4) the Court may order the sale of an infant's interest in land, but only for the infant's benefit. So where application was made for sale of the interest inherited by the infant from his father with the object of paying debts of the deceased owner with part of the proceeds, the Court held that it had no jurisdiction to make the order. *In re Hopper Infants*, 1 N. B. Eq. 245.

III. MAINTENANCE.

—Illegitimate—Adoption—Consent of Parents.]—Under the provisions of 53 V., c. 4 (N.B.) the Supreme Court in Equity of New Brunswick can only grant leave for the adoption of a child on consent of both parents. So where the application was for leave to adopt an illegitimate child and the mother consented, but the father was not known and his consent could not be obtained, the order was refused. *In re C. F., an Infant*, 1 N. B. Eq. 313.

IV. MISCELLANEOUS CASES.

—Negligence of Servant—Contributory Negligence.]—The doctrine of contributory negligence does not apply to an infant of tender age: *Gardner* v. *Grace* (1 F. & F. 359) followed. *Merritt* v. *Hepenstal*, 25 S.C.R. 150.
And see NEGLIGENCE, II.

—Promissory Note—Insurance.]—An infant may be bound by a promissory note given in payment of the premium on a policy of life insurance. *Manufacturers Life Ins. Co.* v. *King*, Q. R. 9 S.C. 236.

—Representations by Infant Married Woman.]
See HUSBAND AND WIFE, IV.

INFECTIOUS DISEASE.

In Leased Premises—Resiliation—Damages.]
See LANDLORD AND TENANT, V.

—Communication of—General Hospital.]
See NEGLIGENCE, III.

INJURES.

Personal Injuries—Judgment for Damages—Attorney's Costs—Contrainte par corps.]
See COSTS, IV (*b*).

—Judgment for Damages—Married Woman.]
See MARRIED WOMAN.

INJURIOUS AFFECTION.

Of Lands.]—See PUBLIC WORK.

INJURY.

Injury to the Person on a Government Railway—Undue rate of speed of train at crossing—Liability of Crown—50 & 51 V. c. 16, s. 16 (c).]
See RAILWAYS AND RAILWAY COMPANIES, V.

INSCRIPTION.

On Appeal—Delay—Notice.]
See APPEAL, IX.

—In Review—Notice—Delay—Deposit.]
See PRACTICE AND PROCEDURE, XVII (*b*.)

—In Review—Opposition—Value of Movable Property—Date of Judgment.]
See PRACTICE AND PROCEDURE, XVII (*b*.)

INSCRIPTION AU MERITE.

Procedure—Production of Depositions.]—A cause may be inscribed upon the roll for hearing upon the merits before the production of the depositions. *Filion* v. *Roger*, Q.R. 9 S.C. 239.

INSINUATION.

See WILL.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INJUNCTION.

Practice—Interim Injunction—Petition to Dissolve.]—An interim order restraining defendants from publishing or circulating certain statements pending suit will not be dissolved where no right to publish or circulate such statements is established, and plaintiff would be greatly prejudiced if not protected by it. *Jones* v. *McLaughlin*, Q.R. 9 S.C. 38.

—Dissolution of — Suppression of Facts.]—An *ex parte* injunction will not be dissolved because the plaintiff on applying for it did not disclose facts relating to the subject matter of the suit, which were material as between himself and a third party, but not as between him and the defendant. *Poirier* v. *Blanchard*, 1 N. B. Eq. 322.

—Contempt of Court.]—An order to commit persons not parties to injunction for contempt of court in disobeying it will not be made unless they had knowledge of the injunction when committing the breach. *De Cosmos* v. *Victoria & Esquimalt Telephone Co.*, 3 B. C. R. 347.

—Procedure—Ex parte Injunction—Motion to Dissolve.]—An ex parte injunction will not be dissolved unless it is shown that it was obtained by false statements provided a *primâ facie* case was established and a reasonable prospect of success at the trial. *Ward & Co. v. Clark*, 3 B.C.R. 356.

—Practice—Injunction—Statutory Offence—Abatement of Nuisance.]—An injunction may issue to restrain persons from polluting a tidal river, though by statute it is made an offence punishable by fine and imprisonment. The injunction may issue even though the defendant makes affidavit that he has taken precautions against the recurrence of the offence. *Attorney-General of Canada* v. *Ewen*; *Attorney-General of Canada* v. *Munn*, 3 B.C.R. 468.

—Municipal Corporation—Expenditure of Public Money—Contribution to Costs of Private Action—Injunction.]
See MUNICIPAL CORPORATIONS, X.

—Public Nuisance—Suppression of—Municipal Corporation.]—See NUISANCE.

—Trade Name—Geographical Designation—"Canadian Bookseller."]
See TRADE MARK.

INSURANCE.

I. COMPANIES GENERALLY.

Employment of Agent—Agent Acting for Rival Company—Dismissal.]—*Eastmure* v. *Canada Accident Ins. Co.*, 25 S.C.R. 691, affirming 22 Ont. A.R. 408.

II. FIRE INSURANCE.

—Insurance against Fire—Mutual Insurance Company—Contract—Termination—Notice—Statutory Conditions—R.S.O. [1887] c. 167—Waiver—Estoppel.]—B. applied to a mutual

company for insurance on his property for four years, giving an undertaking to pay the amounts required from time to time and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of $46.50, being the premium for an insurance to the extent of $1,500 on the property described in his application of this date," and then providing that the company could cancel the contract at any time within fifty days by notice mailed to the applicant, and that non-receipt of a policy within the fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B., and no policy was issued within the said time, which expired on March 4th, 1891. On April 17th B. received a letter from the manager asking him to remit funds to pay his note maturing on May 1st. He did so and his letter of remittance crossed another from the manager, mailed at Owen Sound, April 20th, stating the rejection of his application and returning the undertaking and note. On April 24th the insured property was destroyed by fire. B. notified the manager by telegraph, and on April 29th the latter wrote returning the money remitted by B., who afterwards sent it again to the manager and it was again returned. B. then brought an action which was dismissed at the hearing and a new trial was ordered by the Divisional Court and affirmed by the Court of Appeal:—Held, affirming the decision of the Court of Appeal, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the Ontario Insurance Act (R.S.O. [1887] c. 167) governed such contract, though not in the form of a policy; that if the provisions as to non-receipt of a policy within fifty days was a variation of the statutory conditions, it was ineffectual for non-compliance with condition 115, requiring variations to be written in a different coloured ink from the rest of the document, and if it had been so printed the condition was unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19, which provides that notice shall not operate until seven days after its receipt:—Held also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract and were estopped from denying that B. was insured. *The Dominion Grange Mutual Fire Insurance Association* v. *Bradt*, 25 S.C.R. 154.

—**Insurance against Fire—Conditions of Policy—Fraudulent Statement—Proof of Fraud—Presumption—Assignment of Policy—Fraud by Assignor.**]—Where an insurance policy is to be forfeited if the claim is in any respect fraudulent, it is not essential that the fraud should be directly proved; it is sufficient if a clear case is established by presumption, or inference, or by circumstantial evidence.—The assignee of the policy cannot recover on it if fraud is established against his assignor. *The North British and Mercantile Insurance Company* v. *Tourville*, 25 S.C.R. 177.

—**Conditions in Policy—Breach—Waiver—Recognition of existing risk after Breach—Authority of Agent.**]—A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed or the interest of the parties therein changed:—Held, affirming the decision of the Supreme Court of New Brunswick, that by a chattel mortgage given by the assured on said property, his interest therein was changed and the policy forfeited under said condition. Held, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach. *Torrop* v. *The Imperial Fire Insurance Co.*, 26 S.C.R. 585.

—**Fire Insurance—Co-Insurance.**]—The defendant company delivered to the plaintiffs a policy of fire insurance containing this provision: "It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall maintain insurance on the property covered by this policy, of not less than seventy-five per cent. of the actual cash value thereof, and that failing to do so, the insured shall be a co-insurer to the extent of such deficit, and in that capacity shall bear his, her, or their proportion of any less: Held, that this was in the nature of a condition, and was invalid if not printed in the manner provided by sec. 115 of R.S.O. c. 167. *Wanless* v. *Lancashire Ins. Co*, 23 Ont. A.R. 224.

—**Assignment of Policy—Insurable Interest.**]—The interest of the assured in a policy of insurance upon chattels may before loss be validly assigned by him to a person who has no interest in the chattels at the time of the assignment, the assured remaining owner thereof. *McPhillips* v. *London Mutual Fire Insurance Co.*, 23 Ont.A.R., 524.

—**Statutory Conditions—Variation—Unreasonableness—Notice—Vacancy—Materiality—Part Affected—Title—Agreement between Mortgagee and Insurance Company—Subrogation.**]—The defendants insured seven houses belonging to the plaintiff, which had been mortgaged by him to a loan company, and which were described in the policy as "a two-story frame, roughcast, felt-roofed block, * * containing seven dwellings, six of which are occupied by tenants, and one by assured." In the application, filled up by defendant's agent, the question as to how many tenants was answered "six tenants and applicant," the agent informing defendants that "the largest house of the lot the applicant will occupy himself." A variation of the statutory conditions was printed on the policy in these words: "This policy will not cover vacant or unoccupied buildings (unless insured as such), and if the premises shall become vacant or unoccupied * * this policy shall cease and be void unless the company shall by indorsement * * allow the insurance to be continued." A fire occurred by which the houses were destroyed, and the defendants paid the loan company the amount of their mortgage, under a prior general agreement with them by which the policy was to be treated between the parties to the agreement as unconditional except as to the mortgagor, and whereby the defendants were entitled, upon payment to the loan company under the policy or otherwise of any loss as to

which they claimed to have a defence against the mortgagor, to be subrogated to the loan company's rights and to have the mortgage assigned to them. For some months prior to the fire several of the houses became and remained vacant, of which the plaintiff was aware, but of which he did not notify defendants. In an action by plaintiff upon the policy:—Held, that the actual facts as to occupancy being before them at the time of the application, the defendants were liable, nor were they relieved by their variation of the statutory conditions that the policy would not cover vacant unoccupied houses:—Held, also, that the variation as to the premises becoming vacant or unoccupied where, as here, the houses were of a class likely to be occupied by tenants for short periods, was unreasonable, and the reasonableness of the variation was to be tested with relation to the circumstances at the time the policy was issued: *Smith* v. *The City of London Ins. Co.*, 14 Ont. A.R. 328; *Ballagh* v. *The Royal Mutual Fire Ins. Co.*, 5 Ont. A.R. 87, referred to:—Held, however, that the fact that several of the houses were vacant to plaintiff's knowledge for some months before the fire, was, under the third statutory condition, a change material to the risk, which was thereby increased, and the failure to notify the defendants avoided the policy "as to the part affected," which in this case was the whole block:—Held, also, that the meaning of the word "risk" in the third statutory condition is not distinguishable from the same word in the first statutory condition, and that subsequent mortgages executed by plaintiff were matters relating to title, and were not covered: *Reddick* v. *The Saugeen Mutual Fire Ins. Co.*, 14 Ont. R. 506, followed:—Held, lastly, that although defendants had paid the mortgagees and taken an assignment of the mortgage, they could not hold it against the plaintiff: *Imperial Fire Ins. Co.* v. *Bull*, 18 S.C.R. 697, followed. *McKay* v. *Norwich Union Insurance Co.*, 27 Ont. R. 251.

—**Condition—Notice of Loss—Art. 2478 C.C.**]—Where a policy of insurance against fire contained a condition requiring notice to be given "forthwith after loss":—Held, that compliance with such condition was a condition precedent to right of payment, and a notice given on the twentieth day after the fire was not such a compliance. *Manchester Fire Assurance Co.* v. *Guerin*, Q.R. 5 Q.B. 434.

—**Covenant for Insurance in Mortgage—Assignment of Mortgage—Equitable Assignment of Mortgage Money.**]

See BILLS OF SALE, V.

III. GUARANTEE INSURANCE.

—**Guarantee—Indemnity against Burglary—License.**]—A company agreeing on payment of a fixed sum per month to indemnify a householder for loss by burglary of his premises thereby enters into a contract of insurance, and is liable to a fine, under the Insurance Act, 57 & 58 Vict., c. 20, s. 49, for issuing a policy without a license from the Minister of Finance. *Wood* v. *Grosse*, Q.R. 5 Q.B. 116.

IV. LIFE INSURANCE.

—**Payment of Premium—Agent's Authority.**]—Where a policy of life insurance expressly provides that payment of the premium in cash to the company is necessary, their agent has no power to bind the company by giving the policy-holder a receipt for the amount of a premium as payment for services alleged to have been rendered by the policy-holder to the company. *Tiernan* v. *People's Life Insurance Company*, 23 Ont. A.R. 342.

—**Life Insurance—Premium—Payment—Promissory Note of third person—Discount of Note of insured.**]—A condition in a policy of life insurance providing that if a note be taken for the first premium, and shall not be paid when due, the policy shall become null and void, is not applicable to the case where the promissory note of a third person is accepted in satisfaction and discharge of such premium:—Semble, that where the agent of the insurance company discounted notes given by the insured for the premium, and retained the proceeds, sending his own note to the company for the amount of the premium, less his commission, the transaction amounted, when the proceeds of the discount were received by the agent, to a payment in cash of the premium: *Fleming* v. *London and Lancashire Life Assurance Co.*, 27 Ont. R. 477. On appeal to the Court of Appeal the members of the court were divided, with the result that the judgment below was affirmed. See 23 Ont. A.R. 666.

—**Life Insurance—Benefit Certificate—Voluntary Settlement—R.S.O. c. 136.**]—R. made a written application to a mutual benefit society for membership therein and for the issue to him of a benefit certificate for $2,000, to be made payable to his mother; and by such application, which was made part of the contract, it was agreed between the parties that the benefit certificate should not be made payable to any person other than the wife, children, dependents, father, mother, sister, brother or betrothed of R., and that if he died without having made any further direction as to payment, the money should be paid to the beneficiaries in the above order if living. A benefit certificate was issued to him in conformity with the application. R. died unmarried and intestate, leaving neither father nor mother surviving, the only claimants for the moneys payable under the benefit certificate being two sisters who had been supported by him in his lifetime, and who claimed as "dependents" as well as "sisters," and his administrator who claimed to be entitled to such moneys as assets for the creditors of the deceased's insolvent estate:—Held, that the insurance was in effect a voluntary settlement on the sisters of the assured. That while they were not within the protection of R.S.O. c. 136, they were beneficiaries named in the policy; and as it was not shown that the insured was not in a position to make a voluntary settlement at the time he effected this insurance or at any time, they were entitled to the moneys. *In re William Roddick*, 27 Ont. R. 537.

—**Mutual Co.—Policy—Civil Contract—Commercial acts—Jury—Arts. 2470—71 C.C.**]—Though policies issued by a mutual company are civil

and not commercial contracts (arts. 2470—71 C.C.), the companies may engage in commercial matters.—Though the charter of a mutual insurance company declared that only policy-holders participating in profits were members, if the company engages in acts of commerce by issuing ordinary policies it will be entitled in an action to which it is a party, to trial by jury. *British Empire Mutual Life Assur. Co.* v. *Bergevin*, 9 Q.R. 5 Q.B. 55.

—**Declaration by Assured—Good faith—Non-disclosure of malady.**]—In the absence of proof of bad faith the fact that the person insured by a policy of life insurance did not disclose in the application that he had some years before suffered from a malady which was not shown to have affected his constitution, does not make the policy void. *Canada Life Ins. Co.* v. *Pilot*, Q.R. 5 Q.B. 521.

—**Premium Note—Condition—Transfer—Waiver—Art. 1573 C.C.**]—A premium note payable to order, but subject to a condition, namely, the issue of a policy, may be transferred by indorsement and delivery, but the transferee is in no better position than the original payee and holds it subject to the performance of the condition. If the note extends the time for payment of the premium the condition is not satisfied by the issue of a policy requiring "a full and immediate payment of the whole premium." The maker of the note was therefore justified in refusing it, and the consideration for said note having failed he was not liable on it. A condition avoiding a policy for non-payment of the premium cannot be waived by an agent. *Bernier* v. *Martin*, Q.R. 9 S.C. 421.

—**Mutual Benefit Society—"Bequeathment Certificate"—Right of Executors against Beneficiary.**]—By the rules of a mutual benefit society it was provided that at the death of a member in good standing the amount of life insurance payable on his "bequeathment certificate" should be paid to the wife, affianced wife, or relative of, or person dependent upon such member, as mentioned in such certificate. One of the members of the society by his will directed that his life insurance should be paid to his executors and trustees for the purpose of carrying out certain trusts therein named, and then indorsed a memorandum on his bequeathment certificate revoking the direction therein as to the payment of the insurance due at his death, and authorizing and directing such payment to be made to his executors, who were not persons falling within the classes of persons designated as proper payees under the rules of the society:—Held, that the testator had no interest in the fund raised, or to be raised, to pay the amount of his bequeathment certificate, but merely the power to appoint an object to receive the same, which power must be exercised in accordance with the regulations of the society; and that the beneficiary named in the certificate was entitled to the money, as against the executors of the deceased's estate: *In re William Phillips' Insurance*, 23 Ch. D. 235, followed. *Leadley* v. *MacGregor*, 11 Man. R. 9.

—**Life Policies—Will—Apportionment.**]

See WILL, II.

V. MARINE INSURANCE.

—**Voyage Policy—"At and from" a Port—Construction of Policy—Usage.**]—A ship was insured for a voyage "at and from Sydney to St. John, N.B., there and thence," etc. She went to Sydney for orders and without entering within the limits of the port as defined by statute for fiscal purposes, brought up at or near the mouth of the harbour, and having received her orders by signal attempted to put about for St. John, but missed stays and was wrecked. In an action on the policy evidence was given establishing that Sydney was well known as a port of call, that ships going there for orders never entered the harbour, and that the insured vessel was within the port according to a Royal Surveyor's chart furnished to navigators:—Held, affirming the decision of the Supreme Court of New Brunswick, that the words "at and from Sydney" meant at and from the first arrival of the ship; that she was at Sydney within the terms of the policy; and that the policy had attached when she attempted to put about for St. John. *St. Paul Fire and Marine Insurance Company* v. *Troop*, 26 S.C.R. 5.

—**Goods Shipped and Insured in Bulk—Loss of Portion—Total or Partial Loss—Contract of Insurance—Construction.**]—M. shipped on a schooner a cargo of railway ties for a voyage from Gaspé to Boston, and a policy of insurance on the cargo provided that "the insurers shall not be liable for any claim for damages on * * lumber * * but liable for a total loss of a part if amounting to five per cent. on the whole aggregate value of such articles." A certificate given by the agents of the insurers when the insurance was effected had on the margin the following memo. in red ink: "Free from partial loss unless caused by stranding, sinking, burning, or collision with another vessel, and amounting to ten per cent." On the voyage a part of the cargo was swept off the vessel during a storm, the value of which M. claimed under the policy:—Held, reversing the decision of the Supreme Court of New Brunswick, that M. was entitled to recover; that though by the law of insurance the loss would only have been partial, the insurers, by the policy, had agreed to treat it as a total loss; and that the memo. on the certificate did not alter the terms of the policy, the words "free from partial loss" referring not to a partial loss in the abstract applicable to a policy in the ordinary form, but to such a loss according to the contract embodied in the terms of the policy:—Held, further, that the policy, certificates and memo. together constituted the contract and must be so construed as to avoid any repugnance between their provisions and any ambiguity should be construed against the insurers, from whom all the instruments emanated. *Mowat* v. *The Boston Marine Insurance Co.*, 25 S.C.R. 47.

—**Constructive Total Loss—Notice of Abandonment—Sale of Vessel by Master—Necessity for Sale.**]—If a disabled ship can be taken to a port and repaired, though at an expense far exceeding its value, unless notice of abandonment has been given there is not even a constructive total loss.—If the ship is in a place of safety, but can-

not be repaired where she is or taken to a port of repairs, and if instructions from the owner cannot be received for some weeks, the expense of preserving her, the danger of her being driven on shore and the probability of great deterioration of value during the delay will justify the master, when acting *bonâ fide* and for the benefit of all concerned, in selling without waiting for instructions, and the sale will excuse notice of abandonment. *The Nova Scotia Marine Insurance Co.* v. *Churchill & Co.*, 26 S.C.R. 65.

—**Valuation—Over-Insurance—Disbursements.**] —In an action on a policy of marine insurance the defendant company claimed that with other policies the vessel was over insured. Evidence was given by the owner to show that one policy, stated to be on the hull, was in fact an insurance against disbursements and was stated, as it appeared, on request of the company's agent. The plaintiff had a verdict:—Held, that there was evidence to justify the jury in finding that the last-mentioned policy was really on disbursements and not on the hull, and the verdict should stand. *McLeod* v. *Universal Marine Ins. Co.*, 33 N.B.R. 447.

INTERCOLONIAL RAILWAY.

See RAILWAYS AND RAILWAY COMPANIES, IV.

INTEREST.

Expropriation for Government Railway—Possession taken by Crown before acquiring Title—Compensation—Interest.]—Where the Crown has gone into possession of lands sought to be expropriated for the purposes of a public work, interest upon the sum awarded as their value may be computed from the date of entering into possession, notwithstanding the fact that the Crown may not have acquired a good title to the lands until a date subsequent to that of such entering into possession. *The Queen* v. *Murray*, 5 Ex. C.R., 69.

—**Petition of Right for Breach of Contract by Crown—Damages—Interest—Computation.**]—Held, (following *St. Louis* v. *The Queen*, 25 S.C.R. 649) that interest may be allowed against the Crown upon a judgment on a petition arising *ex contractu* in the Province of Quebec, in the absence of any express undertaking by the Crown to pay the same, or any statutory enactment authorizing such allowance. But such allowance should only be computed from the date when the petition of right is filed in the office of the Secretary of State. *Lainé* v. *The Queen*, 5 Ex. C. R. 103.

—**Wrongful Arrest of Merchant Ship by Crown—Damages—Interest.**]—Where a merchant vessel was seized by one of Her Majesty's ships, acting under powers conferred in that behalf by *The Behring Sea Award Act*, 1894, and such vessel was found innocent of any offence against the said Act, the court awarded damages for the wrongful seizure and detention, together with interest upon the ascertained amount of such damages. *The Queen* v. *The Ship "Beatrice,"* 5 Ex. C.R. 160.

—**Work and Services—Reference—58 V. (Ont.) c. 12, s. 118—Interest.**]—Upon a reference of an action for payment for work and services agreed upon at a fixed rate, the referee found that the wages claimed were payable yearly, and allowed interest on the several amounts claimed from the times they became payable. An appeal was taken by the defendant from the report of the referee:—Held, that under the provisions of the Ontario Act, 58 Vict. c. 12, s. 118, the interest was properly allowed. *McCullough* v. *Newlove*, 27 Ont. R. 627.

—**Transfer of Mortgage—Interest on Interest.**]—G., at the request of the mortgagor, paid the principal and interest due on the mortgage and took an assignment of it. In a suit by the mortgagor for redemption:—Held, that in the absence of an express agreement therefor G. could not claim interest on the sum paid for interest due when the mortgage was assigned. *Thomas v. Girvan*, 1 N.B. Eq. 257.

—**Appeal from Court of Review—Appeal to Privy Council—Appealable Amount—Addition of Interest—C.C.P. arts. 1115, 1178, 1178a—R.S.Q. art. 2311—54 & 55 V. (D.) c. 25, s. 3, s.s. 3—54 V. (P.Q.) c. 48 (amending C.C.P. art. 1115).**]

See APPEAL, III (*a*).

—**Mortgage—Loan to Pay off Prior Incumbrance—Interest—Assignment of Mortgage—Purchase of Equity of Redemption—Account.**]—*London Loan Co.* v. *Manley*, 26 S.C.R. 443.

—**Distress for Interest—Attornment Clause in Mortgage.**]—See LANDLORD AND TENANT, II

—**Mortgage—Payment of Prior Encumbrance—Rate of Interest.**]—See MORTGAGE, VII.

—**Mortgage—Owner of Equity of Redemption—Extension of Time—Increased rate of Interest—Reservation of Remedies.**]

See MORTGAGE, VII.

—**Rate of—Mortgagee—Foreclosure—Judgment—Merger.**]

See MORTGAGE, VII.

—**Expropriation for Government Railway—Damages—Use and Occupation—Profits—Interest—Compensation.**]

RAILWAYS AND RAILWAY COMPANIES, VI.

INTERLOCUTORY ORDER.

Master in Chambers—Judge in Chambers—Order—Appeal—Ont. Rule 739.]—An order of a Judge in Chambers, made upon appeal from an order of the Master in Chambers, allowing summary judgment under Rule 739 (Ont.) to be entered, is an interlocutory order, but an appeal lies from it to a Divisional Court. *Bank of Toronto* v. *Keilty*, 17 Ont. P.R. 250.

INTERNATIONAL LAW.

Act of Foreign State—Territorial Jurisdiction—Agency.]—C., an American citizen, was carrying on business at Honolulu when a rebellion

broke out and martial law was established. C. was considered by the Government to be a person dangerous to the peace of the community and ordered to be banished. He was placed on a British steamship and conveyed to Vancouver, B.C., the master of the ship taking a letter of indemnity from the authorities and insisting on his being booked in the usual way as a passenger. In an action by C. against the master and owner of the steamship the defendants by one paragraph of the statement of defence pleaded that "in receiving the said plaintiff on board the said steamship and conveying him to Vancouver aforesaid, the master was acting as agent of the Hawaiian Government and carrying out the lawful order of that Government." In his reply the plaintiff admitted said paragraph.—Held, that the admission had reference to the facts alleged only and not to the extent of the agency as alleged, which was a matter of law to be deduced from the facts:—Held, further, that the order of the Government did not justify the act of the master; that it might have done so if carried out in an Hawaiian vessel, but on a British ship the master was guilty of a trespass as soon as she was outside of Hawaiian jurisdiction; and that the owner was liable, if not for the master's act, for that of the agent who booked C. as a passenger in the usual way. *Cranstoun* v. *Bird*, 4 B.C.R. 569.

—Treaty of 1818—Illegal Fishing.]

See FISHERIES.

INTERPLEADER.

Security for Costs—Interpleader—Party out of Jurisdiction.]—See COSTS, III.

—Interpleader—Bailees—Right to Order.]

See PRACTICE, XII.

INTERVENTION.

Right to Intervene—Vagueness and uncertainty as to Beneficiaries—"Poor Relatives"—"Public Protestant Charities"—Charitable uses—Persona designata.]—In 1865 J.G.R., a merchant of Quebec, whilst temporarily in New York, made a holograph will as follows:—"I hereby will and bequeath all my property, assets or means of any kind to my brother Frank, who will use one half of them for public Protestant charities in Quebec and Carluke, say the Protestant Hospital Home, the French Canadian Mission, and amongst poor relatives as he may judge best, the other half for himself and for his own use, excepting two thousand pounds, which he will send to Miss Mary Frame, Overton Farm. JAMES G. ROSS."

In an action to have the will declared invalid interventions were filed by Morrin College, an institution where youth are instructed in the higher branches of learning, and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free general and theological education, and are assisted by scholarships and bursaries to complete their education; by the Finlay Asylum, a corporate institution for the relief of the aged and infirm, belonging to the communion of the Church of England; and by W. R. R., a first cousin of the testator claiming as a poor relative:—Held, that Morrin College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no *locus standi* to intervene; but that Finlay Asylum came within the terms of the will as one of the charities which F. C. might select as a beneficiary, and this gave it a right to intervene to support the will:—Held, further, that in the gift to "poor relatives" the word "poor" was too vague and uncertain to have any meaning attached to it, and must therefore be rejected, and the word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. R. not coming within that class his intervention should be dismissed:—Held, per Fournier and Taschereau, JJ., that the bequest to "poor relatives" was absolutely null for uncertainty. *Ross* v. *Ross*, 25 S.C.R. 307.

— Court of Review — Tierce-opposition — Arts. 154, 510 C.C.P.]

See PRACTICE AND PROCEDURE, XVII (*b*).

INTRUSION.

Information of — Advent Possession against Crown—Crown Grant—21 Jac. 1 c. 14.

See CROWN, II (*a*).

INVENTION.

See PATENT OF INVENTION.

INVOICE.

Sale by Sample—Price.]—See SALE, II.

IRREGULARITY.

Judgment — Appearance — Default—Tender—Notice—Irregularity—Motion for Judgment.]

See PRACTICE AND PROCEDURE, XIII.

—Notice of Trial—Irregularity—Close of Pleadings.]—See PRACTICE AND PROCEDURE, XXIII.

IRRELEVANCY

In Declaration—Exception to—Demurrer.]

See PLEADING, II.

ISSUES.

See EQUITABLE ISSUES.

JOINDER.

Of Causes of Action—Recovery of Land.] See ACTION, IX.

—Joinder of Causes of Action—Ontario Rule 341.] See PRACTICE AND PROCEDURE, I (*a*).

JOINT STOCK COMPANY.

See COMPANY.

JUDGE.

Jury Notice—Striking out—Powers of Local Judge.]—A local Judge has jurisdiction, under s. 185 (5) of the Ontario Judicature Act, 1895, in an action brought in his own county, where the solicitors for all parties reside in such county, to make an order, under s. 114, striking out a jury notice as a matter of discretion; and he may do so sitting in Chambers. Where the issues raised in an action of ejectment were mainly equitable, and it appeared to be a case in which the Judge at the trial would dispense with the jury:—Held, that the Judge should have exercised his discretion and struck out the jury notice. *Fox* v. *Fox*, 17 Ont. P.R. 161.

—Jury Notice—Crown Suit—Ontario Rule 364—Trial Judge.]—In an action by the Crown upon an official bond, a judge on the application of the Crown, has power, under Rule 364, to make an order striking out a jury notice given by the defendants.—Per Osler, J. A.: If before the trial the court or judge has ordered that the action may be tried without a jury, the judge presiding at the trial has no power to direct it to be tried by a jury. *The Queen* v. *Grant*, 17 Ont. P.R. 165.

—Appeal from a Single Judge—Ontario Rule 1487 (803)—Judgment at Trial.]—The words "appeal from a single Judge" in Rule 1487 (803) mean from a Judge presiding in Court; that Rule does not interfere with the right to appeal from the judgment of the trial Judge to a Divisional Court; and a party has still the right to prosecute such an appeal without terms being imposed as to giving security for costs. *Wilson* v. *Manes*, 17 Ont. P.R. 239.

—Non-suit by Judge ex mero motu—Appeal.] See COSTS, V.

—Judge in Chambers—Appeal from—Interlocutory Order.] See INTERLOCUTORY ORDER.

JUDGMENT.

Action—Bar to—Foreign Judgment—Estoppel—Res judicata—Judgment obtained after Action begun—R.S.N.S. (5 ser.) c. 104, s. 12, s.s. 7; orders 24 and 70, rule 2; order 35, rule 38.]—A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada.—Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained: *The Delta* (1 P. D. 393) distinguished. The combined effect of orders 24 and 70, rule 2, and s. 12, s.s. 7 of c. 104 of R.S.N.S. 5 ser., will permit this to be done in Nova Scotia.—The provisions of R.S.N.S. 5 ser., c. 104, order 35, rule 38, that evidence of a judgment recovered in a foreign country shall not be conclusive, in an action on such judgment in Nova Scotia, of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favor of the defendant in Nova Scotia who has brought an unsuccessful action in a foreign court against the plaintiff. *Law* v. *Hansen*, 25 S.C.R. 69.

—Against Firm—Liability of Reputed Partner—Action on Judgment.]—In an action upon a promissory note against M. I. & Co., as makers, and J. I., as indorser, judgment was rendered by default against the firm, and a verdict found in favor of J. I., as it appeared by the evidence that he had indorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note:—Held, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as maker or indorser. *Isbester* v. *Ray, Street & Co.* 26 S.C.R. 79.

—Criminal Code, sec. 575—Confiscation of Gaming Instruments, Moneys, etc.—Action to Recover.]—In an action to revendicate moneys seized and confiscated under the provisions of sec. 575 of the Criminal Code:—Held, per Strong, C.J., that a judgment declaring the forfeiture of moneys so seized cannot be collaterally impeached in an action of revendication. *O'Neil* v. *The Attorney-General of Canada*, 26 S.C.R. 122.

—Joint Stock Company—Ultra Vires Contract—Consent Judgment on—Action to set Aside.]—A company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter or such as are reasonably incident thereto, nor to exercise their powers in the attainment of authorized objects in a manner not authorized by the charter. The assent of every shareholder makes no difference.—If a company enters into a transaction which is *ultra vires* and litigation ensues in the course of which a judgment is entered by consent, such judgment is as binding on parties as one obtained after a contest and will not be set aside because the transaction was beyond the power of the company. *Charlebois* v. *Delap* 26 S.C.R. 221.

—Appeal—Time Limit—Commencement of—Pronouncing or entry of Judgment—Security—Extension of Time—Order of Judge—Vacation—R.S.C. c. 135, ss. 40, 42, 46.] See APPEAL, VIII.

—Appeal—Time Limit—Commencement of—Pronouncing or entry of Judgment—Security—Extension of Time—Order of Judge—R.S.C. c. 135, ss. 40, 42, 46.]—See APPEAL, VIII.

—**Revivor of Action—Order for, after Judgment—Motion to set aside — Ontario Rule 622.**] — *Chambers* v. *Kitchen*, 17 Ont. P.R. 3, affirming order of Street, J., in 16 Ont. P.R. 219.

—**Appeal from Judgment on Preliminary Issue.**] —See APPEAL, VIII.

—**Garnishee Plaint — Application to Renew — Judgment against Primary Debtor only.**] See PRACTICE AND PROCEDURE, V.

— **Acquiescence in—Attorney—Registration.**] — See ESTOPPEL.

—**Date of—Judge's Minute.**]—See PRACTICE AND PROCEDURE, XVII (*b*).

—**Manitoba Judgments Act, R.S.M., c. 80. s. 12—Exemptions.**]—See EXEMPTIONS.

—**Entering Judgment on Præcipe in Mortgage Action—Ontario Rule, 718 (1349).**] See PRACTICE AND PROCEDURE, XIII.

—**Recovery of Land—Ancillary Claim—Joinder of Causes of Action—Motion for Judgment in such case.**]—See PRACTICE AND PROCEDURE, XIII.

—**Summary Judgment—Ontario Rule 739—Unconditional leave to defend.**] See PRACTICE AND PROCEDURE, XIII.

—**Summary Judgment—Promissory Note—Unconditional Leave to Defend.**] See PRACTICE AND PROCEDURE, XIII.

—**Petition to Open up—New Evidence—Forum—Ontario Rule 782.**] See PRACTICE AND PROCEDURE, XIII.

—**Summary Judgment — Writ of Summons — Special Indorsement—Amendment—Compound Judgment.**]—See PRACTICE AND PROCEDURE, XIII.

—**Action to Realize Charge on Land—Subsequent Incumbrances—Varying Judgment—Notice.**] See PRACTICE AND PROCEDURE, XIII.

—**Summary Judgment—Ontario Rule 739—Special Appearance—Want of Jurisdiction—Ontario Judicature Act [1895], s. 124.**] See PRACTICE AND PROCEDURE, XIII.

—**Summary Judgment—Application for—Ontario Rule 739—Defence—Disclosure of Facts.**] See PRACTICE AND PROCEDURE, XIII.

JUDGMENT DEBTOR.

Examination of—Answers—Gambling Transactions.]—Upon a motion to commit a judgment debtor for unsatisfactory answers upon his examination, the Court should not be called upon to inquire into gambling transactions, that is, practically to take an account to ascertain what money was made and subsequently lost in that way by the judgment debtor, so as to determine whether, arising therefrom, any profits remained as estate in the debtor's possession. *Harvey* v. *Aikene*, 17 Ont. P.R. 71.

—**Enforcing Production of Books and Documents—Examination of Judgment Debtor—Mode of.**] See PRACTICE AND PROCEDURE, XXVII.

JUDICATURE ACT.

Ontario practice—Added Parties—Orders 46 and 48.]—See PRACTICE AND PROCEDURE, XVIII.

JUDICIAL PROCEEDING.

Appeal — Jurisdiction — Judicial Proceeding—Opposition to Judgment—Arts. 484—493 C.C.P.—R.S.C. c. 135, s. 29—Appealable Amount — 54 & 55 V., c. 25, s. 3, s.s. 4—Retrospective Legislation.]—An opposition filed under the provisions of articles 484 and 487 of the Code of Civil Procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a "judicial proceeding" within the meaning of sec. 29 of "The Supreme and Exchequer Courts Act," and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court of Canada when the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled is of the sum or value of $2,000. *Turcotte* v. *Dansereau*, 26 S.C.R., 578.

JURISDICTION.

Alimony—Writ—Service out of Jurisdiction.] See ALIMONY.

—**Writ of Summons—Service out of Jurisdiction.**]—See PRACTICE AND PROCEDURE, XXVII.

—**Jurisdiction of Division Court in Action in Promissory Note for $400, payable in three annual Instalments.**] See DIVISION COURTS.

—**Of Local Judge to Strike out Jury Notice—Ontario Judicature Act, 1895, ss. 114 and 185 (5).**] See JUDGE.

—**County Court—Prohibition—Jurisdiction.**] See PROHIBITION.

—**County Courts—New Trial—Setting aside—Judgment—Manitoba County Courts Act.**] See COUNTY COURT.

—**Security for Costs—Settling Order for, where party comes to reside in Jurisdiction.**] See COSTS, III.

—**Jurisdiction of Court to decree sale under Mortgage where part of Railway is outside the Province.**

See RAILWAYS AND RAILWAY COMPANIES, VII.

See also ACTION.

" APPEAL.

JURY.

Equitable and Legal Issues.]—Semble, that where there are both legal and equitable issues on the record, in the absence of an order under sec. 114 of the Ontario Judicature Act [1895] a party has the right to have the legal issues tried by a jury: *Baldwin* v. *McGuire*, 15 Ont. P.R. 305, commented on. *Fox* v. *Fox*, 17 Ont. P.R. 161.

—Jury List—Challenge to array—Revision—R.S.Q. Art. 2635—53 V., c. 34 (P.Q.).]—The list of jurors entered in the sheriff's and prothonotary's registers can only be altered in manner prescribed by law (R. S. Q., art. 2635). Any revision must be made within three months from the date of the list, and where a revision was made later, was only partial and had improperly struck off the names of persons who should have been summoned in their proper order, the challenge to the array was maintained. *Grose* v. *The Holmes Electric Protection Co.*, Q.R. 9 S.C. 374.

—Railway Company—Loan of Cars—Reasonable Care—Breach of Duty—Negligence—Risk Voluntarily Incurred—"Volenti non fit Injuria."]

See ACTION, IX.

—Answers to Questions — Railway Co.—Negligence.—*Pudsey* v. *Dominion Atlantic Railway Co.*, 25 S.C.R. 691.

—Trial by Justices of the Peace with Jury.]

See JUSTICE OF THE PEACE.

—Jury Notice—Striking out by Local Judge—Discretion—Equitable Issues.]

See JUDGE.

—Jury Notice—Crown Suit—Application to Strike out—Jury Notice by Crown before Trial—Trial Judge.]—See PRACTICE AND PROCEDURE, XIV.

JUSTICE OF THE PEACE.

Felony—Warrant of Justice of the Peace—Absence of Written Information—Trespass—Notice of Action—Criminal Code, ss. 22, 23.]—A justice of the peace is liable in trespass where he issues his warrant for the arrest of a person charged with felony without an information therefor being first duly sworn. Sections 22 and 23 of the Criminal Code are a codification of the common law with respect to the right of a peace officer, whether justice or constable, to personally arrest on view, or on suspicion, or by calling on some one present to assist him. They do not authorize a justice to direct a constable to make an arrest elsewhere without warrant. A notice of action alleging that the defendant on a given date, wrongfully, illegally and without reasonable and probable cause, issued his warrant and caused the plaintiff to be arrested, and kept under arrest on a charge of arson, and, on such date, maliciously, illegally and wrongfully, and without any reasonable and probable cause, caused the plaintiff to be brought before him and to be committed for trial, and to be confined in the common gaol, is a sufficient notice of action in trespass. Semble, notice of action is necessary in such a case. *McGuinness* v. *Dafoe*, 23 Ont. A. R. 704. Affirming 27 Ont. R. 117.

—Police Magistrate—Conviction under Liquor License Act.]—Sec. 419 (a) of the Ontario Municipal Act [1892] which provides that a magistrate shall not be disqualified from acting as such by reason of the fine or penalty, or part thereof, on conviction going to the municipality of which he is a ratepayer, includes a police magistrate.—Where such magistrate is appointed under R.S.O. c. 72, and paid a salary by the municipality instead of fees, such salary being in no way dependent on any fines which he may impose, he has no pecuniary interest in the fines, and is not thereby disqualified. Semble, that in such a case there would have been no disqualification at common law. *The Queen* v. *Fleming*, 27 Ont. R. 122.

—Distress Warrant—Prohibition.]—Prohibition will not lie to restrain the issue and enforcement of a distress warrant by a justice of the peace upon a conviction regular on its face, and which was within the jurisdiction of the justice making it, such acts being ministerial and not judicial. *The Queen* v. *Coursey*, 27 Ont. R. 181.

—Canada Temperance Act—Conviction—Certiorari.]—Held, that under the provisions of the Canada Temperance Act, sec. 117, a conviction cannot be set aside for defect of form or substance, where it appears that it was made for an offence against a provision of the Act within the jurisdiction of the justice who made it, and that no greater penalty was imposed than the law authorized.—Held, also, that the power of a magistrate to hear and determine a charge was not affected by a failure to exercise his jurisdiction as to part of the case, or the imposition of a higher punishment in the shape of costs than might have been awarded. *The Queen* v. *Reed*, 28 N.S.R. 159.

—Trial by Justices of the Peace of Civil Actions with a Jury—Failure of Jury to Agree—Res Judicata.]—Where a civil cause is tried before Justices of the Peace under chap. 102 of the Revised Statutes of Nova Scotia, 5th ser., with a jury, and the jury fail to agree and are dismissed, the trial is abortive and the functions of the justices are at an end.—Where justices, under such circumstances, sign judgment, the cause does not, in consequence, become *res judicata*.—Where the plaintiff wishes to pursue the matter further, he must issue a fresh summons, but is not bound to choose the same justices. *Creelman* v. *Stewart*, 28 N.S.R. 185.

—Certiorari—Conviction—Issue of Distress Warrant after Writ—Contempt.]

See CONTEMPT OF COURT.

—Summary Conviction by—Certiorari—Duty of Court as to reviewing Evidence—Jurisdiction.]

See PRACTICE AND PROCEDURE, VII.

—Costs upon Successful Motion to Quash Conviction, where bona fides of Magistrate Attacked.]

See COSTS, II.

LACHES.

Delay in moving to set aside Award—Effect of.]

See ARBITRATION AND AWARD, IV.

LAND.

See CROWN, III.
" RAILWAYS AND RAILWAY COMPANIES, VI.
" SALE, III.

LANDLORD AND TENANT.

I. ASSIGNMENT.

—**Mortgage of Lease—Assignee of Term.**]—The lessee of certain demised premises granted and mortgaged to a loan company, "their successors and assigns forever," all and singular the said indenture of lease, and the benefit of all covenants and agreements therein contained, and "all that certain parcel, etc.," (describing lands) to secure the repayment of $4,000 *habendum* unto the mortgagees, "their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease, less one day thereof, and all renewals and substituted estates and rights of renewal and other interests of the mortgagor":—Held, that by the words used in the premises of the indenture there was no express grant of any particular estate, interest, or term in the lands mentioned; that the expression of that estate, interest, or term being left to the *habendum*, which is its peculiar office in a grant, there was, therefore, no repugnancy between the premises and the *habendum*.—That the one day excepted might be taken as the last day of the term, and that the mortgagees were not assignees of the term and liable for the rent. *Jamieson* v. *London and Canadian Loan and Agency Company*, 23 Ont. A.R. 602. Reversed on Appeal to Supreme Court of Canada, May 1st, 1897.

II. ATTORNMENT.

—**Mortgage — Attornment Clause — Distress—Distress Act, R.S.M., c. 46, s. 2.**]—A mortgage of lands contained a special attornment clause as follows: "And the said mortgagor doth hereby "attorn to and become tenant of the said lands "to the mortgagees, at a yearly rental of $96, "to be paid in the manner and upon the terms "hereinbefore appointed for the payment of "interest." The indenture of mortgage was not executed by the mortgagee:—Held, that there was a valid relationship of landlord and tenant created by this clause:—Held, also, that on default of payment of interest the mortgagee might distrain for a year's rent under such clause:—Held, further, that sec. 2 of the Distress Act, R. S. Man. c. 46, has no reference to the right of mortgagees to distrain for rent under a tenancy validly created, but only to the right to distrain for interest as such provided for in the ordinary distress clause in the short form of mortgages set out in the Act respecting Short Forms of Indentures. *Linstead* v. *Hamilton Provident and Loan Society*, 11 Man. R. 199.

—**Distress — Rent and Interest — Mortgage — Attornment—Admission—11 Geo. II., c. 19, s. 19.**]—Under a mortgage containing a provision that the mortgagee might distrain for arrears of interest, and an attornment clause by which the mortgagor became a tenant to the mortgagee of the land at a yearly rental equal to the amount of interest payable in the mortgage, the mortgagee distrained upon the crops of a lessee of the mortgagor of the land covered by the mortgage for the amount of arrears of interest due on the mortgage:—Held, that under the Rev. Stats. of Manitoba, c. 46, s. 2, the distress was wholly illegal, as the defendant could only take the goods of the mortgagor for arrears of interest due by him.—The bailiff, after making the seizure, neglected to given notice of the distress, or to make an appraisement of the goods, but it appeared that after the seizure and sale of the crops, the plaintiff's husband agreed with the defendants' manager to pay the defendants $200 if they would abandon their claim to the crops, and procure a release from the person who had bought them at the sale. This money was afterwards paid and accepted by the defendants, and they contended that the agreement was an admission of rent being due, and that the statute 11 Geo. II., c. 19, s. 19, applied so as to prevent the plaintiff from bringing an action such as the present, and that the only action open to the plaintiff was an action on the case for special damages, if any:—Held, that there was not sufficient evidence that any interest was in arrear on the mortgage or any rent overdue, and that the agreement entered into by the plaintiff's husband could not be construed as an admission that any rent was due by the mortgagor, and that, therefore, the case was not brought within the last mentioned statute. *Miller* v. *Imperial Loan and Investment Co.*, 11 Man. R. 247.

III. BUILDINGS.

—**Water Lots—Filling in—"Buildings and Erections"—"Improvements."**]—The lessor of a water lot who had made crib-work thereon and filled it in with earth to the level of adjoining dry lands, and thereby made the property available for the construction of sheds and

warehouses, claimed compensation for the work so done under a proviso in the lease by the lessor to pay for "buildings and erections" upon the leased premises at the end of the term. Held, affirming the judgment of the Court of Appeal, that the crib-work and earth-filling were not "buildings and erections" within the meaning of the proviso. *Adamson* v. *Rogers*, 26 S.C.R. 159.

—**Assessment and Taxes — Buildings.**]— By a lease of certain premises in the city of Toronto it was provided that the lessee might "build or extend any building over the lane to the north of the premises demised, so as such building or extensions is or are always nine feet above the level of Y—— street." The lessee covenanted to pay all taxes charged "upon the demised premises or upon the said lessor on account thereof." There was a further provision in the lease that if the lessor elected not to renew the lease, he should pay for the buildings which might be erected on the demised premises and over the said lane:—Held, per Hagarty, C.J. O., and Burton, J.A., that the covenant to pay taxes did not apply to the portion of the buildings afterwards erected over the lane.—Per Osler and Maclennan, J.J.A: That the right to build was part of the subject matter passing by the lease, and that the lessee was liable to pay the taxes assessable against the portion of the building over the land:—Held, also, that the matter was a question of assessment, and that although the lessor had been assessed in respect of the lane for its full value as vacant land, and the lessee had been assessed in respect of the extension as merely so much bricks and mortar, the lessor could not recover any portion of the taxes paid by him, the apportionment of the assessment being altogether a matter for the Assessment Department. *Janes* v. *O'Keefe*, 23 Ont. A.R. 129.

IV. Distress.

—**R.S.O. [1887], c. 143, s. 28 — Construction of Statute — Distress — Goods of Person holding "under" Tenant.**]—The Ontario Landlord and Tenant Act (R.S.O. [1887], c. 343, s. 28) exempts from distress for rent the property of all persons except the tenant or person liable. The word tenant includes a sub-tenant, assignees of the tenant and any person in actual occupation under or with consent of the tenant:—Held, reversing the judgment of the Court of Appeal, that persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress. *Farwell*, v. *Jameson*, 26 S.C.R. 588.

—**Right to Distrain — Garnishment — R.S.O. c. 143, ss. 2 and 6.**]—Rent may be attached, and when it is done the result is that the collateral remedy of the landlord (i.e., the judgment debtor) by way of distress is suspended in respect of such rent as has accrued up to the day of the service of the garnishing order. *Patterson* v. *King*, 27 Ont. R. 56.

—**Distress — Withdrawal — Arrangement with Tenant—Second Distress—Fraud—58 V. c. 26, s. 4 — Construction.**]— A landlord had distrained upon his tenant's goods for rent in arrear, but had subsequently withdrawn the distress, at the request and for the accommodation of the tenant on obtaining from the tenant a chattel mortgage on his goods as security for the payment of the rent. The mortgage contained a provision that in case the mortgagee should feel unsafe or insecure, or deem the goods conveyed by the mortgage in danger of being sold or removed, then the whole of the money secured by the mortgage should immediately become due and payable. The tenant fraudulently concealed from his landlord, in obtaining this indulgence from him, that he had previously given to the defendant a chattel mortgage on most of the goods covered by the plaintiff's mortgage for securing the payment of a debt. The defendant having seized the goods under the chattel mortgage held by him, the plaintiff caused a second distress to be levied on his tenant's goods for the rent which had accrued previous to the tenant having given him the mortgage, and for as much as had accrued since that time. Held, that the second distress was properly made. Section 4 of 58 Vic., ch. 26 O., the Landlord and Tenant Act, 1895, does not take away the common law right of distress, but merely renders it unnecessary that the relation of landlord and tenant should depend upon tenure or service, or that a reversion should be necessary to the relation. The section is not retroactive. *Harpelle* v. *Carroll*, 27 Ont. R. 240.

—**Distress—Mortgaged Goods—Agreement between Bailiff and Tenant—Pound Breach—2 Wm. & M. sess. 1, c. 5.**]—The goods of a tenant, which had been mortgaged by him, were distrained for rent and impounded, and were left on the premises in his charge for over three weeks by agreement between him and the bailiff, when on being advertised for sale under the distress they were seized and taken away by the mortgagee:—Held, that while there was a good distress and a good impounding as between the landlord and tenant, and there was no abandonment between them, yet as between the landlord and the mortgagee the latter was entitled after the expiration of five days from the date of the distress, and after a reasonable time for the sale and disposal of the goods distrained had elapsed, to treat the goods as no longer in the custody of the law, but subject to his mortgage. Having taken possession of them under his mortgage, the mortgagee was not, under the circumstances, guilty of a pound breach under 2 Wm. & M. sess. 1, c. 5. *Langtry* v. *Clark*, 27 Ont. R. 280.

—**Distress — Conditional Sale of Goods—Lien—Property—"Interest"—Statutes—Repeal—Substitution.**]—An agreement for the sale of certain machinery and other goods contained a provision that until the balance of the purchase money should be fully paid, the vendor should have a vendor's lien on the goods for such balance, and that no actual delivery of such property should be made, nor should possession be parted with, until such balance and interest should be fully paid. After the sale

the vendee took possession of the goods, and subsequently, on the 1st April, 1890, with the assent of the vendor, who surrendered a former lease, the defendants leased to the vendee the premises upon which the goods were situated. Afterwards, and while the balance of the purchase money was still unpaid, the defendants distrained for rent upon the goods in question:—Held, that the transaction in question amounted to an executory agreement to sell the chattels mentioned, the transfer of property in them being conditional upon payment of the price. That the retention of possession by the vendor was intended as security for the payment of the price, and that being the case, the stipulation that there should be a "vendor's lien" for the price should be read out of the contract as mere surplusage, because with the retention of possession provided for, there was no reason for the existence of the lien. The contract being one of conditional sale under 57 Vict., c. 43 (O.), only the interest of the tenant in the goods could be distrained on. Held, also, that the Act 57 Vict., c. 43, which repeals sec. 28, sub-sec. 1 of R.S.O., c. 143, and substitutes a new section therefor, applies to leases made on or after 1st October, 1887, to which the repealed section, by sec. 42 of R.S.O., c. 143, applied. *Carroll* v. *Beard*, 27 Ont. R. 349.

—**Distress—Pledge of Goods.**—If a lessee fraudulently pledges his goods so that the pledge might be annulled, the annulment would not give the lessor a right to seize after eight days from the time of their removal from the premises, and before judgment on a writ of *saisie-gagerie*. *Cuddy* v. *Kamm*, Q.R. 9 S.C. 32.

— **Distress — Goods of Third Parties.**] —The owner of a piano contested the seizure thereof for rent on the ground that in selling it to the tenant he had reserved the property in it until paid for, and that default had been made in payment; he claimed also that the other goods distrained upon should be first sold:—Held, that the landlord could exercise his right of distress indiscriminately on all the goods on the tenant's premises, and could not be compelled to reserve the piano until the other goods were sold. *Langhoff* v. *Boyer*, Q.R. 9 S.C. 216.

V. Duty of Lessor.

—**Health Act—54 V., c. 27 (P.Q.)**]—Where, after execution of a lease of residential premises, but before possession by the lessee, a case of typhoid fever occurred on said premises, of which the lessor was immediately notified:—Held, that it was the duty of the lessor to give the notice to the Board of Health required by the Public Health Act, 54 V., c. 27, art. 3066, and he not having done so the lessee could refuse to take possession or pay rent until the premises were properly disinfected and rendered fit for habitation. The lessee was not estopped, by reason of an attempt to sub-let to out-going tenants, from insisting on this right. *Laurier* v. *Turcotte*, Q.R. 9 S.C. 86.

—**Written Lease—Nuisance to Lessee—Resiliation—Notice to Lessor—Damages—Art. 1067 C.C.**] F. leased a dwelling house from D. for a term of two years. Shortly after F. took possession the adjoining premises were also leased by D., and the lessee thereof converted them into a house of ill-fame, which eventually deprived F. of the beneficial use of his premises, and he brought an action against D. for resiliation of his lease and for damages;—Held, that the lease being in writing D. was entitled to a written notification (*mise en demeure*) before damages could be claimed from him; Art. 1067 C.C.; and because of the omission of the *mise en demeure* F. could not succeed as to damages, but was entitled to the resilation of his lease. *Fitzpatrick* v. *Darling*, Q.R. 9 S.C. 247.

VI. Easement.

—**Easement—Implied Grant—Derogation from.**] —A store, two rooms and a cellar connected with the store by hatchway and stairs, were leased to J. "with the privileges and appurtenances thereunto belonging." The rooms communicated with the store, and a door in one of the rooms opened off an alleyway leading from the street to the rear of the premises, which alleyway was on the lot leased and had for many years previous to the lease been used by occupiers of the premises, coal being carted through the door to a shute through which it was placed in the cellar. The lessor sought to block up the alleyway door and prevent access by carts, contending that it was not necessary for the convenient use of the premises; that coal could be put in the cellar by means of the front door and hatch; and that a right to the alleyway did not pass in the absence of an express grant:—Held, that the tenant was entitled to the unimpaired use of the alleyway since it was in use at the date of the lease as an easement belonging to the premises. *Jones* v. *Hunter*, 1 N.B. Eq. 250.

VII. Fixtures.

—**Trade Fixtures—Right to Remove—Reasonable time to Remove.**]—Trade fixtures brought on the demised premises by the tenant for the purposes of his business, may be removed by him if he can do so without substantial injury to the freehold, and the covenant in the Short Forms of Leases Act (R.S.O., c. 106) to leave the premises in repair does not restrict the right to remove.—Where the lessor has an election to forfeit the term upon the happening of an uncertain event, the tenant has a reasonable time after the election to forfeit to remove trade fixtures. *Argles* v. *McMath*, 23 Ont. A.R., 44.

VIII. Liability for Negligence.

—**Fire in Leased Premises — Origin — Responsibility of Lessee — Evidence—Art. 1629, C.C.**]—Where premises under lease are damaged by fire, art. 1629 of the Civil Code does not oblige the lessee to establish the cause of the fire. He is only required to show that it did not occur through his fault. Thus where the lessee of an industrial establishment exercised all possible care in order to protect the premises, but they were destroyed by a fire of which it was impossible to ascertain the origin, the presumption under the said article was sufficiently rebutted by his establishing that it was not caused by his fault, nor by that of his employés who had access to the portion of the building in which the fire started. *Labbé* v. *Murphy*, Q.R. 5 Q.B. 88. Affirmed by the Supreme Court of Canada on Jan. 25th, 1897.

IX. Notice to Quit.

—**Overholding—Form of Action—New Contract.**]—Defendant gave notice to quit the premises occupied by him, to take effect on the first day of May then next ensuing. The 1st of May falling on Monday, defendant did not commence to move out until the following day, and had not completed the moving when another tenant, to whom the plaintiff had let the premises, arrived:—Held, affirming the judgment of the County Court Judge, that the tenancy between plaintiff and defendant having been put an end to, there could be no new contract except by mutual agreement. Held, also, that in the absence of an intention to that effect, the overholding was not a waiver of the notice to quit. Held, further, that the only payment for which defendant would be liable would be for the several days that elapsed before he returned the key, provided plaintiff proved that the non-delivery of the key prevented him from obtaining possession, in which case the action would be for use and occupation. *Nisbet* v. *Hall*, 28 N.S.R. 80.

X. Overholding Tenant.

—**Lease—Renewal—Holding over.**]—C. occupied premises under a lease for 15 months, renewable at his option, on giving 6 months notice, for five years more at an increased rent. After the 15 months expired he remained in possession, paying the increased rent, but not having given notice, for three years, when he gave notice that he would give up possession:—Held, that after the term expires he was only tenant at will and no tenancy for five years existed by his remaining in and paying the rent fixed for such tenancy. *Joseph* v. *Chouillou*, Q.R. 5 Q.B. 259, affirming 8 S.C. 1.

XI. Rent.

—**Reduction of Rent—Effect on Provisions of Lease.**]—A company were assignees of a lease in writing, containing a provision for the acceleration of six months' rent in case the tenant became insolvent. Before the expiry of the lease a verbal arrangement was made between the company and the landlord for a reduction of the rent after the lease expired; nothing was said as to the other terms. The company was put into liquidation, and the landlord sought to prove a claim for two quarters' rent under the acceleration clause in the original lease:—Held, that the new arrangement made related to the old lease, and the terms of the latter were to be imported into it, so far as applicable, including the acceleration clause. *Re Canada Coal Company*, 27 Ont. R. 151.

—**Garnishment of Rent—Order—Parties—Amendment—Assignment under 4 & 5 Anne, c. 16, c. 10—Notice.**]—See Attachment of Debts.

—**Assignment for Creditors—Landlord's preferential lien—58 V. c. 26, s. 3, s.s. 4 and 5 (Ont.).**]—See Bankruptcy and Insolvency, II.

—**Claim for Rent—Insolvent Estate—Possession of Goods—Proceedings against Curator—Costs—Privileged Claim.**]

See Bankruptcy and Insolvency, II.

XII. Repairs.

—**Lease—Mechanic's Lien—R.S.O. c. 126, s. 2, s.s. 3.**—The lessor in a lease which provides that certain repairs shall be done by the lessee, and the cost deducted from the rent, is not, as regards persons employed to do such repairs, an "owner" within the meaning of sub-section 3 of section 2 of R.S.O. c. 126, the Mechanics' Lien Act. *Garing* v. *Hunt and Claris*, 27 Ont. R. 149.

XIII. Secretion of Goods.

—**Fire on Leased Premises—Removal of Goods.**]—Where premises under lease had been made uninhabitable by a fire, and the lessee, with the lessor's knowledge, had sent a piano saved from the fire to be repaired and caused the other goods to be sold as damaged:—Held, that this did not constitute a secretion of the goods which justified a *saisie-arrêt* before judgment in an action by the lessor. *Perrault* v. *Tite*, Q.R. 9 S.C. 260, reversing 8 S.C. 399.

XIV. Surrender of Lease.

—**Notice to Quit—Repudiation of Lease—Recovery of Rent.**]—Where a tenant pays the rent of demised premises up to the time of quitting them, and notifies his landlord that he does not intend to keep the premises for the remainder of the term or pay any more rent, the landlord cannot regard the tenant's conduct as a repudiation of the contract, and forthwith sue to recover the whole rent for the unexpired portion of the term. He must either consent to the tenant's quitting as a surrender of the term, or must treat the term as subsisting and sue for future gales of rent as they fall due. *Connolly* v. *Coon*, 23 Ont. A.R. 37.

LAND REGISTRY ACT.

Equitable Mortgage—Subsequent Registered Conveyance—Priority—Evidence—Onus.]—K. verbally agreed to give to a creditor a mortgage on her real estate and delivered the title deeds to the creditor in order to have it prepared, which was not done. K. subsequently conveyed the said real estate to R., who registered the conveyance as a charge, his subsequent application to be registered as owner of the "absolute fee" being refused because of the deposit of the title deeds as above. The creditor brought an action to foreclose his equitable mortgage:—Held, that before the passing of the Land Registry Act (C.S.B.C. c. 67) R., unless he proved that he had made inquiries for the title deeds and also had given valuable consideration for the conveyance to him, would have been affected with constructive notice of the mortgage. By s. 35 of the Act he would be relieved from the effect of such notice, merely by proving himself a purchaser for value, the onus of which was on him. On the trial the action was dismissed as against R., but the full court ordered a new trial to determine the question of bona fides of his deed. *Hudson Bay Co.* v. *Kearns & Rowling*, 3 B.C. R. 330.

On appeal from the verdict in the second trial in favour of the equitable mortgagee the

majority of the court held that R., as purchaser of the registered title, was protected by s. 35 of the Land Registry Act, which provides, in substance, that no such purchaser shall be affected with notice of any unregistered title or interest. *Hudson Bay Co.* v. *Kearns & Rowling*, 4 B.C. R. 536.

—**Certificate of Title—C.S.B.C. c. 67, s. 63.**]—The Land Registry Act, C.S.B.C. [1888], c. 67, s. 63, provides that "the owner in fee of any land, the title to which shall have been registered for the space of seven years, may apply to the Registrar for a certificate of indefeasible title:"—Held, by an equal division of opinion, that the applicant for such certificate must prove a registered title in himself for seven years. *In re Vancouver Improvement Co.*, 3 B.C.R. 601.

LATENT DEFECT.

Sale of Horse—Warranty—Reasonable Delay for Complaint—Arts. 1506, 1530 C.C.—Art. 231 C.C.P.]—See SALE, I (*f*).

LEASE.

See LANDLORD AND TENANT.

LEASE OF CHATTELS.

Property, Real and Personal—Immovables by Destination—Movables Incorporated with Freehold—Severance from Realty—Contract—Resolutory Condition—Conditional sale—Hypothecary Creditor—Unpaid vendor—Arts. 379, 2017, 2083, 2085, 2089. C. C.]—See CONTRACT, III (*a*).

LEGACY.

See WILL, II.

LEGAL ISSUES.

Equitable and Legal Issues on the Record—Right to Jury Trial.]—See JURY.

LEGAL MAXIMS.

Cujus est dare ejus est Disponere.]—See *Howland, Sons & Co.* v. *Grant*, 26 S.C.R. p. 373.

—**De Minimis non curat lex.**]—See *Sleeth* v. *Hurlbert*, 25 S.C.R. p. 632.

—**In jure non Remota Causa sed Proxima Spectatur.**]—See *Northern Pacific Express Co.* v. *Martin*, 26 S.C.R. p. 139.

—**Interest Reipublicæ ut sit Finis Litium.**]—See *The Queen* v. *St. Louis*, 5 Ex. C. R. p. 354.

—**Locus regit actum.**]—See *Ross* v. *Ross*, 25 C.R. p. 328.

—**Nemo debet bis vexari pro unâ et eâdem Causâ.**]—See *The Queen* v. *St. Louis*, 5 Ex. C.R. p. 354.

—**Omnia præsumuntur contra spoliatorem.**]—See *The Queen* v. *St. Louis*, 25 S.C.R. p. 652.

—**Qui Jure suo Utitur neminem Lædit.**]—See *Drysdale* v. *Dugas*, 26 S.C.R. p. 27.

—**Qui prior est tempore, potior est in jure.**]—See *The Queen* v. *The City of Windsor*, 5 Ex. C.R., p. 231.

—**Sic utere tuo ut alienum non laedas.**]—See *Drysdale* v. *Dregas*, 26 S.C.R., p. 23.

—**Verba fortius accipiuntur contra proferentem.**]—See *La Compagnie pour l'éclairage au gaz de St. Hyacinthe* v. *La Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe*, 25 S.C.R. p. 174.

—**Volenti non fit injuria.**]—See *Canada Atlantic Railway Co.* v. *Hurdman*, 25 S.C.R. p. 219.

LEGATAIRE UNIVERSAL.

Hypotheque Conventionnelle — Mention of amount—Payment of Legacy—Art. 2044 C.C.]
See HYPOTHEC.

LEGISLATURE.

Constitutional Law—Powers of Executive Councillors—"Letter of Credit"—Ratification by Legislature—Obligations Binding on the Province—Discretion of Government as to Expenditures—Petition of Right—Negotiable Instrument—"Bills of Exchange Act, 1890"—"The Bank Act," R.S.C., c. 120.]
See CONSTITUTIONAL LAW, I (*b*)

—**Constitutional Law—Marital Rights—Married Woman — Separate Estate — Jurisdiction of North-West Territorial Legislature — Statute, Interpretation of—40 V. c. 7, s. 3, and amendments—R.S.C. c. 50—N.W. Ter. Ord. No. 16 of 1889.**]
See CONSTITUTIONAL LAW, II (*b*).

—**Canadian Waters—Property in Beds—Public Harbours — Erections in Navigable Waters — Interference with Navigation—Rights of Fishing—Power to Grant — Riparian Proprietors — Great Lakes and Navigable Rivers—Operation of Magna Charta—Provincial Legislation—R.S.O. [1887] c. 24, s. 47—55 V. c. 10, ss. 5 to 13, 19 to 21 (O.)—R.S.Q. arts. 1375 to 1378.**]
See CONSTITUTIONAL LAW, II (*a*).

—**Powers of—Municipal Control of Streets—Interference with.**]
See CONSTITUTIONAL LAW, II (*b*).

LEGS PARTICULIER.

See HYPOTHEC

LESSEE.

See LANDLORD AND TENANT.

LETTER OF CREDIT.

Member of Executive—Legislative Vote—Petition of Right.]

See CONSTITUTIONAL LAW, I (*b*).

LIBEL AND SLANDER.

I. DAMAGES.

—Libel—Recourse for—Damages—Interference with amount of, on appeal—Court of Review.]—Art. 1053 C C. is the only part of the code which gives a remedy to a person libelled, and the expression "damages caused" therein, notwithstanding the qualifying words, "real," etc., should always represent the compensation for the injury.—Unless the amount of damages given by a court of first instance is so great as to shock the sense of a reasonable man, it should not be interfered with on appeal. For the application of this rule the Court of Review is a court of appeal, and its judgment reducing damages may be reversed by the Queen's Bench. $5000 is not an excessive amount to be awarded for libel against a Lieut.-Governor for accusing him of corruptly abusing the powers. *Angers* v. *Pacaud*, Q.R. 5 Q.B. 17.

II. PRIVILEGE.

—Privilege—Malice—Notice of Action.]—A statement by a post office inspector when investigating complaints as to lost letters to the sureties of the postmaster, that the postmaster's wife has stolen the letters in question, and has given him a written confession of her guilt, is *primâ facie* privileged because of the financial interest of the sureties in the investigation:—Semble, such a statement to a partner of one of the sureties is not protected.—The facts that the plaintiff at the trial denies having stolen the letters and having made any confession, and that the inspector does not produce the alleged confession or in any way account for it, is some evidence that he made the accusation knowing it to be untrue, and therefore maliciously, so as to displace the *primâ facie* case of privilege.—A post office inspector is not entitled to notice of an action to recover damages for defamatory statements made by him. *Hanes* v. *Burnham*, 23 Ont. A.R. 90.

—Libel—Report of Public Meeting—Public Interest—Functions of Jury.]—It is not the province of a jury to find whether or not a publication alleged to be libellous was published in the interest of the public. That should be decided by the Judge as a deduction from the facts proved.—In an action for publishing in a newspaper a libel on a private individual the defendant cannot justify by showing that he merely reproduced the words of a candidate for election to the House of Commons uttered at a public meeting held in the interest of his candidature, the defendant having taken no steps to prove the truth or falsity of the utterance, and notwithstanding the jury found it was published in good faith, without malice and in the public interest. *Graham* v. *Pelland*, Q.R. 5 Q.B. 196, affirming 8 S.C. 348.

III. SPECIAL CASES.

—Libel—Incorporated Company—Injury to Business—Damages.]—An action will lie at the suit of an incorporated trading company to recover damages for a libel calculated to injure their reputation in the way of their business: *South Hetton Coal Co.* v. *North-Eastern News Association* [1894], 1 Q.B. 133, followed. *Journal Printing Co.* v. *McLean*, 23 Ont. A. R. 509, approved. *Journal Printing Co.* v. *McLean*, 23 Ont. A. R. 324.

—Newspaper Libel—Notice of Action—Sufficiency—R.S.O. c. 57, s. 5.]—Where, in an action for libel against a newspaper company in respect of defamatory articles published in their newspaper, the notice complaining of the publication given in pursuance of R.S.O. c. 57, s. 5, s.s 2, was addressed to the editor of the paper and was served on the city editor at the company's office, and a similar notice was served on the chairman of the board of directors at the said office, the Court held that the notice being addressed to the editor was not a notice to the defendants within the meaning of the above enactment. *Burwell* v. *The London Free Press Company*, 27 Ont. R. 6.

—Pleading—Charge of unprofessional conduct.]—Where the plea to an action charged the plaintiff's attorney with unprofessional conduct in agreeing with his client to assume the risk of costs on condition of sharing in any amount recovered, and such plea is not established or justified by the evidence, the attorney may recover damages therefor. *Gaudet* v. *Esplin*, Q.R. 9 S.C. 210.

—Defamation—Imputation of Theft.]—A member of the entertainment committee at a dinner observed that a box of cigars had disappeared, and declared that some one must have taken or stolen it. D., who was present, insisted on being searched, though not charged with theft. He afterwards brought an action against the member for defamation:—Held, that there was no ground for such action. *Dick* v. *Kennedy*, Q.R. 9 S.C. 312.

—Slander—Attempt to prove at Trial issue not raised in Pleadings—Costs—Appeal.]—In an action for slander, the defendant by his defence denied speaking and publishing the words complained of. At the trial, although he had not framed his pleading to cover such a defence, he attempted to show that the plaintiff's reputation was bad, but failed. The trial judge gave the plaintiff judgment for five dollars, but withheld costs:—Held (on appeal therefrom), that the trial judge erred in withholding costs. *Croft* v. *Jodrey*, 28 N.S.R. 78.

LICENSE.

Nova Scotia—License—Application for renewal — Section authorizing renewal — Repeal — Revised Statutes, 5th Ser., c. 7., s. 95.]—The appellants having obtained a license to work for two years under s. 95, c. vii. of the Revised Statutes, 5th series, afterwards applied under the same section for a renewal thereof; but in the meantime s. 95 had been repealed by an amending Act of 1889:—Held, that at the date of the application to renew the power to grant it was gone, for even if the amending Act was so construed as not to interfere with vested rights, the appellants possessed a privilege and not an accrued right in reference to the renewal sought: *Main* v. *Stark* (15 App. Cas. 384) referred to. *Reynolds* v. *Attorney-General for Nova Scotia* [1896], A.C. 240.

—Constitutional Law — Powers of Provincial Legislatures—Direct Taxation — Manufacturing and Trading Licenses—Distribution of Taxes—Uniformity of Taxation—Quebec Statutes, 55 & 56 V., c. 10, and 56 V., c. 15—British North America Act, 1867.]—The provisions of the Quebec statute, 55 & 56 V., c. 10, as amended by 56 V., c. 15, do not involve a regulation of trade and commerce, and the license fee thereby imposed is a direct tax and *intra vires* of the legislature; the license required to be taken out by the statute is merely an incident to the collection of the tax and does not alter its character.—Where a tax has been imposed by competent legislative authority, the want of uniformity or equality in the apportionment of the tax is not a ground sufficient to justify the courts in declaring it unconstitutional. *Bank of Toronto* v. *Lambe* (12 App. Cas. 575), followed; *Attorney-General* v. *The Queen Insurance Co.* (3 App. Cas. 1090) distinguished. *Fortier* v. *Lambe*, 25 S.C.R. 422.

—License to Sell Lands—Nova Scotia Probate Act—R.S.N.S. 5 ser. c. 100; 51 V. (N.S.) c. 26—Executors and Administrators — Estoppel — Res Judicata.]—An executrix obtained from the Probate Court a license to sell real estate of a deceased testator for the payment of his debts. Judgment creditors of the devisees moved to set aside the license, but failed on their motion and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser brought an action to have it declared that the judgment was not a charge thereon:—Held, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors, and they were precluded thereby from taking collateral proceedings to charge the lands affected, upon grounds invoked or which might have been invoked upon the motion:—Held, further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action. *Clark* v. *Phinney*, 25 S.C.R. 633.

—Constitutional Law—Municipal Corporation—Powers of Legislature — License — Monopoly — Highways and Ferries—Tolls—Ferry—Disturbance of Licensee—Club Associations, Companies and Partnerships—North-west Territories Act, R. S.C. c. 50, ss. 15 and 24—B.N.A. Act, s. 92, s.s. 8, 10 and 15—Rev. Ord. N.W.T. [1888] c. 28—N.W.Ter. Ord. No. 7 of 1891-2, s. 4.]

See CONSTITUTIONAL LAW, II (*b*).

—Government License — Insurance Business—Penalty.]—See INSURANCE, III.

—Marriage in Ontario—Domicile—Formalities—Presumption.]—See MARRIAGE LAW.

—To search for Mines.]

See MINES AND MINERALS.

—License to enter Lands—Trespass—Damages—Easement—Equitable Interest—Municipal By-law—Notice.]

See MUNICIPAL CORPORATIONS, VIII.

LIEN.

Transfer of Land—Agreement to maintain Vendor—Performance by another.]—A farm was conveyed by an aged couple to their son in consideration of his agreement to board them. On the death of the son in their lifetime, leaving a widow and infant daughter, his brother, at the request of the widow and his parents, took charge of the farm and performed the agreement:—Held, that the brother was entitled to a lien on the land for the money expended in making permanent improvements and in performing the said agreement. *Waters* v. *Waters*, 1 N.B. Eq. 167.

—For Costs—Attorney—Assignment by Debtor after Seizure.]—See ATTORNEY.

—Landlord's Preferential Lien for Rent.]

See BANKRUPTCY AND INSOLVENCY, II.

—Contract—Implied Covenant—Lien on Land—Statute of Limitations.]—See CONTRACT, V (*a*).

—Attorney for Sale of Lands—Lien—Personal Obligation.]—See EQUITABLE ASSIGNMENT.

—Vendor's Lien—Conditional Sale of Goods—Landlord and Tenant.]

See LANDLORD AND TENANT, IV.

—Railway — Priority of Lien for Working Expenses over first Mortgage in Trust for Bondholders—Dom. Act, 46 V., c. 68, s. 5.]—See RAILWAYS AND RAILWAY COMPANIES, VII.

—Maritime Lien—Master's Wages and Disbursements—Account between Co-owners—Mortgage—Priority of Lien Holder.]

See SHIPPING, V. (*b*).

—Maritime Lien—Crown's Rights in Enforcing same—Priority of Master's Lien—Writ of Extent—Costs.]

See SHIPPING, V (*b*)
" also MECHANICS' LIEN.

LIFE ESTATE.

Will, Construction of—Death without Issue—Executory Devise over—Conditional Fee—Estate Tail.]—See WILL, II.

LIMITATION OF ACTIONS.

I. ADVERSE POSSESSION.

—Trespasser—Possession—Tax Title—R.S.O. c. 111, s. 5, s.s. 4—Construction.]—S.s. 4 of s. 5 of the Real Property Limitations Act, R.S.O. c. 111, requiring twenty years' possession as to non-cultivated lands, only operates in favour of the patentee and those claiming under him, and not to persons claiming title derived from the sale of the land for taxes. *Brooke* v. *Gibson*, 27 Ont. R. 218.

—Sale of Land—Trustee and cestui que trust—Possession—Limitations—Registry Act.]—The parties to an agreement for the sale of land in payment of the purchase money, until the taking of possession by the purchaser, stand in the relation of trustee and *cestui que trust*; and as the former has no effective right of entry, the Statute of Limitations does not apply in favor of the possession of the *cestui que trust*; *Warren* v. *Murray* (1894), 2 Q.B. 648, applied. A mortgagee from the trustee under the above circumstances, who takes and registers his mortgage in ignorance that any one other than the mortgagor is in occupation of the land, and without notice, actual or constructive, of any equitable right of the *cestui que trust*, is entitled to set up the provision of s. 83 of the Registry Act, which is retrospective, and to plead it if it is necessary to do so: *Bell* v. *Walker*, 20 Gr. 558; *Grey* v. *Ball*, 23 Gr. 390, followed. *The Building and Loan Association* v. *Poaps*, 27 Ont. R. 470.

—Purchase of Farm—Mortgage to Secure Purchase Money—Possession by Son of Purchaser—Payment of Mortgage—Effect of Discharge.]—In March, 1881, the plaintiff's testator purchased a farm, and had it conveyed to himself, giving to the vendor a mortgage to secure $3,600, part of the purchase money. In April, 1881, one of his sons, with his assent, went into possession upon the understanding that he should apply the profits derived from the farm, after providing for his own living, towards payment of the mortgage, and there was some evidence that the father promised that when the mortgage was paid he should have the farm, subject to payment of an annuity to his father and mother. The son contributed from time to time $1,800 towards payment of the mortgage which, the balance being made up by the father, was paid off on the 30th March, 1886, a statutory discharge acknowledging payment by the father being made on that day and registered. The father after this declined to convey the farm to the son, and promised to leave it to him by his will, but died in 1894, leaving a will in favour of the plaintiffs. The son continued in possession of the farm until his death in 1893, and the defendants, to whom he devised his property, continued in possession after his death, this action being brought to eject them. From time to time, during the lifetime of his son, the father had spent a few days at the farm, but had not actively interfered in the management:—Held, that title had not been acquired by the son as against the father and his devisees:—Held, also, that the execution and registration of the discharge gave, in any event, a new starting point for the Statute of Limitations. *Henderson* v. *Henderson*, 23 Ont. A.R. 577.

II. CONTINUING DAMAGE.

—Prescription—Commencement—Continuing Damage—Tortious Act.]—The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act, and could have been foreseen and claimed for at the time. *Kerr* v. *The Atlantic and Northwest Railway Co.*, 25 S.C.R. 197.

III. INTERRUPTION OF PRESCRIPTION.

—Interruption—Taxation of Costs.]—A prescription of an action by delay can only be interrupted by an act of a party to a cause having for its object the continuation of the proceedings. A taxation of costs in favour of the attorney of a party pursuant to an incidental judgment will not interrupt it. *Merchants Bank of Canada* v. *Irving*, Q.R. 9 S.C. 255.

—Filing Petition for Letters of Administration—Effect of in Preventing the Operation of the Statute of Limitations.]

See PROBATE AND ADMINISTRATION.

—Trust and Trustee—Account—Limitation of Actions—Estoppel.]

See WILL, V.

IV. PERIOD OF LIMITATION.

—Action against Municipal Corporation—Maintenance of Roads and Streets—R.S.Q. art. 4616, s. 3.]—F. fell and broke his arm while walking on the footpath of a public highway and brought an action for damages against the municipality. More than three months having elapsed between the time of the accident and the institution of the action, defendant's plea of prescription under art. 4616 R.S.Q. was upheld and the action dismissed. *Featherston* v. *Town of Lachine*, Q.R. 9 S.C. 37.

—Substitution created by Will—Law prior to Code.]—Prescription against a substitution created by will in 1834, was held to be governed by the law then in force and not by the Code, and to run against the substitutes in favour of third parties only from the opening (*ouverture*) of the substitution. *Page* v. *McLennan*, Q.R. 9 S.C. 193, affirming 7 S.C. 368.

—**Donation Created before the Civil Code—Prescription—Opening of Substitution.**]—Held, per Lacoste, C.J., and Bossé, Hall and Würtele, J.J., that where a substitution was created before the Civil Code, and was only opened by the death of the *grevé* less than ten years before the institution of the action, the right of the plaintiffs to revendicate an immovable which had been charged with the substitution was not prescribed by the prescription of ten years:—Held, per Blanchet, J., before the code the prescription of ten years and that of thirty years had no place as against the *appelé* before the opening of the right. Since the code the two run against him before the opening, but that of ten years must be accompanied by good faith at the time of the acquisition, and the insinuation and publication of the substitution were sufficient to make the one who acquired it in bad faith and to prevent the prescription. *Meloche* v. *Simpson*, Q.R. 5 Q.B. 490.

—**Action against Railway Co.—Fire caused by sparks from Engine.**] - The prescription of an action against a Railway Co. for loss by fire alleged to have been caused by sparks proceeding from an engine is one year from the occurrence of the alleged damage. *Senésac* v. *Central Vermont Railway Co*, Q.R. 9 S.C. 319.

—**Substitution—Creation by Donation before the Code—Opening—Commencement of Prescription.**]
See SUBSTITUTION.

—**Contract—Retrospective Legislation—Implied Covenant—Lien on Land—Statute of Limitations.**] – See CONTRACT, V (*a*).

LIQUIDATOR.

Assets of Partnership—Action for Dissolution—Possession of Third Parties — Art. 1806a C.C.]—A liquidator appointed under art. 1806*a* of the Civil Code to administer the assets of a partnership pending an action for dissolution, is not entitled *de plano* to take possession of assets which may have belonged to the partnership formerly, but which, previous to his appointment, had come into the possession of third parties under an apparent title and colour of right, more especially when the validity of the deed of conveyance to such third parties is the subject of litigation. *Palliser* v. *Vipond*, Q.R. 9 S.C. 362.

And see COMPANY.

LIQUOR.

Sale of—Social Club.]—See CANADA TEMPERANCE ACT.

LIQUOR LICENSE.

Statute—Liquor License Act—54 V. c. 21 s. 4 (B.C.)]—By sec. 4 of the Liquor License Regulation Act of British Columbia, (54 V. c. 21) the prohibition of sale of liquor during certain hours does not apply to hotel or restaurant keepers supplying liquor to guests with meals:—Held, that "meals" applied to food eaten to satisfy hunger, and that refusing liquor to a customer unless he ordered a meal, and supplying it upon his ordering a plate of crackers and cheese, for which no extra charge was made, was a mere excuse for supplying liquor. *The Queen* v. *Sauer*, 3 B.C.R. 368.

LOCAL IMPROVEMENTS.

Municipal Corporation — Pavements—Assessment of Owners—Double Taxation—24 V. (N.S.) c. 39, 53, V. (N.S.) c. 60, s. 14.]
See MUNICIPAL CORPORATION, V.

—**Municipal Corporation—By-law — Assessment —Local Improvements—Agreement with Owners of Property — Construction of Subway—Benefit to Lands.**]—See MUNICIPAL CORPORATION, V.

LOCATEUR.

Privilege of—Distress for Rent.]
See LANDLORD AND TENANT, IV.

LOCUS STANDI.

Executors and Administrators—Distribution pari passu—Action by Administratrix to Recover Excess—Locus Standi—R.S.O. c. 110, s. 36.]
See EXECUTORS AND ADMINISTRATORS.

—**Gas Company—Reduction of Price to Consumers—Action to Compel—Locus Standi.**]
See ASSESSMENT AND TAXES.

LORD'S DAY.

Lord's Day Act, R.S.O. c. 203, s. 1—Operation of Street Cars on Sunday.]—An incorporated company operating street cars on Sunday is not within the prohibition of s. 1 of the Lord's Day Act, R.S.O. c. 203: *Sandiman* v. *Breach*, 7 B. & C. 96; *Reg.* v. *Budway*, 8 C.L.T. Occ. Not. 269; and *Reg.* v. *Somers*, 24 Ont. R. 244, followed:—Semble, that, if the Act applied, the defendant company was within the exception as to "conveying travellers:" *Reg.* v. *Daggett*, 1 Ont. R. 537, followed. *Reg.* v. *Tinning*, 11 U.C.Q.B. 636, not followed. *Attorney-General for Ontario* v. *The Hamilton Street Railway Co.*, 27 Ont. R. 49.

LOUAGE.

—**Distress for Rent—Locateur—Privilege.**]
See LANDLORD AND TENANT, IV.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MAGNA CHARTA.

Canadian Waters—Property in Beds—Public Harbours—Erections in Navigable Waters—Interference with Navigation—Right of Fishing—Power to grant—Riparian Proprietors—Great Lakes and navigable Rivers—Operation of Magna Charta—Provincial Legislation—R.S.O. [1887] c. 24, s. 47—55 V. c. 10, ss. 5 to 13, 19 to 21 (O)—R. S. Q. arts. 1375 to 1378.]—Where the provisions of Magna Charta are not in force, as in the province of Quebec, the Crown in right of the province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours, in which, as in public harbours, the Crown, in right of the Dominion, may grant the beds and fishing rights. Gwynne, J. dissenting.—Per Strong, C. J. and King, and Girouard, J. J.: The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec) unless repealed by legislation, but such legislation has probably been passed by the various provincial legislatures, and these provisions of the charter so far as they affect public harbours have been repealed by Dominion legislation. *In re Jurisdiction over Provincial Fisheries*, 26 S.C.R. 444.

MAINTENANCE.

Of Child—Adoption.]—See INFANT, III.

—Of Parents—Transfer of Property.]—See LIEN.

MALICIOUS PROSECUTION.

Assault—Criminal Code, 1892, s. 53.]—A trespasser upon land of which another is in peaceable possession cannot be convicted of an assault under section 53 of the Criminal Code, 1892, merely because he refuses to leave upon the order or demand of the other, and the latter part of the section does not apply until there is an overt act on the part of the person in possession towards prevention or removal, and an overt act of resistance on the part of the trespasser. A verdict, therefore, against the defendant for malicious prosecution in charging the plaintiff before a magistrate with an assault, when the plaintiff had merely refused on the demand of the defendant to quit the premises upon which he was trespassing, was held to be right. *Pockett* v. *Pool*, 11 Man. R 275.

MALPRACTICE.

See MEDICAL PRACTITIONER.

MANDAMUS.

Action for—Ontario Rule 1112—Railways—Damages—53 V., c. 28, s. 2 (D.)]—The prerequisites to be observed to obtain a prerogative writ of mandamus are not essential where there is a right of action for a mandamus, namely, where under Rule 1112 the plaintiff is personally interested in the fulfilment of a duty of a quasi public character, as in this case the omission of a railway company to properly fence their tracks.—The damages under s. 2 of 53 V., c. 28 (D.), are limited to injuries caused to animals by the company's trains or engines; damages incurred in watching cattle by reason of the bad state of the fences are not recoverable. *Young* v. *Huron and Erie Railway Co.*, 27 Ont. R. 530.

—Prerogative—Liquor License—Public Officer—Stay of Proceedings.]—In the Province of Quebec licenses to sell liquor are granted, to persons complying with the statutory requirements (R.S.Q. art. 829), by the Government, in the name of the Lieutenant-Governor, and signed by him or by persons authorized by Order in Council and then delivered to collectors of Provincial Revenue to be issued to the applicants:—Held, that a mandamus would not lie to compel the collector to issue a license, he acting only as a revenue officer and servant of the Crown in the matter. —Proceedings on mandamus will not be stayed pending a decision in a suit to annul the confirmation by the Municipal Council of a certificate signed by electors to enable an applicant to get a license. *McKenzie* v. *Bernier*, Q.R. 5 Q.B. 251.

—School Commissioners—Duty of Secretary-Treasurer.]—At a meeting of school commissioners one of the board after his name had been entered in the procés-verbal of the secretary-treasurer as present, quitted the meeting and a resolution was afterwards passed by the board:—Held that the secretary-treasurer should have noted the departure of said commissioner, and could, in case of necessity, be ordered by mandamus to do so:—Held, also, that the mandamus should be addressed to the officer and not to the board. *Guay* v. *Beauchamp*, Q.R. 9 S.C. 229.

—Public Road—Duty to Repair—Rights of Frontagers.]—Road trustees, who are constituted a corporation for the express purpose of making and keeping in repair certain public roads and vested with all necessary powers therefor are bound to maintain said roads in a condition in which they can safely be used for all the purposes for which it is intended. A writ of mandamus is the most efficacious means of compelling the performance of that duty by the corporation, and such writ may issue on demand of a person who owns and occupies property fronting upon the road in respect to which the demand is made. *Perreault* v. *Les Syndics des Chemins à Barrières*, Q.R. 9 S.C. 512.

—Municipal Election—Action to Annul—Preliminary Exceptions—Suspension of Proceedings.]
See MUNICIPAL CORPORATIONS, VI.

MANDATE.

Partnership—Division of Assets—Art. 1898 C. C.—Debtor and Creditor—Account.]—In the province of Quebec, where there is no other arrangement between the partners, the partition of the property of a commercial partnership must be made according to the rules laid down in the Civil Code in relation to the parti-

tion of succession, in so far as they can be made to apply. Upon the dissolution of a partnership, where one of the partners has been entrusted with the collection of moneys due as the mandatory of the others, any of his co-partners may bring suit against him directly either for an account under the mandate, or as for money had and received. *Lefebvre* v. *Aubry*, 26 S.C.R. 602.

— Partnership—Hypothec—Power of one Member to Hypothecate—Express Mandate—Proof.]

See HYPOTHEC.

— Owner of Rents — Collection — Negotiorum gestor—Action en Reddition de Compte—Joint Creditors.]—See RENTS.

—Notary—Registry of acte—Express Mandate—Proof.]—See NOTARY.

MANUFACTURE.

Manufacture of Patented Invention in Canada.]

See PATENT OF INVENTION.

MARCHANDE PUBLIQUE.

Wife separated as to Property—Administration—Authorization of Husband to sue and be sued.]—See HUSBAND AND WIFE, IV.

MARINE INSURANCE.

See INSURANCE, V.

MARI ET FEMME.

See HUSBAND AND WIFE.

MARITAL AUTHORIZATION.

Wife separated as to Property—Authority to sue and be sued.]

See HUSBAND AND WIFE, IV.

MARITIME LAW.

See SHIPPING.

MARITIME LIEN.

See SHIPPING, V.

MARRIAGE LAW.

Domicile—Marriage in Ontario—Formalities—Presumption as to.]—In an action for dissolution of a community, it appeared that parties domiciled in the province of Quebec were married in Ontario, in 1867, without ante-nuptial contract. There were witnesses present at the marriage and it was duly registered, but there was no evidence of license or previous publication. Immediately after the marriage the said parties returned to Quebec and went through the form of marriage again, which was preceded by a contract excluding community and providing for mutual separation of property. The wife died, and one of the children, issue of the marriage, brought this action against the father to dissolve the community, which, it was alleged, existed by virtue of the marriage in Ontario, and had been continued after the wife's death between the father and the children. The father claimed that the marriage in Ontario was invalid for want of license or publication and that community was excluded under the marriage in Quebec:—Held, that in the absence of evidence to the contrary, it would be presumed that the official who celebrated the marriage in Ontario acted regularly and in accordance with the law; that as there was no evidence of the legal effect of a marriage in Ontario without license or previous publication, the presumption must be that it was similar to the law of Quebec, namely, that the marriage was voidable but not radically null by the omission of those formalities; that the Ontario marriage never having been declared null by a competent court, must be treated as valid; and hence the parties, being at the time domiciled in Quebec, and having married without ante-nuptial contract, became common as to property in accordance with Quebec law. *Thomson* v. *Thomson*, Q.R. 9 S.C. 389.

—Conditions in Restraint of—"Dying Without Issue"—"Revert"—Contingencies—Annuity—Dower—Election by Widow—Devolution of Estates Act, 49 V. (O.) c. 22—"The Wills Act of Ontario," R.S.O. [1889] c. 109, s. 30.]

See WILL, II.

MARRIED WOMAN.

Constitutional Law—Marital Rights—Married Woman—Separate Estate—Jurisdiction of North-west Territorial Legislature — Statute — Interpretation of—40 V., c. 7, s. 3, and Amendments—R.S.C. c. 50—N. W. Ter. Ord. No. 16 of 1889.]—The provisions of ordinance No. 16 of 1889, respecting the personal property of married women, are *intra vires* of the legislature of the North-west Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the order of the Governor-General in Council passed under the provisions of "The North-west Territories Act."—The provisions of said ordinance No. 16 are not inconsistent with sections 36 to 40 inclusively of "The North-west Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.—The words "her personal property" used in the said ordinance No. 16 are unconfined by any context, and must be interpreted not as having reference only to the "personal earnings" mentioned in s. 36, but to all the personal property belonging to a woman married subsequently to the ordinance, as well as to all the personal property acquired since

then by women married before it was enacted: *Brittlebank* v. *Gray-Jones* (5 Man. R. 33) distinguished. *Conger* v. *Kennedy*, 26 S.C.R. 397.

—**Arrest—Personal Injuries.**]—A married woman is not privileged from arrest in execution of a judgment awarding damages against her for personal injuries, unless the trial judge finds that there are special reasons for refusing the order. *Lefebvre* v. *Forgues*, Q.R. 9 S.C. 528.

See also HUSBAND AND WIFE.

MASTER'S CERTIFICATE.

Report—Appeal from.]—The certificate of a Master of the High Court of Justice of Ontario is a report by him, and is subject to the same rules as to appeal as an ordinary report. *Re Molphy, Beckes* v. *Tiernan*, 17 Ont. P.R. 247.

MASTER IN CHAMBERS.

See APPEAL, VII.

MASTER'S LIEN.

See SHIPPING, V.

MASTER AND SERVANT.

I. ACTION FOR WAGES.

—Hiring of Husband and Wife—Joinder of Action.]—Where the contract of hiring of a husband and wife as servants, to be implied from the services rendered, and from the terms of the hiring, is to be considered as joint; the plaintiffs must sue jointly for the value of their services. *Giles* v. *McEwan*, 11 Man. R. 150.

II. DISMISSAL OF SERVANT.

—General Hiring—Hiring for a Year—Question of fact — Corporations — Implied Contract of Company.]—The plaintiff having been for many years superintendent of a factory at a salary, was still under engagement for the current year when the factory and business were purchased by a joint stock company, the employment of the plaintiff continuing without further express agreement until after the expiration of the year, when he was dismissed on refusing to submit to a reduction of salary:—Held, that whether the plaintiff's hiring at the time of dismissal, was for a year or not, and whether it was terminable by written notice or not, both of which were questions of fact and not of law, no reasonable notice had been given, and he was entitled to damages.—A general hiring is not necessarily to be considered a hiring for a year.—The increase in the extent, importance, and variety of corporate dealings which has taken place in modern times has modified the law as to contracts of trading corporations, so as to correspondingly increase their liability on implied contracts: *Finlay* v. *The Bristol and Exeter Railway Co.*, 7 Ex. 409, considered. *Bain* v. *Anderson*, 27 Ont. R. 369.

—Insurance Co.—Employment of Agent—Agent Acting for rival Companies—Dismissal.]—*Eastmure* v. *Canada Accident Ins. Co.*, 25 S.C.R. 691.

III. LIABILITY OF MASTER FOR ACTS OF SERVANT.

—Negligence of Servant—Deviation from Employment — Resumption — Contributory Negligence — Infant — Evidence.]—A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work and in doing so ran over and injured a child:—Held, affirming the decision of the Supreme Court of New Brunswick, that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to his master's store and made a fresh start. *Merritt* v. *Hepenstal*, 25 S.C.R. 150.

—Tortious Act—Public Work—Contractor—Liability of Railway Company.]—A company building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner not authorized by the contract. *Kerr* v. *The Atlantic and North-West Railway Co.*, 25 S.C.R. 197.

—Railway Company—Loan of Cars—Reasonable Care—Breach of Duty—Negligence—Risk Voluntarily Incurred—"Volenti non fit Injuria."]—A lumber company had railway sidings laid in their yard for convenience in shipping lumber over the line of railway with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway company thereupon sending their locomotive and crew to the respective sidings in the lumber yard, and bringing away the cars to be despatched from their depot as directed by the bills of lading.—Held, that in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that where the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using reasonable skill and care in moving the car with them in it, so as to avoid all risk and injury to them. *The Canada Atlantic Railway Co.* v. *Hurdman*, 25 S.C.R. 205.

—**Negligence—"Quebec Factories Act,"—R.S.Q. arts. 3019-3053—Art. 1053 C.C.—Civil Responsibility—Accident, Cause of—Conjecture—Evidence—Onus of Proof—Statutable Duty, Breach of—Police Regulations.**]—The plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial, and left the manner in which the accident occurred a matter of conjecture:—Held, that in order to maintain the action it was necessary to prove by direct evidence or by weighty, precise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed.—The provisions of "The Quebec Factories Act" (R.S.Q. arts. 3019 to 3053 inclusive) are intended to operate only as police regulations and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the Civil Code. *The Montreal Rolling Mills Co.* v. *Corcoran*, 26 S.C.R. 595.

IV. Liability of Master for Injury to Servant.

(a) *Liability of Employer under Civil Code.*

—**Duty of Employer — Negligence — Proximate cause of Injury.**]—If an employer exercises in respect to his employees the kind and extent of care which a *bon père de famille* would exhibit towards his own children, and surrounds them with all the protection that human foresight can suggest, he is not responsible for an injury sustained by one of them, the immediate cause of which was a condition for which he was in no way accountable. Thus, where an employee went to her work in the morning without taking food, and being attacked with faintness received an injury while unconscious, she was held not entitled to damages from her employer.—A guarantee company which insures employers against accidents to their employees may resist actions for damages against the employers by every lawful means. *Montreal Steam Laundry Co.* v. *Demers*, Q.R. 5 Q.B. 191, reversing 8 S.C. 354. Affirmed by Supreme Court of Canada, June 7th, 1897.

(b) *Workmen's Compensation for Injuries Act.*

—**Ontario Workmen's Compensation for Injuries Act, 1892 — "Superintendence" — Evidence.**]—Where several labourers are told by their foreman to do a certain work, and one of them, a somewhat more experienced workman than the rest, suggests a course which they all adopt, if injury results to one of them in carrying out their work in the method so suggested the employer is not liable. The workman who made the suggestion mentioned had no "superintendence" over his fellow-workmen within the meaning of s. 2 of "The Workmen's Compensation for Injuries Act 1892."—Per Burton, J.A.: In an action of this kind the onus is upon the plaintiff to show what the negligent workman's duties were. A mere statement by the man himself, that he had charge, or that the plaintiff was bound to conform to his orders, is not evidence, but he must show the facts from which he draws that conclusion, and it then becomes the duty of the judge to determine whether there is any evidence that he had such superintendence and control as to make his orders imperative. *Garland* v. *City of Toronto*, 23 Ont. A.R. 238.

See also Negligence.

MATIERE COMMERCIALE.

Evidence—Defendant a Witness on his own behalf.]—See Evidence, I.

MECHANICS' LIEN.

R.S.O. c. 126, s. 2, s.s. 3—"Owner"—Scenic Artist—Lease.]—The lessor under a lease which provides that certain repairs shall be done by the lessee and the costs deducted from the rent, is not, as regards persons employed to do such repairs, an owner, within the meaning of s.s. 3 of s. 2 of R.S.O. c. 126, the Mechanics' Lien Act:—*Semble*, a scenic artist is not a "mechanic, labourer, or other person, who performs labour," etc., under s. 6 (1) of the Act. *Quære*, whether movable scenery and flying stages in a theatre are part of the freehold. *Garing* v. *Hunt and Claris*, 27 Ont. R. 149.

—**Prior Mortgage—Increased Value—Rights of Lienholder and Mortgagee—Destruction of Property—Period of ascertainment of value.**]—Where on a reference in a mechanic's lien proceeding, it is found as between a lienholder and a prior mortgagee, that the selling value of the property has been increased by the work done and materials supplied to an amount equal to the claim of the lienholder, who under s.s. 3 of s. 5 of the Mechanics' Lien Act, is declared entitled to rank on such increased value in priority of the mortgage, and pending the proceedings the premises are destroyed by fire, the claim of the lienholder is at end so far as the interests of the mortgagee are affected by it:—Semble, the amount of the increased value to which the lienholder is entitled to resort as against the mortgagee cannot be ascertained until the property has been sold. *Patrick* v. *Walbourne*, 27 Ont. R. 221.

—**Mechanics' Lien Act, 1891, (B.C.)—Dominion Railways.**]—The Mechanics' Lien Act, 1891 (B.C.) does not apply in the case of work done on railways within the control of the Dominion Parliament. *Larsen* v. *Nelson and Fort Sheppard Railway Co.*, 4 B.C.R. 151.

MEDIATORS.

Award of Arbitrators—Form of—Deed of Submission.]—See Arbitration and Award, II.

MEDICAL PRACTITIONER.

—Practising Medicine—Ont. Medical Act R.S.O. c. 148, s. 45.]—The defendant was convicted under the Ontario Medical Act R.S.O. c. 148, s. 45, for practising medicine for hire. The evidence showed that when the complainant went to the defendant he told him his symptoms; that he did not know what was the matter with himself; that he left it to the defendant to choose the medicines, after learning the symptoms; and that on further advice of the defendant, he took his medicine, went under a course of treatment extending over some months, and paid the price agreed upon:—Held, that there was evidence to support the conviction: *Reg.* v. *Coulson*, 24 Ont. R. 246, distinguished; *Reg.* v. *Howarth*, 24 Ont. R. 561, followed; *The Queen* v. *Coulson*, 27 Ont. R. 59.

Practising Medicine—Unregistered Practitioner—C.S.B.C. [1888] c. 81, s. 41.]—If the vendor of patent medicines calls upon people to submit to his personal inspection and asks the nature and symptoms of their complaints, which he professes to cure by application of his medicines, he is liable to the penalty imposed by the Medical Act, C.S.B.C. [1888] c. 81, s. 41, on persons "practising medicine" without being on the medical register. *The Queen* v. *Barnfield, alias Sequah*, 4 B C.R. 305.

MINES AND MINERALS.

British Columbia — Precious Metals — Free Miner's Certificate—Construction—Law of British Columbia—47 V., c. 14, s. 3—54 V., c. 26.]—By sec. 3 of the British Columbia Act (47 V., c. 14) land was granted to the Dominion Government, the appellant company's predecessor in title, "including all mines, minerals and substances whatsoever thereupon, therein and thereunder":—Held, in an action for wrongful ejectment by the holder of a free miner's certificate under the "British Columbia Placer Mining Act, 1891" (54 V., c. 26) applicable to a part of the land granted, that he was entitled to mine for gold and other precious metals thereon, the above words not being sufficiently precise to transfer to the appellants' predecessor the right of the provincial legislature to administer the precious metals in the lands assigned. *Esquimalt and Nanaimo Railway Co.* v. *Bainbridge*, [1896] A.C. 561.

—Reservation of Mining Rights—Registration of Notice—Radiation.]—Where the deed of sale of an immovable reserves the mines the latter constitute a distinct property, which is unaffected by any mutations or registrations connected with the surface. Therefore the original vendors in whose favour the reservation was made are not affected by a sheriff's sale of the land on execution against the transferees from the vendee. Where the registered notice of the reservation claims servitude over and rights in the surface itself, the owners of the latter have a right to ask its radiation as to all beyond mere ownership in the mines. *Laurier* v. *Desbarats*, Q.R. 9 S.C. 274.

—Application to search Areas already covered—Construction of Nova Scotia Statutes, R.S.N.S. 5, ser. c. 7, s. 84; Act of 1892, c. 1, s. 98.]—On the 13th October, 1891, W. applied for, and obtained, from the Commissioner of Mines, a license to search for coal over an area of one square mile, such license expiring on the 13th April, 1893. On the 2nd April, 1892, plaintiff applied for a license to search over an area of five square miles, including the area covered by the license to W. By the Acts of 1892, c. 1, s. 98, the Commissioner of Mines was authorized in the case of licenses to search for mines other than gold or gold and silver, to receive other applications (called second rights) over the same tract; but at the time the plaintiff's application was made c. 7, R.S.N.S. 5 ser., s. 84, was in force, which provided that the Commissioner should receive no more applications than there were areas of one square mile each contained within the areas first applied for:—Held, that the effect of the section last quoted was clearly to prevent the Commissioner from accepting plaintiff's application for the area held by W. while the title of W. thereto still existed:—Held, also, that it made no difference that plaintiff's application covered other grounds in addition to those embraced in the license to W.:—Held, further, that as plaintiff's application, so far as it extended to the area held by W., was never valid or effective, he acquired no right under his application, and upon the expiration of the license to W. the area became vacant, and open to any one who made an application therefor. *McColl* v. *Ross*, 28 N S.R. 1

—License — Registry of — Refusal to Register—Damages.]—The Mines and Mineral Act, R.S. N.S. 5 ser., c. 7, s. 130, enacted that "all licenses and a description of all mortgages, bills of sale, attachments, judgments, transfers and documents of title of any kind effecting such licenses" should be registered in the office of the Commissioner of Mines, any mortgage, etc., not so registered to be void as against subsequent *bonâ fide* mortgages, etc., previously registered. By the Act of 1885, c. 3, s. 1, passed April 24th, 1885, this section was amended by adding a proviso requiring such mortgages, bills of sale, attachments, judgments, transfers or documents of title to "proceed from or be charged against the parties who may appear upon the registry to be lessees or licensees of such gold and silver, coal and other mines, so as to be transferred or to be encumbered." In an action against the Commissioner for refusing to register a document in his office, and for registering a later transfer, it appeared that on the 16th June, 1883, a letter was addressed to the Commissioner enclosing what purported to be a copy of a transfer from V. to G. of an interest in a property at Montague. The transfer itself was not recorded, and the legal title to the property was vested at the time in D. under lease No. 105. On the 8th October, 1885, G. transferred to plaintiff one-third of all his interests in mining leases and mines of gold, etc., inclusive of all areas possessed by him and registered in his name in Montague and other districts named, and of all areas in which he was interested, "though not named on the records of the Mines Office." The latter transfer was registered against the properties expressly named, bnt was not registered, and no request was made to have it registered against lease No. 105, until after the passage of the amending Act of 1885. After

the passage of this Act the commissioner was requested to record the transfer from G. to plaintiff, but refused. The interest of G. under lease No. 105 was subsequently purchased by A., who had the transfer recorded by defendant, both A. and the party to whom he sold having actual notice of plaintiff's claim :—Held, that as when the request to have the transfer to plaintiff recorded against lease No. 105, the act as amended rendered it incumbent upon the commissioners to record only transfers proceeding from those who appeared on the registry to be lessees of the mine, and G. did not appear to be a lessee or sub-lessee, or to derive title through a lessee, no case of negligence on the part of defendant had been proved and plaintiff was not entitled to recover even nominal damages :—Held, also, that in no case could plaintiff recover other than nominal damages, there being no proof of the nature or value of the equitable interest, or that it had been lost or affected by the failure to register :—Held, further, that A. was not a *bonâ fide* transferee in respect to plaintiff's claim :—Held, further, that if the document of transfer from G. to plaintiff was properly lodged for registry, it would be sufficient, under the doctrine of *Yost* v. *McCuish*, 25 N.S.R. 519, to affect subsequent transferees with notice :—Held, further, that the provision added by the amendment, under the Act of 1885, operated as a repeal of the provision in respect to documents mentioned :—Held, further, that in the absence of a request for registration, prior to the amendment, plaintiff's right to have his document registered was merely executory and not vested :—Held, further, that where a document is handed to the commissioner without directions as to the property against which it is to be registered, and it is registered against properties apparently affected, a case of negligence to search for other properties would have to be made out :—Held, further, that there would be no negligence in not registering against equitable interests not appearing in the register of the office :—Semble, that a general request to register a document against leases standing in the name of G. in Nova Scotia would be bad, and that the objection would be greater in the case of the transfer in question, which covered areas in which the transferor might be interested, "though not named on the records" :—Quære, whether it is the duty of the Commissioner under the practice prevailing in Nova Scotia to make such searches :—Quære, per Meagher, J., whether defendant was bound or ought in any case to record a document which was not in the prescribed form, inasmuch as it contained no reference to the lease or leases it was supposed to affect, nor the number of shares intended to be conveyed. *Fielding* v. *Church*, 28 N.S.R. 136.

—**Nova Scotia Consolidated Mines Act, 1892—Mortgage—Fixtures—Foreign Corporations.**]—An engine used in connection with a gold mining property, was placed inside the pump-house upon a foundation 30 feet long, 15 feet wide, and 5 feet deep. The foundation consisted of three tiers of timber laid horizontally in a pit. The engine was fastened to the timber by bolts passing through all three tiers. The ground was then levelled over the timber, and a floor put down :—Held, as against an execution creditor, that the engine was a fixture, and passed with the land under a mortgage of the mine registered under the Nova Scotia Consolidated Mines Act, 1892. Held, also, that the Act, in so far as it requires mortgages to be filed in the county where the grantor resides, is not applicable to a foreign corporation with headquarters out of the Province. *Don* v. *Warner*, 28 N.S R. 202. Affirmed on appeal to the Supreme Court of Canada. See MORTGAGE, V.

—**Mines and Mineral Acts (N.S.), 1892—Application for Licenses to search subsequent to first Right.**]—The Mines and Minerals Acts of 1892, s. 91, authorized the Commissioner of Works and Mines to grant licenses to search, to be in force one year and six months from the date of application therefor. By sec. 98, when a license was granted the Commissioner was authorized to receive other applications (called second rights) over the same tract. By sec. 99 it was enacted that on the expiration of the license to search granted upon the first application, or on the selection of an area for lease by the holder thereof, a license to search over such tract, or the remainder thereof, as the case may be, may be granted to the first of the applicants for license to search (called second rights). Upon the expiration of this license, or selection of an area by the holder, the second of such applicants may be granted a license over such tract, or the remainder thereof, as the case may be, and so on until all such applications for areas in the tract have been exhausted :—Held, that the periods to be covered by the licenses or rights, subsequent to the first right, commenced to run, not from the dates of the applications therefor, respectively, but from the expiry of the preceding rights, respectively. *In re Application of Caldwell*, 28 N.S.R. 240.

—**Mining Law—Mineral Act (B.C.), 1891—Re-location "Owner"—Staking—Excess of Area—Abandonment—Public Officer—Misuse of Knowledge obtained in Office.**]—The owners of a mineral claim, the title to which was considered defective, permitted a third person to re-locate it in his own name, whereupon he, without previous binding agreement to that effect, conveyed his title to them for a consideration ;—Held, not a re-location by the owners within s. 29, c. 25, Mineral Act, 1891, and that the written permission of the gold commissioner was not necessary. The owner of shares in an incorporated mining company is not an owner of any part of a mining claim owned by it within sec. 29, *supra*. The location of a mineral claim is not void because, as staked, it exceeds the 1,500 feet in length provided by sec. 3 of the Mineral Act (1891), Amendment Act (1893), but may be corrected by virtue of sec. 14 of that Act, by the provincial surveyor who makes the survey, by the removal for the correction of distance of any post except the initial post No. 1, if the alteration does not affect the previously acquired rights of adjacent owners. Sec. 27 of the Act, providing that the owner may abandon a mineral claim, inferentially permits him to abandon any portion of it upon his specifying and recording such abandonment. The court

should deal with mining disputes upon the principles of a Court of Equity, and should discountenance a plaintiff, whose action is based upon defects in title, knowledge of which was acquired by him while a government employee in a mining record office; it being contrary to his duty to the public, and those interested in the records, for him so to use such information. *Granger* v. *Fotheringham*, 3 B.C.R. 590.

MINING MACHINERY.

Mortgage—Registration—Interpretation—Bill of Sale—Personal Chattels—Delivery—R.S.N.S. (5 ser.) c. 92, s.s. 1, 4 and 10 (Bills of Sale)—55 V. (N.S.) c. 1, s. 143 (The Mines Act)—41 & 42 V. (N.S.) c. 31, s. 4.]

See MORTGAGE, V.

MINING RIGHTS.

See MINES AND MINERALS.

MINOR.

Promissory Note—Premium of Life Insurance.] —A minor, twenty years of age, can be made liable on a promissory note given in payment of a premium on a policy of life insurance. *Manufacturers Life Ins. Co.* v. *King*, Q.R. 9 S.C. 236.

—Tutor ad hoc—Nomination—False Statement to Family Council—Sale to Third Parties in Good Faith.]—See TUTOR.

MISE EN CAUSE.

Du Mari — Action against Wife — Erroneous Description.]—See ACTION, I.

MISE EN DEMEURE.

Lessor and Lessee—Default—Damages—Resiliation—Art. 1067 C. C.]

See LANDLORD AND TENANT, V.

MISTAKE.

Contract—Reforming an Agreement—Evidence to retify Agreement—Promissory Notes—Guarantee.]—See CONTRACT, III (*b*).

MONOPOLY.

Construction of Statute—By-law — Exclusive Rights—Statute confirming—Extension of Privilege—C.S.C. c. 65—45 V. (P.Q.) c. 79, s. 5.

See MUNICIPAL CORPORATION, II (*c*)

—Constitutional Law—Municipal Corporation—Powers of Legislature—License—Highways and Ferries—Navigable Streams—By-laws and Resolutions — Tolls — Disturbance of Licensee — North-west Territories Act, R.S.C. c. 50, ss. 13 and 24—B.N.A. Act, s. 92, s.s. 8, 10 and 16—Rev. Ord. N.W. Ter. (1888), c. 28—Ord. N.W.T. No. 7 of 1891-92, s. 4.

See CONSTITUTIONAL LAW, II (*b*).

MORTGAGE.

I. ACCOUNT.

—Chattel Mortgage—Mortgagee in Possession—Negligence — Sale under Powers—"Slaughter Sale."—A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives, but for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor. *Rennie* v. *Block*, 26 S.C.R. 356.

—Several Parcels—Sale under Power, en bloc—Duty of Mortgagees — Damages.]—The mortgagees, in a mortgage containing two parcels of land, a farm with buildings, and some village lots with stores thereon, about three-quarters of a mile distant from the farm, sold the properties *en bloc*, under the power of sale in the mortgage, for a much smaller sum, as shown in the evidence, than would have been realized had the properties been sold separately:—Held, that the mortgagees had not acted with that prudence and discretion which they were bound to do, and that they were liable to the mortgagors for the amount that might have been realized. *Aldrich* v. *Canada Permanent Loan and Savings Co.*, 27 Ont. R. 548.

— Suretyship — Appropriation of Payments — Reference to take Accounts.]

See PRINCIPAL AND SURETY, I.

II. ASSIGNMENT.

—Chattel Mortgage—Insurance—Assignment of Mortgage — Equitable Assignee of Insurance Money.]—See BILLS OF SALE, V.

—Assignment of—Extension of Time—New Mortgage—Parol Reservation of Rights—Purchaser of Equity.]—See PRINCIPAL AND SURETY, II.

III. Charge on Lands.

—Agreement to Charge Lands — Statute of Frauds—Registry.]—The owner of an equity of redemption in mortgaged lands, called the Christopher farm, signed a memorandum as follows: "I agree to charge the east half of lot No. 19, in the seventh concession of Loughborough, with the payment of two mortgages held by G. M. G. and Mrs. R. respectively, upon the Christopher farm * * * amounting to $750 * * * and I agree on demand to execute proper mortgages of said land to carry out this agreement, or to pay off the said Christopher mortgages:"—Held, affirming the judgment of the Court of Appeal, that this instrument created a present equitable charge upon the east half of lot 19 in favor of the mortgagees named therein. *Rooker* v. *Hoofstetter*, 26 S.C.R. 41.

IV. Discharge.

—Extension of Time for Payment—Increase in Rate of Interest—Reservation of Remedies.]—Where mortgaged premises are sold by the mortgagor, and he takes from the purchaser a covenant to pay the mortgage, the fact that the mortgagees subsequently agree with the purchaser to extend the time for payment of the mortgage in consideration of payment of interest at an increased rate, reserving their remedies against the original mortgagor, such agreement does not operate as a release of the mortgagor. In such a case the mortgagor is not a mere surety for the purchaser, the contract between them being that of indemnity only; and so long as the mortgagor's rights are not impaired by the agreement between the mortgagees and the purchaser, the mortgagor's obligations under the mortgage remain intact: *Bristol & West of England Land Co.* v. *Taylor*, 24 O.R. 286, distinguished. *Trust and Loan Co.* v. *McKenzie*, 23 Ont. A.R. 167.

V. Fixtures.

—Mining Machinery—Registration—Interpretation—Bill of Sale—Personal Chattels—R. S. N. S. (5 ser.) c. 92, ss. 1, 4 and 10 (Bills of Sale)—55 V. (N.S.) c. 1, s. 143 (The Mines Act)—41 & 42 V. (N.S.) c. 31, s. 4.]—The "fixtures" included in the meaning of the expression "Personal Chattels" by the tenth section of the Nova Scotia "Bills of Sale Act," are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.—An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia "Bills of Sale Act" (R.S.N.S. 5 ser., c. 92), and there is now no distinction, in this respect, between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee. *Warner* v. *Don*, 26 S.C.R. 388.

—Mining Law—Mortgage of Mine Registered under Nova Scotia Consolidated Mines Act, 1892, c. 1.]—See Mines and Minerals.

VI. Foreign Lands.

—Jurisdiction to Entertain—Mortgage of Foreign Lands—Action to set Aside—Secret Trust—Lex rei sitæ.]—A Canadian court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the court not being able to assume that the law of the foreign country in which the lands were situate corresponded to the statutory law of the province in which the action was brought: *Burns* v. *Davidson* (21 Ont. R. 547) approved and followed. *Purdom* v. *Pavey & Co.*, 26 S.C.R. 412.

VII. Interest.

—Collateral Bond—Covenant in—Rate of Interest—Merger.]—In May, 1884, the assignee of the Equity of Redemption in a mortgage, in consideration of an extension of time for payment of the balance due thereon, executed a bond to the mortgagee conditioned to pay him the said balance in one year and providing that "in the meantime, and until the said sum is fully paid and satisfied, to pay interest thereon or upon such part thereof as shall remain unpaid. Such interest to be calculated from the first day of June, 1884, at the rate of seven per cent. per annum." The mortgagee having obtained judgment on this bond, afterwards brought suit to foreclose the mortgage:—Held, that assuming that as against the assignee the land was chargable with the debt and interest according to the terms of the bond, there was nothing in such terms making the assignee liable for more than the statutory rate of interest after default, and he could only recover at the rate of 7% up to June 1st, 1885:—Held, also, that the debt was merged in the judgment on the bond, and for that reason also only six per cent. the statutory rate on judgment debts would be allowed. *Hanford* v. *Howard*, 1 N.B. Eq. 241.

—Transfer of—Suit to Redeem—Interest.]—In a suit to redeem a mortgage against an assignee who, at the mortgagor's request, paid off both principal and interest due at the time of the assignment:—Held, that the assignee would not be allowed interest on the sum paid for interest. *Thomas* v. *Girvan*, 1 N.B. Eq. 257.

—Distress for Rent — Interest — Mortgage — Attornment—Admission—11 Geo. II., c. 19, s. 19.]
See Landlord and Tenant, II.

VIII. Redemption.

—Mortgage of Trust Estate—Equitable Recourse—Construction of Deed—Description—Falsa Demonstratio—Water Lots—Accretion—Contribution to Redeem—Estoppel.]—On the dissolution of the firm of A. & Co by the retirement of C. D. A. the business was carried on by the remaining partners T. A. and B. A. on the same premises, which were the property of C. D. A., the continuing partners agreeing to pay off a mortgage thereon as one of the old firm's debts. They neglected to pay and the property was sold by the sheriff under a foreclosure decree, when they

purchased and took a deed describing the lands as in said mortgage, one side being bounded by "the windings of the shore" of Sydney Harbour, and including a "water lot," part of which was known as the "stone ballast heap," in front of the shore lands. They immediately re-mortgaged the lands by the same description, adding a further or alternative description, and, at the end, the following words—"Also all and singular the water lots and docks in front of the said lots,"—although in fact they then owned none except those covered by the description in the deed from the sheriff, and they gave at the same time a collateral bond to the mortgagees for the amount of their mortgage. They then conveyed the equity to C. D. A., giving him a bond of indemnity against the mortgage they had so executed. Some time afterwards T. A. and B. A. acquired by grant certain other water lots in front of the mortgaged property and used and occupied them as part of their business premises along with the mortgaged lands. C. D. A. sold the equity of redemption subject to the mortgage, and T. A. and B. A. settled their obligation under the indemnity bond by a compromise with the assignees of C. D. A., paying $8,000, and obtained their discharge. Upon proceedings being taken by the assignees of the mortgagees to foreclose the mortgage, and against T. A. and B. A. upon the collateral bond, T. A. and B. A. paid the amount due and the foreclosure proceedings were continued for their benefit:—Held, that the liability of the mortgagors was fully satisfied and discharged by the compromise, and as they were afterwards obliged to pay the outstanding encumbrance they were entitled to take an assignment and enforce the mortgage by foreclosure proceedings against the lands.—Per Gwynne, J.—The mortgagors were only entitled to foreclosure for the realization of the amount actually paid by them in compromising their liability under the indemnity bond:—Held, further, that as the construction of the mortgage depended upon the state of the property at the time it was made, parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be effected; that as there was no specific descriptions or recitals tending to show that any other property was intended to be covered by the mortgage beyond what would be satisfied by including the water lot described as the "Stone ballast heap," the after-acquired water lots would not be charged or liable to contribute ratably towards redemption of the mortgage; and that even admitting that the description was sufficient to include the after-acquired property, such property was not liable to contribute towards payment of the mortgage debt. *Imrie* v. *Archibald*, 25 S.C.R. 368.

—Equity of Redemption — Sale — Payment of Prior Encumbrance—Interest.]—When a loan is effected for the purpose of paying off encumbrances, at once or as they become due, at the option of the new mortgagees, and one of the encumbrances, at a lower rate of interest than the new mortgage, is not due, and the prior mortgagee refuses to accept pre-payment, the new mortgagee cannot treat that mortgage as paid off, and charge the mortgagor with interest at the increased rate on the amount thereof, unless he has set apart the amount of the prior encumbrance, and notified the mortgagor to that effect, but must until the prior mortgage is fully paid, charge interest at the increased rate only on the amount actually paid to the prior mortgagee.—An assignee of a mortgage takes it subject to the actual state of the accounts between the mortgagor and mortgagee, and cannot, even where it contains a formal receipt for the whole mortgage money, claim more in respect of it than has been advanced, and cannot, in such a case as this, charge the mortgagor with the increased rate. The fact that the purchaser of the equity of redemption has been allowed the full amount of the mortgage as between the mortgagor and himself does not make him liable to pay that sum to the mortgagees. *Manley* v. *The London Loan Company*, 23 Ont. A.R. 139. Affirmed on appeal, 26 S.C.R. 448.

—Suit for Redemption—Dispute as to amount due—Costs.]—A mortgagee will not be deprived of his costs in a suit for redemption made necessary by a dispute as to the rate of interest to which he was entitled. *Thomas* v. *Girvan*, 1 N.B. Eq. 314.

—Sale of Equity—Effect of]

See CHOSE IN ACTION.

IX. MISCELLANEOUS CASES.

—Consideration—Larceny—Mitigation of sentence—Validity.]—Where the defendant, while a prisoner arrested on a charge of larceny, sent for the agent of the owner of the property stolen, and, admitting his guilt, offered to give security by mortgage for the value of the goods stolen, and the agent informed him he would have to take his trial whether he gave a mortgage or not, and that he could not release him from his position even if he gave the security, but after the security was given let the accused know that he would endeavor to get a mitigation of the sentence, which he afterwards did:—Held, that there was no sufficient evidence that there was any agreement to stifle the prosecution, and that the security was valid. *Henry* v. *Dickie*, 27 Ont. R. 416.

—Jurisdiction of Court to decree Sale under Mortgage where part of Railway is outside the Province—Priority of Lien for working expenses—46 V., c. 68, s. 5 (D.)]

See RAILWAYS AND RAILWAY COMPANIES, VII.

—Chattels—Distress—Pound Breach.]

See LANDLORD AND TENANT, IV.

—Sale of Land—Mortgage by Trustee.]

See LIMITATION OF ACTIONS, I.

—Mortgage to secure future Advances—Action—Amendment.]

See PRACTICE AND PROCEDURE, III.

MORTMAIN.

Devise to Religious Body—Gift for School Teacher's Residence—Invalidity.]

See WILL, IV.

MUNICIPAL CORPORATIONS.

I. Bonuses, Exemptions and Privileges.

—Taxation — Exemption without Contract.]—In 1892 a city council passed a by-law exempting the property of the partnership of which the respondent, who had been elected alderman, was a member, from taxation except as to school rates, for a period of seven years:—Held, that the exemption, not being founded upon any contract, but being an exemption without a contract, as provided by 56 V., c. 35, s. 4 (O.), there was no disqualification: *Reg. ex rel. Lee* v. *Gilmour*, 8 Ont. P.R. 514, distinguished. Held, also, that the respondent was entitled to qualify upon his rating upon the assessment roll of 1895, as the joint owner of a freehold estate in the partnership property, the four partners being rated for this property as freeholders to the amount of $10,000: 55 V., c. 42 (O.), ss. 73 and 86.—The words "exempt from taxation" in 56 V., c. 35, s. 4, mean exempt from payment of all taxes, including school rates. *The Queen ex rel. Harding* v. *Bennett*, 27 Ont. R. 314.

—By-law—City Charter—Conflict with general Municipal Act.]—By sec. 129 of the Vancouver Incorporation Act [1886], a by-law of the city for raising money for ordinary expenses that has received the assent of the electors shall not be altered, amended nor repealed by the Council except as provided in the Act. Sec. 113 of the general Municipal Act, 1892, provides that "no such by-law shall be altered nor repealed except with the consent of the Lieutenant-Governor-in-Council":—Held, that the matter of repeal or alteration of such by-law was exclusively governed by sec. 129 of the Incorporation Act. Therefore, by-laws which were similar to, but varied in substantial particulars from, one previously ratified by the electors, were quashed notwithstanding the assent of the Lieutenant-Governor-in-Council to the alterations.—A by-law for granting a bonus to a railway company is not invalid because it provides that the debentures of the city shall be handed over to the company instead of the money proceeds thereof. *In re Bell-Irving and the City of Vancouver*, 4 B.C.R. 228.

II. By-Law.

(a) *Proceedings to Quash.*

— Petition to Quash — Appeal to Court of Queen's Bench — 40 V. c. 29 (P.Q.), 53 V. c. 70 (P. Q.) — Judgment Quashing — Appeal to Supreme Court from—R.S.C. c. 135, s. 24 (g).]—Sec. 439 of the Town Corporations Act (40 V. c. 29, P.Q.) not having been excluded from the charter of the city of Ste. Cunégonde (53 V. c. 70), is to be read as forming a part of it, and prohibits an appeal to the Court of Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under s. 310 of said charter. Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction, no appeal lies to the Supreme Court of Canada from its decision. *Ste. Cunégonde* v. *Gougeon*, 25 S.C.R. 78.

—Drainage By-law—Engineer's Report—Erroneous basis of fact.]—A township by-law for repairing and deepening a drain extending through three municipalities set out the report of the engineer recommending the work and assessing the cost in different proportions against them, respectively, but he based his report upon the assumption that the drain had been originally constructed as one drain, whereas it consisted of at least two drains built at different times, and for different purposes:—Held, that the by-law must be quashed, for the persons affected were on being assessed entitled to have the engineer's judgment upon the true state of facts, as was also the council when acting on his report. *In re Stonehouse and The Corporation of the Township of Plymton*, 27 Ont. R. 541.

—Ultra Vires—Uncertainty—Delegation of Powers—Evidence—Manitoba Shops Regulation Act, R. S. Man., c. 140, s. 3, and 57 V., c. 2, s. 2.]—Where the corporation of the city of Winnipeg had passed a by-law, under R. S. Man., c. 140, s. 3, as amended by 57 V., c. 42, s. 2, requiring boot and shoe shops to close at 7 p.m. except on Saturdays and on the day preceding any civic holiday * * * and during the days on which the exhibition of the Winnipeg Industrial Exhibition Association is being held, and a person who was convicted of a breach thereof by a magistrate applied for a writ of *certiorari* to remove the conviction for the purpose of having it quashed:—Held, that the by-law was bad for uncertainty, and also *ultra vires* because the council delegated the power of fixing certain of the days when the shops might remain open, to the Exhibition Association:—Held, also, that although it was too late to move to quash the by-law, a conviction under it might be quashed, since the invalidity was apparent on the face of the by-law. Per Taylor, C.J.: When an objection is taken before a magistrate that a by-law under which he is asked to convict is illegal, the illegality must appear on the face of the by-law, and no evidence should be received to show how it came to be passed, or that there were irregularities or failures to comply with statutes in and about the introduction of the by-law. The provisions of the Act requiring a petition signed by three-fourths of the occupiers of shops of the same kind prior to the passing of

the by-law, that it should be passed within one month from the receipt of the petition, and should be published before the date on which it was to take effect, are directory and not imperative. *Re Cloutier*, 11 Man. R. 220.

— Time for Quashing — "After the Passing" —Municipal Act B.C. [1892] ss. 125-129.] – By sec. 128 of the Municipal Act of 1892 (B.C.) "No application to quash a by-law * * shall be entertained unless the application is made within one month after the passing of the by-law." By sec. 122 every by-law is binding after publication in the British Columbia Gazette. Sec. 126 requires a notice to be appended to every copy of a by-law stating that any person desiring to quash it must apply within one month after publication, and sec. 126 that if no application to quash is made within one month after publication a by-law shall be valid:—Held, that an application to quash could be made within a month after publication of the by-law in the Gazette, though more than a month had elapsed since it passed the council. *Kane* v. *The City of Kaslo*, 4 B.C.R. 486.

(b) Submission to Ratepayers.

—County By-law—Guaranteeing Debentures of Town—Assent of Electors.]—The assent of the electors is not required to make valid a by-law of the council of a county corporation, passed under sec. 511, s.s. 2, of the Consolidated Municipal Act, 1892, guaranteeing the debentures of a municipality within the county. *Re Kerr and County of Lambton*, 27 Ont. R. 334.

—Municipal Acts—City Charter—Repugnancy or Inconsistency — Submission to Electors — Voters' Lists — Municipal Act [1892] s. 113 (B.C.)—Vancouver Incorporation Act [1886] s. 128, [1892] s. 5.]—By sec. 4 of the Municipal Act of B.C. [1892] the provisions of said Act shall apply to the cities of New Westminster and Vancouver, except where repugnant to or inconsistent with their Acts of Incorporation. The Vancouver Incorporation Act, c. 32, s. 128, Acts of 1886, as amended by c. 62, s. 5, Acts of 1892, requires a money by-law of a municipality to state, *inter alia*, "the amount of the debt which such new by-law is intended to create, and, in some brief and general terms, the object for which it is created": – Held, that a provision in the Municipal Act (sec 113) requiring a money by-law to name "the annual special rate on the dollar for paying the interest, and creating an equal yearly sinking fund for paying the principal, of the new debt," was not repugnant to nor inconsistent with the charter of Vancouver, and a by-law of the city is invalid that does not name such annual special rate on the dollar. Sec. 127 of the Incorporation Act gives the right of voting on by-laws to certain persons rated on the Revised Assessment Roll "on which the voters' lists of the city are based." The Assessment Roll for 1892 was revised in February, but the voters' lists thereon were not finally revised until November. A by-law was voted on in September, 1892, the lists used being taken from the Assessment Roll of that year:—Held, that the vote should have been taken on the previous year's lists, and the by-law should be quashed. Judgment of McCreight, J., (4 B.C.R. 219) reversed. *In re Bell-Irving and The City of Vancouver*, 4 B.C.R. 300.

(c) Other Cases.

—Construction of Statute—By-law—Exclusive right granted by—Statute confirming—Extension of Privilege—45 V. c. 79, s. 5, (P.Q.)—C.S.C. c. 65.] In 1881 a municipal by-law of St. Hyacinthe granted to a company incorporated under a general Act (C. S. C. c. 65) the exclusive privilege for twenty-five years of manufacturing and selling gas in said city, and in 1882 said company obtained a special Act of incorporation (45 V. c. 79, P.Q.), s. 5 of which provided that "all the powers and privileges conferred upon the said company, as organized under the said general Act, either by the terms of the Act itself or by resolution, by-law or agreement of the said city of St. Hyacinthe, are hereby reaffirmed and confirmed to the company as incorporated under the present Act, including their right to break up, etc., the streets * * * and in addition it shall be lawful for the company, in substitution for gas or in connection therewith, or in addition thereto, to manufacture, use and sell electric, galvanic or other artificial light, and to manufacture, store and sell heat and motive power derived either from gas or otherwise, and to convey the same by gas or otherwise * * * with the same privilege, and subject to the same liabilities, as are applicable to the manufacture, use and disposal of illuminating gas under the provisions of this Act": Held, affirming the decision of the Court of Queen's Bench, that the above section did not give the company the exclusive right for twenty-five years to manufacture and sell electric light; that the right to make and sell electric light with the same privilege as was applicable to gas did not confer such a monopoly, but gave a new privilege as to electricity entirely unconnected with the former purposes of the company; and that the word "privilege" there used could be referred to the right to break up streets, and should not, therefore, be construed to mean the exclusive privilege claimed. Held, also, that it was a private Act notwithstanding it contained a clause declaring it to be a public Act, and the city was not a party nor in any way assented to it; and that in construing it the court would treat it as a contract between the promoters and the legislature, and apply the maxim *verba fortius accipiuntur contra proferentem*, especially where exorbitant powers are conferred. *La Compagnie pour l'eclairage au gaz de St. Hyacinthe* v. *La Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe*, 25 S.C.R. 168.

— Municipal By-law — Special Assessments — Drainage—Powers of Council as to Additional Necessary Works—Ultra Vires Resolutions—Executed Contract.]—Where a municipal by-law authorized the construction of a drain benefiting lands in an adjoining municipality which was to pass under a railway where it was apparent that a culvert to carry off the water brought down by the drain, and prevent the flooding of adjacent lands, would be an absolute necessity, the construction of such culvert was a matter within the provisions of sec. 573 of the Municipal Act (R.S.O. [1887] c. 184), and a new by-law authorizing it was not necessary. *The Canadian Pacific Railway Co.* v. *The Township of Chatham*, 25 S.C.R. 608.

—Constitutional Law — Powers of Legislature— License—Monopoly—Ferries—Navigable Streams — Tolls—Disturbance of Licensee—North-west Territories Act, R. S. C. c. 50, ss. 13 & 24—B. N. A. Act, s. 92, s.s. 8, 10 & 16—Rev. Ord. N. W. T. [1888] c. 28—N. W. Ter. Ord. No. 7 of 1891-2, s. 4.]—The authority given to the Legislative Assembly of the North-west Territories, by R.S.C. c. 50, and orders-in-council thereunder, to legislate as to "municipal institutions" and "matters of a local and private nature," (and perhaps as to license for revenue) within the Territories, includes the rights to legislate as to ferries.—The Town of Edmonton, by its charter and by "The Ferries Ordinance" (Rev. Ord. N.W.T. c. 28) can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality; and as under the charter the powers vested in the Lieutenant-Governor in Council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license and a by-law is not necessary. *Dinner* v. *Humberstone*, 26 S.C.R. 252.

—By-law authorizing Debentures—Guarantee—Liability.]—At the time a certain county by-law was passed, the by-law of the minor municipality authorizing the issue of the debentures had not been finally passed, but had been provisionally adopted, and had received the assent of the electors, in accordance with sec. 293 Ontario Municipal Act, and the form that the guarantee of the county was to take was such that it could not actually be given until after the final passing of the by-law of the minor municipality:—Held, that, under the circumstances, the county by-law was not prematurely passed.—The by-law in question enacted: (1) that the corporation "do hereby guarantee the due payment of the debentures," etc.; (2) that upon each debenture should be written "payment hereof guaranteed by the corporation of the county," etc.; (3) that the warden and clerk should sign and seal such guarantee on each debenture; (4) that when so signed the corporation should be liable to the holders of the debentures, and responsible for the due payment thereof:—Held, that the by-law did not impose upon the county corporation any greater liability than that of guarantors. *Re Kerr and County of Lambton*, 27 Ont. R. 334.

—By-law — Ultra Vires—Highways.]—S. 593 of Manitoba Municipal Act, as amended by 58 V. c. 32, s. 14, enacts that rural municipalities may pass by-laws "for regulating or prohibiting the passage of traction engines, threshing machines, or other heavy vehicles over highways or bridges upon highways, and for providing the penalty in case of the violation of the provisions of such by-law." The defendants passed a by-law providing that no traction engine, steam engine, threshing machine, or watertank, should pass, or be transported over any of the highways within the defendant's municipality, except at the sole risk of the owner of such engine, machine, etc. Held, that this was not a *bonâ fide* exercise of the power conferred by the Act, as it neither regulated nor prohibited the passage of such engines, etc., and that such by-law was *ultra vires*. *McMillan* v. *Portage la Prairie*, 11 Man. R. 216.

—By-law—Health Regulations—Infected locality —Evidence.]—The Health By-law of the city of Victoria gives the medical health officer power "to stop, detain and examine every person or persons, freight, cargoes, railway and tramway cars coming from a place infected with a malignant or infectious disease." A Chinaman brought an action against the health officer for causing him, on landing at Victoria in a steamer from Hong Kong, to be removed to the "suspect station," and subjected to a cleansing process. The passengers on the steamer had been passed by the quarantine officer, and the white men among them were not interfered with. On the trial no evidence was given of the existence to a dangerous extent of small-pox at Hong Kong, but a medical man swore that small-pox was endemic there, and that there was danger of infection from white passengers, but not to the same extent as from Chinamen:—Held, that the health officer was not justified in his action, and that the plaintiff was entitled to damages. *Wong Hoy Woon* v. *Duncan*, 3 B.C.R. 318.

—By-law—Sale on Sunday—Unreasonable provisions.]—A municipal by-law is not open to objection on the ground that it is unreasonable if it is in the very terms of the enabling Act.—A by-law of Vancouver prohibiting the sale on Sunday of any personal property, except milk, drugs or medicines, as authorized by the City Charter, is not defective because food and other necessaries are not also excepted. Nor is it objectionable for being inconsistent with The Lord's Day Act, 29 Car. 2, c. 7, the legislature having power to deal with the subject. *The Queen* v. *Petersky*, 4 B.C.R. 385.

—Taxation—Chinese Laundries—Direct or Indirect Tax.]—See CONSTITUTIONAL LAW, II (*b*).

III. CONTRACT.

—Trespass — Damages — Easement — Equitable Interest — Municipal By-law, Registration of — Notice — Registry Act, R. S. O. c. 114.]—R.S.O. [1877] c. 114, s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests.—If the owner of land gives permission to the municipality to construct a drain through it, the municipality, after the work has been done, has an interest in the land to which the registry laws apply, whether the agreement conveys the property, creates an easement or is a mere license which has become irrevocable, and if there has been no by-law authorizing the land to be taken such interest is, under the said section, invalid as against a registered deed executed by an assignee of the owner, a purchaser for value without notice: *Ross* v. *Hunter* (7 S.C.R. 289) distinguished. *The City of Toronto* v. *Jarvis*, 25 S.C.R. 237.

The courts will not restrain a municipal corporation from awarding a contract to other than the lowest tenderer, which is a matter within the discretion of the corporation, and not subject to judicial control unless fraud is shown or there is a manifest invasion of private rights. *Haggerty* v. *The City of Victoria*, 4 B.C.R. 163.

IV. Highways.

—Public Highway—Registered Plan—Dedication—User—Retrospective Statute—46 V. c. 18 (O.)]—The right vested in a municipal corporation by 46 V. c. 18 (O.) to convert into a public highway a road laid out by a private person on his property, can only be exercised in respect to private roads, to the use of which the owners of property abutting thereon were entitled. *Gooderham* v. *The City of Toronto*, 25 S.C.R. 246.

—Repair of Streets—Liability for non-feasance.] In the absence of a statute imposing liability for negligence or non-feasance a municipal corporation is not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way, or having been allowed to get out of repair: *Municipality of Pictou* v. *Geldert* ([1893] A.C. 524), and *The Town of Sydney* v. *Bourke* ([1895] A.C. 433), followed. *The City of Saint John* v. *Campbell*, 26 S.C.R. 1.

—Repair of Streets—Pavements — Assessment of Owners—Double Taxation—24 V., c. 39 (N.S.)—53 V., c. 60, s. 14 (N.S.)—By s. 14 of the Nova Scotia statute, 53 V., c. 60, the City Council of Halifax was authorized to borrow money for paving the sidewalks of the city with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done and to be a first lien on such properties. A concrete sidewalk was laid, under authority of this statute, in front of L.'s property, and he refused to pay half the costs on the ground that his predecessor in title had in 1867, under the Act 24 V., c. 39, furnished the material to construct a brick sidewalk in front of the same property, and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well:—Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing, because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless and dangerous. *The City of Halifax* v. *Lithgow*, 26 S.C.R. 336.

— Sidewalks — 55 V. (O.) c. 42, s. 623 b.]—An assessment charging lands is a judicial act, of which the party affected must have notice, and be allowed to be heard.—Under the provisions of s. 623b of the Consolidated Municipal Act, 55 V. c. 42, publication in a local newspaper of a notice that the corporation intend to construct sidewalks in certain districts named therein, is not sufficient notice to a property owner affected by the proposed work. *In re Hodgins and The City of Toronto*, 23 Ont. A.R. 80.

—Private Approach — Non-repair — Liability.]—Defendant had constructed, with the knowledge of, and without objection by, the municipal corporation, an approach across a ditch between the sidewalk and the highway for the purpose of enabling vehicles to pass to and from his property. Plaintiff was passing on foot along the sidewalk in front of the defendant's property, and wishing to cross to the opposite side of the street she entered upon the defendant's approach, which at the time had become dilapidated and out of repair. It being in the night time, the plaintiff's foot passed through a hole in the approach which she did not see, and, in consequence, her leg was broken:—Held, that the defendant was liable. *Hopkins* v. *The Town of Owen Sound*, 27 Ont. R. 43.

—Highway — Want of Repair.] — Anything which exists or is allowed to remain above a highway interfering with its ordinary and reasonable use constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway —A branch of a tree growing by the side of a highway, to the knowledge of defendants, extended over the line of travel at a height of about eleven feet. The plaintiff in endeavoring to pass under the branch, on the top of a load of hay, was brushed off by it and injured:—Held, that the jury having found that the highway was out of repair, the defendants were liable: *Embler* v. *Town of Wallkill*, 57 Hun 384, referred to.—The question whether a highway is out of repair is a question for the jury: *Derochie* v. *Town of Cornwall*, 21 Ont. A.R. 279, followed. *Ferguson* v. *Township of Southwold*, 27 Ont. R. 66.

—Street Level—Injury by Raising—Damages.]—The purchaser of a lot of land has an absolute right, as against his vendor, to have the adjoining ground maintained at its natural level if a change of such level would be injurious to him, and the corporation of the city in which such lot is situated has no greater right to change the level than such vendor would have had except for reason of public utility, and then subject to the obligation of indemnifying the owner of the lot for any loss accruing to him therefrom. The owner in such case is entitled to damages, even though he knew when he purchased the lot that proceedings involving a change of level were contemplated, and when building made some provision, though inadequate, against the anticipated change. *Audet* v. *The City of Quebec*, Q.R. 9 S.C. 340.

—Widening of Street—Statutory authority—Care of Turnpike Roads.]—In proceedings to annul a by-law for the widening of a main thoroughfare within the municipality:—Held, that an arrangement between the municipality and the turnpike road trustees by which the latter handed over to the municipality the care of turnpike roads within its limits in consideration of the municipality assuming certain obligations of the trustees, was duly authorized by 42 & 43 V., c. 43 (P.Q.), and that the municipality in passing the by-law for the widening of the street, merely exercised the right given to it by its act of incorporation and other statutes regulating the rights and duties appertaining to it as a municipal corporation. *Murray* v. *The Town of Westmount*, Q.R. 9 S.C. 366.

—Negligence—Construction of Statute—Municipal Act [1892] s. 104, s.s. 90 (B.C.]—A duty may be cast by statute upon a municipal corporation to repair highways, and if that is clearly done it will be liable for damages caused by negligence in not repairing. The Municipal Act 1892, s. 104, s.s. 90, which empowers a corporation to raise money by way of road tax and to pass by-laws respecting roads, streets and bridges, does not cast on a corporation the duty of keeping streets in repair. *Lindell* v. *City of Victoria*, 3 B.C.R. 400.

—Constitutional Law——Powers of Legislature — License — Monopoly — Ferries — Navigable Streams — By-laws and Resolutions — Tolls — Disturbance of Licensee — North-West Territories Act, R.S.C. c. 50, ss. 13 and 24—B.N.A. c. 92, ss. 8, 10 and 16 — Rev. Ord. N.W. Ter. [1888] ch. 28—Ord. N.W.T. No. 7 of 1891-92, sec. 4.]—See CONSTITUTIONAL LAW. II (*b*).

—Neglect to Repair Road—Summary Conviction —Appeal to Queen's Bench—Art. 4616 R.S.Q.]
See CRIMINAL LAW, II.

—Maintenance of Roads and Streets—Accident from want of Repair—Action for—Delay—Prescription.]
See LIMITATION OF ACTIONS, IV.

— Repair of Public Road — Remedy for Non-Repair.]—See MANDAMUS.

—Municipal Corporations — By-laws Transferring and Assuming Road — Invalidity — Relinquishment of Control of Roads by Minister of Public Works.]—See WAY.

—Municipal Corporation By-Law—Ultra Vires—Highways.] — See MUNICIPAL CORPORATIONS, II (*c*).

—Notice of Action—Non-repair.]
See NEGLIGENCE, III.

V. LOCAL IMPROVEMENTS.

—Special Tax—Ex post facto legislation—Warranty.]—Assessment rolls were made by the city of Montreal under 27 & 28 V., ch. 60, and 29 & 30 V., ch. 56, apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside as null and the other was lost. The corporation obtained power from the legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed by a deed with warranty containing a declaration that all taxes, both special and general, had been paid. New rolls were subsequently made assessing the lands for the same improvements and the purchaser paid the taxes and brought action against the vendor to recover the amounts so paid:—Held, affirming the judgments in the courts below, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the warranty and declaration by the vendor did not oblige her to reimburse the purchaser for the payment of the special taxes apportioned against the land subsequent to the sale. *La Banque Ville Marie* v. *Morrison*, 25 S.C.R. 289.

—By-law—Assessment—Agreement with Owners Construction of Subway — Benefit to Lands.] — An agreement was entered into by the Corporation of Toronto with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made, running east on King Street to the limit of the subway, the street being lowered in front of the company's lands, which were, to some extent, cut off from abutting as before on certain streets; a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property so assessed being on the approach to the subway:—Held, that to the extent to which the lands of the company were cut off from abutting on the street as before the work was an injury, and not a benefit to such lands, and therefore not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement:—Held further, that as the by-law had to be quashed as to three-fourths of the work affected, it could not be maintained as to the residue, which might have been assessable as a local improvement if it had not been coupled with work not so assessable.—Notice to a property owner of assessment for local improvements under s. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act. In the result the judgment of the Court of Appeal, 23 Ont. A.R. 250, was affirmed. *City of Toronto* v. *Canadian Pacific Railway Co.*, 26 S.C.R., 682.
And see MUNICIPAL CORPORATIONS, IV.

VI. MUNICIPAL ELECTIONS.

—Personation—Prior and subsequent Provisions as to same Offence — Repugnancy —Repeal.—Where a clause in a statute prohibits a particular act and imposes a penalty for doing it, and a subsequent clause in the same statute imposes a different penalty for the same offence, which cannot be reconciled either as cumulative or alternative punishment, the former clause is repealed by the latter, which operates by way of substitution for the former. Principle applied to ss. 167 and 210 of the Ontario Consolidated Municipal Act: *Robinson* v.

Emerson, 4 H. & C. 352; and *Michell* v. *Brown*, 1 El. & El. at p. 275, followed. *The Queen* v. *Rose*, 27 Ont. R. 195.

—**Election—Action to Annul—Status—Onus—Evidence.**]—One who brings an action to annul a municipal election must prove that he is a ratepayer and elector of the municipality: *Rider* v. *Snow*, 20 S.C.R. 12; *Amyot* v. *Labreeque*, 20 S.C.R. 181, followed. Production of title to land in his wife, and of certificate of marriage, is not sufficient evidence of status. *Hamilton* v. *Brunet*, Q.R. 9 S.C. 1.

—**Demand of Poll.**]—A convention was called for the election of two municipal councillors, and opened at 10 a.m. Four candidates were nominated, and at 11 a.m. an elector called for a show of hands. While the president was counting the electors to see who had the majority of votes a poll was demanded, which he refused, and proclaimed two of the nominees elected:—Held, that the poll having been demanded before the proclamation it was improperly refused, and the election by show of hands was null. *Bragg* v. *Williams*, Q.R. 9 S.C. 258.

—**Municipal Councillor—Qualification—Payment of Taxes.**]—A municipal elector whose taxes are unpaid is not eligible for election to the municipal council, and he cannot remove his disqualification by a demand against the council which is not plain and clear, but is contestable and has been contested. *Gauthier* v. *La Municipalité de St. Louis du Mile-End*, Q.R. 9 S.C. 418.

—**Action to Annul—Status of Petitioner—Qualification and identity.**]—In an action to annul a municipal election the petitioner must, in order to prove his status, establish his identity with the person of the same name on the list of voters produced as used at such election. *Thérien* v. *Wilson*, Q.R. 9 S.C. 469.

—**Action to Annul—Preliminary Exceptions—Security for Costs—Suspension of Proceedings—Mandamus.**]—See PRACTICE AND PROCEDURE, XVII (*b*).

—**Contestation of—Form of Petition—Address to Judges.**]—See PRACTICE AND PROCEDURE, XVII (*b*).

VII. MUNICIPAL EXPROPRIATION.

—**Disqualification—Exemption without Contract—Property Qualification—55 V., c. 42, ss. 73, 86—56 V., c. 35 (O.), s. 4.**]—In 1892 a city council passed a by-law exempting the property of the partnership of the respondent, who had been elected alderman, from taxation except as to school rates, for a period of seven years:—Held, that the exemption, not being founded upon any contract, but being an exemption without a contract, as provided for by 56 V., c. 35, s. 4 (O.), there was no disqualification: *Regina ex rel. Lee* v. *Gilmour*, 8 Ont. P.R. 514, distinguished:—Held, also, that the respondent was entitled to qualify upon his rating upon the assessment roll of 1895 as the joint owner of a freehold estate in the partnership property, the four partners being rated for this property as freeholders to the amount of $10,000: 55 V., c. 42 (O.) secs. 73 and 86. The words "exempt from taxation" in 56 V., c. 35, s. 4, mean exempt from payment of all taxes, including school rates. *The Queen ex rel. Harding* v. *Bennett*, 27 Ont. R., 314.

—**Negligence.**]—Under the Act authorizing the City of Montreal to expropriate lands for public works the commissioners cannot give damages to any person except owners of expropriated land. If the works are carried on in an unskilful or negligent manner, or if there is unreasonable delay in their completion, adjoining proprietors may recover damages therefor under art. 1,053 C.C. *City of Montreal* v. *Robillard*, Q.R. 5 Q.B. 292.

—**Procès Verbal—Opening of Road—Appeal—Discretion.**]—Municipal corporations are subject to the reforming power and control of the Superior Court, but their actions in matters left by law to their discretion will not be interfered with, unless fraud or invasion of private rights has been committed, or a manifest wrong inflicted on an individual.—An appeal lies to the county council from the resolution of a local council to homologate a *procès verbal* for the opening of a road, and the county Council may, in its discretion, confirm, amend or disallow such *procès verbal*.—A *procès verbal* for the opening of a road is not null and void, because it does not provide for the expropriation of the land on which the road is to pass. *Corporation of Ste. Louise* v. *Chouinard*, Q.R. 5 Q.B. 362.

—**Action—Notice—52 V., c. 79, s. 213 (Q).**]—By 52 V., c. 79, s. 213, if a portion of a person's land is expropriated by the City of Montreal for municipal purposes, the owner may compel the corporation to acquire the residue, if not exceeding 40 feet in depth, or giving notice to the City Clerk before the day fixed for valuation by the Commissioners, who shall thereupon value the residue as well as the part required:—Held, that notice to the city on the day before that fixed for the valuation was sufficient. That if the commissioners failed to value the residue the owner could recover the value thereof from the city by action. *Guerin* v. *City of Montreal*, Q.R. 9 S.C. 42.

—**Arbitration and Award—Expropriation—Waiver—By-law authorizing Arbitration—Pleading.**]—See ARBITRATION AND AWARD, II.

VIII. MUNICIPAL LICENSES.

—**Licenses—Petty Chapman—Ultra Vires—Damages.**]—Where a municipal corporation owes its existence wholly to a statute, it is not liable for damages arising out of the enforcement of a by-law passed under misconstruction of its powers, unless such liability is expressly or impliedly imposed by statute.—A city corporation acting in excess of its powers passed a by-law amending an existing by-law for licensing pedlars, prohibiting them from peddling on certain streets, and the officers of the corporation in carrying out the by-law declined to issue licenses except in the restricted form, which the plaintiff refused to accept, and while attempting to peddle without a license, he was interfered with by the police, over whom the corporation had no control:—Held

that the corporation were not liable therefor. Nor does any liability arise where a licensee, who takes out a license under such a by-law, in the restricted form, is damnified by being prevented by the police from peddling on prohibited streets. *Pocock* v. *The Corporation of the City of Toronto, Ferrier* v. *The Corporation of the City of Toronto*, 27 Ont. R. 635.

—License—Wholesale Trader—55 V., c. 33, s. 204, s.s. 10 (B.C.)—A manufacturer who sells the product of his skill and labour in wholesale quantities is subject t o the license allowed by 55 V., c. 33; s. 204, s.s. 10, to be imposed by a municipality on the business of a wholesale trader. *The Queen* v. *Pearson*, 3 B.C.R. 325.

—By-law—Hawkers and Peddlers—Sale of Vegetables, etc.—License—Uncertain Fees—Vancouver Incorporation Act [1886] s. 142, s.s. 71 [1889] s. 33.] By the Vancouver Incorporation Act [1886] s. 142, s.s. 71, as amended by s. 33 of the Act of 1889, the council may pass by-laws "for licensing, regulating and governing hawkers, etc.," and for fixing a sum to be paid by them for carrying on their trade within the city, provided that no license should be required for hawking or peddling goods grown or produced in the Province. A by-law of the city prohibited the sale of vegetables and other articles at any place in the city except a store or the market place within certain hours; and the sale of such goods, except at a store or the market, without payment of market fees, the amount thereof to be fixed from time to time by resolution of the council:—Held, that the by-law was bad in imposing market fees of an unknown amount, instead of being certain and definite; in fixing the market as the only place where the goods could be sold within certain hours, which implies power to prohibit entirely the sale elsewhere; and in making no exception in the case of sale of native produce. *The Queen* v. *Jim Sing*, 4 B.C.R. 338.

—Statute — Construction — Municipal Corporation—Club license.] — The heading under which a section of an act is placed must be read as part of such section. By sec. 173 of the Municipal Act of B.C., 1889, every club in a municipality shall pay to the corporation an annual tax:—Held, that as this section was placed under the head of "Trades Licenses" it could only apply to a club that carried on the business of selling liquor:—Held, also, that a club that keeps liquor for its own members only, who obtain it on paying according to rates fixed by its rules, does not sell liquor and is not taxable under said section, though coming within the definition of a club in the Act. *City of Victoria* v. *The Union Club*, 3 B C.R. 363.

IX. Parks.

—Public Parks Act—R.S.O., c. 190.]—Held (per Hagarty, C.J.O., and Burton, J.A.), that where a city had adopted the Public Parks Act (R.S.O., c. 190) and appointed commissioners thereunder, who entered into contracts to purchase lands for park purposes, so long as the commissioners had not exceeded the statutory limit, the city was bound to provide the purchase money. Per Osler and Maclennan, JJ.A. That under the provisions of s. 17 of the Act any purchase made by the Park Commissioners is subject to the approval of the city council; and that the city council is not bound, upon the requisition of the Park Commissioners, to provide the money. *City of Ottawa* v. *Keefer, City of Ottawa* v. *Clark*, 23 Ont. A.R. 386.

X. Miscellaneous Cases.

—Public Health Act—R.S.O. c. 205, s. 84—Breach of—Infectious Disease — Isolation.]—Sec. 84 of The Public Health Act (R.S.O. c. 205), enacts that where any person comes from abroad into a municipality and is suffering from any disease mentioned in the preceding section thereof, the local board of health of such municipality "may make effective provision in the manner which to them shall seem best for the public safety, by removing such person to a separate house, or by otherwise isolating him, if it can be done without danger to his health, etc.":—Held, that these directions are imperative, and where, instead of isolating and taking care of a person suffering from an infectious disease, the members of a local board of health sent him into an adjoining municipality, they were held liable to repay to such municipality moneys reasonably expended in caring for him and preventing the spread of the disease. *Township of Logan* v. *Hurlburt*, 23 Ont. A.R 628.

—Expenditure of Public Money—Contribution to Costs of Private Action—Injunction.]—A ratepayer having brought an action against a gas company on behalf of himself and all other consumers of gas for an account of moneys alleged to have been properly obtained in the past from gas consumers, and with the intent of reducing the price of gas to them, the executive committee of the council of the city of Toronto reported in favour of authorizing the city council to grant money to carry on the action. The plaintiff, on behalf of himself and all other ratepayers in the said city, brought an action to restain the payment for such purpose:—Held, that the plaintiff was entitled to an injunction to restrain any such payment by the defendants, the same being without consideration and not in pursuance of any prior agreement or understanding. *Jarvis* v. *Fleming*, 27 Ont. R. 309.

—Public Nuisance — Action for Suppression—Indictment.]—A municipal corporation cannot maintain a civil action for the suppression, by indictment or otherwise, of a business carried on in the municipality which is alleged to be a public nuisance. The only remedy is by recourse to the criminal courts by indictment, or by proceeding in the civil courts at the instance of the Attorney-General, as representing the sovereign, and charged with the protection of the rights of the general public. *Corporation De Lorimier* v. *Beaudoin*, Q.R. 9 S.C. 222.

—Dismissal of Officer—Resolution.]—The dismissal from office of the secretary-treasurer of a municipal council results from the adoption by the council of a resolution appointing another person to the office and another resolution directing the retired officer to prepare his official statement (reddition du compte),

and also from the fact that the latter has abstained, since the passing of said resolutions, from acting as secretary-treasurer and attending the meeting of the council; and in these circumstances the council may claim the books and other things pertaining to the office even before adopting a resolution formally dismissing the official. *Corporation of the Village of Coteau Landing* v. *Filiatrault*, Q.R. 9 S.C. 497.

—Bureau de Délégués—Appeal from Decision of —Arts. 1,066, 1,067 M.C.]

See APPEAL III (*f*).

—Procés Verbal—Cost of—Action by County Council—Demand of Payment—Arts. 951, 961 M.C.]

—Sale of Land for Taxes—Damages against Municipality—The Assessment Act, R.S. Man. c. 101, s. 192—Right of Action—Compensation.]

See TAX SALE.

—Debentures of School District—Change of Name of District—Effect of—Liability.]

See SCHOOLS.

MUTUAL BENEFIT SOCIETY.

Life Insurance—Mutual Benefit Society—Benefit Certificate—Voluntary Settlement—R.S.O. c. 136.]—See INSURANCE, IV.

—Life Insurance—"Bequeathment Certificate"—Will—Right of Executors against Beneficiary.]

See INSURANCE, IV.

NAVIGABLE WATERS.

Constitutional Law—Title to Soil in Bed—Crown—Dedication of Public Lands by—Presumption—User—Obstruction—Public Nuisance.]—The title to the soil in the beds of navigable rivers is in the Crown in right of the provinces, not in right of the Dominion: *Dixon* v. *Snetsinger*, 23 U.C.C.P. 235, discussed. By 23 Vict., c. 2, s. 35 (Can.), power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use. The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication. If a province before confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown, as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge. An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance, though of very great public benefit and the obstruction of the slightest possible degree. *The Queen* v. *Moss*, 26 S.C.R. 322.

—Canadian Waters—Property in Beds—Public Harbours—Erections in Navigable Waters—Interference with Navigation—Rights of Fishing—Power to Grant—Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta—Provincial Legislation—R.S.O. (1887) c. 24, s. 47—55 V., c. 10, ss. 5 to 13, 19 and 21 (O.)—R.S.Q. arts. 1375 to 1378.]

See CONSTITUTIONAL LAW, II (*a*).

NAVIGATION.

Constitutional Law—Navigable Waters—Title to Soil in bed—Dedication of Public Lands—Presumption—User—Obstruction—Public Nuisance.]

See CONSTITUTIONAL LAW, III.

—Maritime Law—Collision—Rules of the Road—Narrow Channel—R.S.C. c. 79, s. 2, arts. 15, 16, 18, 19, 21, 22 and 23—"Passing" Ships—Breach of Rules—Contributory Negligence—Moiety of Damages—36 & 37 V. (Imp.) c. 85, s. 17—Manœuvres in "agony of collision."]—See SHIPPING, III.

NEGLIGENCE.

I. CONTRIBUTORY NEGLIGENCE.

— Careless Driving — Non-Repair of Road.] — Plaintiff hired a conveyance and took two of his friends for a drive. He allowed one of them to take the reins for a time, and in passing over a piece of road out of repair the latter drove with such negligence that an accident occurred. In an action against the municipal authorities for damages in respect of the non-repair of the road:—Held, that the plaintiff was responsible for the contributory negligence of the person to whom he entrusted the management of the conveyance, and could not recover. *Flood* v. *Village of London West*, 23 Ont. A.R. 530.

— Finding of Jury — Primâ Facie Case — Employer's Liability Act.] — M. brought an action against a dredging company for damages in consequence of injury by a pile driver falling on him while working for the company. On the trial one question to the jury was, "Was the plaintiff at time of accident acting in disobedience to defendants' orders?" They answered, "We are not certain as to his actions in this particular instance, but we consider that it would be his usual duty to be there":—Held, that M. having made out a *primâ*

facie case, this answer was no ground for a new trial:—Held, also, that M. was a "workman" within s. 1, s.s. 3 of the Employer's Liability Act. *McMillan* v. *Western Dredging Co.*, 4 B. C.R. 122.

II. Master and Servant.

—Negligence of Servant—Deviation from Employment—Resumption—Infant—Evidence.]—A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work and in doing so he ran over and injured a child:—Held, affirming the decision of the Supreme Court of New Brunswick, that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to the master's store and made a fresh start.—The doctrine of contributory negligence does not apply to an infant of tender age: *Gardner* v. *Grace* (1 F. & F. 359) followed. *Merritt* v. *Hepenstal*, 25 S.C.R. 150.

—Quebec Factories Act—R.S.O. arts. 3019-3053—Art. 1053 C.C.—Civil Responsibility—Accident—Conjecture—Onus of Proof—Statutable Duty, Breach of—Police Regulations.]—The plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial and left the manner in which the accident occurred a matter of conjecture:—Held, that, in order to maintain the action it was necessary to prove by direct evidence, or by weighty, precise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed.—The provisions of the Quebec Factories Act (R.S.O. Arts. 3019 to 3053 inclusive) are intended to operate only as police regulations, and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the Civil Code. *The Montreal Rolling Mills Co.* v *Corcoran*, 26 S.C.R. 595.

—Duty of Master—Precautions against accident.]—A girl employed in a factory shortly before the signal was given to cease work was combing her hair, and in stooping to pick up the comb which had dropped underneath the table at which she worked her hair was caught upon a revolving shaft running under said table, and she was seriously injured. In combing her hair before the signal she was disobeying orders, though she had never been told that it was dangerous to do so. In an action by the girl's tutor against the owner of the factory:—Held, that the employer was bound to maintain all machinery in the factory in the best possible condition for the safety of the operatives, and was responsible for the injury, as it was shown that the shaft was not covered or otherwise guarded, and the neglect to have it so was the immediate cause of the accident:—Held, further, that the girl acted imprudently in stooping as she did so near the shaft, but as such imprudence was not the cause of the accident it did not relieve the employer from responsibility, though it should be considered in estimating the damages. *Bergeron* v. *Tooke*, Q.R. 9 S.C. 506, reversed by the Supreme Court of Canada, June 7th, 1897.

III. Municipal Corporations.

—Highways—Ice on Sidewalk—57 V., c. 50, s. 13 (O).]—A street crossing in the line of and adjoining parts of a sidewalk on opposite sides of the street, is not a sidewalk within the meaning of 57 Vict., c. 50, s. 13 (O.)—On the street crossing in question snow had accumulated, partly from being shovelled there from the sidewalk and partly from the action of passing sleighs, so that there was a descent of some inches from the crossing to the sidewalk, and the plaintiff slipped on this descent and was injured.—Held, per Hagarty, C.J O., and Maclennan, J. A., that the municipality was not liable. Per Burton and Osler, J.J.A., that there was evidence of negligence to go to the jury. In the result the judgment of the Common Pleas Division for the plaintiff was affirmed. *Drennan* v. *City of Kingston*, 23 Ont. A.R. 406. Affirmed on appeal to the Supreme Court of Canada, January 25th, 1897.

—Defective Highway—Contributory Negligence—Excessive Damages.]—A branch of a tree growing by the side of a highway to the knowledge of the defendants, extended over the line of travel at a height of about eleven feet. The plaintiff, in endeavoring to pass under the branch, on the top of a load of hay, was brushed off by it and injured. It was shown that the plaintiff had hauled hay upon this road and past this particular place not long before; that he and another man who was on the road with him, when approaching the branch, observed the situation, but concluded they could pass in safety; that the other man did pass safely under the branch, and the plaintiff, instead of lying close to the hay, put up his feet to raise the limb, which he failed to do:—Held, that the plaintiff was not called upon to do the very best and wisest thing; and that upon this evidence the court could not interfere with the finding of the jury that the accident could not have been avoided by the exercise of reasonable care on the part of the plaintiff: *Connell* v. *The Town of Prescott* 22 S. C. R. at pp. 162-3, referred to:—Held also, upon the evidence, that the sum assessed as damages, $1,200, was not so excessive as to warrant the court in interfering with verdict. *Ferguson* v. *Township of Southwold*, 27 Ont. R. 66. And see *McCullough* v. *Anderson*, 27 Ont. R. 730.

—Defective Sidewalk—Notice of Action.]—The notice required by 57 Vict., c. 50, s. 13 (Ont.) in cases of injury from defective sidewalks is to inform the corporation before action of the nature of the accident. Having regard to Ontario Consol. Rule 402, that a defendant is to raise all such grounds of defence, as, if not raised at the pleadings would be likely to take the opposite party by surprise, it is proper for the defendant to set up in his defence want of notice in case the statement of claim is silent on the point, so that the judge can inquire into

the circumstances (if any) which excuse the want or insufficiency of this notice. Where the objection, in such a case, to the want of notice was not raised until after the evidence was closed, a motion for a non-suit was refused. *Longbottom* v. *The City of Toronto*, 27 Ont. R. 198.

—**Way—Opening—Invitation—Accident—Land adjoining Highway.**]—Where the plaintiff, instead of taking the way provided for access to and from his premises, left it and proceeded to his destination upon a track belonging to the defendants, which, to his knowledge, was not a street or way completed for use or opened for public travel, no invitation or inducement being held out by the defendant to the public to travel upon it, and on which he, owing to irregularities on its surface, fell and was injured:—Held, that he could not recover damages for his injury:—Held, also, that he could not recover upon the alternative allegation that he was obliged to leave the highway, because it was in a dangerous state from snow and ice, and sustained the injury upon the adjoining land. *Noverre* v. *City of Toronto*, 27 Ont. R. 651.

—**Infectious Disease—Hospital.**]—Where a shed in the rear of the Montreal General Hospital was used for the disinfection of the clothing of fever patients and for the disposal of the bodies of persons who had died from fever awaiting burial, the hospital was held liable in damages to a person inhabiting the adjoining building who had contracted fever in consequence of such use of the shed.—As the hospital is operated under the control of the city of Montreal, the latter was held jointly and severally responsible with the hospital for such damages. *Breux* v. *The City of Montreal*, Q R. 9 S.C. 503.

—**Hydrant on Street—Misdirection—Evidence.**]—A hydrant was placed on a narrow, irregular street in the town of Woodstock, in which there was no line of demarcation between the street and sidewalks, with two posts placed around it to protect it from damage and mark its position in winter when the snow accumulated so as at times to cover it up. There was no light on the street, and a woman in passing through it after nine o'clock on a night in August struck against the hydrant and posts and was injured. In an action against the town for damages:—Held, that the jury were rightly asked at the trial to say whether or not the posts were a proper or necessary means of protection or whether any protection at all was required; and that it was not misdirection to leave to them for consideration whether a line between the sidewalk and street should not have been made by the town: Held, also, that evidence of other accidents from the same cause was properly admitted. *Glidden* v. *The Town of Woodstock*, 33 N.B.R. 388.

—**Municipal Corporation—Repair of Streets—Liability for Non-feasance.**]—

See MUNICIPAL CORPORATIONS, IV.

—**Municipal Act 1892 (B.C.) Construction—Highways.**]—See MUNICIPAL CORPORATIONS, IV. And see WAY.

IV. PROXIMATE CAUSE.

—**Livery Stable—Accident to Child.**]—The proprietor of a livery stable is liable to damages for injury to a boy thirteen years old, who was permitted by his foreman to mount a horse and ride him around the yard, though the accident might not have happened if the boy had not struck the horse with a switch which he held. *Pilon es qual.* v. *The Shedden Co.*, Q.R. 9 S.C. 83.

—**Vicious Dog—Injury to Passer-by—Art. 1055 C.C.**]—B. tied up his dog in a yard through which he had a right of passage. M. was returning from a house fronting said yard, and had entered it believing he could safely do so, when the dog, having broken the rope by which he was tied, rushed out and bit M. severely. It appeared that the dog, without being vicious, was dangerous when tied up:—Held, that M. was not in fault in entering into the yard without evil intent, and that B. was responsible for the injury, because he did not fasten the dog securely, whereby he was able to escape and attack passers-by. *Miller* v. *Bourbonnière*, Q.R. 9 S.C. 413.

—**Electric Wire—Broken Wire left exposed—Imprudence—Reduction of Damages.**]—D., seeing a broken wire lying on the ground, wound one end around a post and taking up the other end, which had fallen across an electric light wire and become charged with electricity, was killed by the current. In an action by his widow and the curator of his child for damages against the city corporation which had control of the electric service:—Held, that the corporation was guilty of negligence in placing the wire where, if it broke, it might be charged with electricity by contact with the electric light wire immediately underneath, and in allowing the wire to remain on the ground several hours after the break and after the officials of the corporation were aware that a break had occurred somewhere. The negligence of the corporation being the primary and principal cause of the accident it was responsible in damages, but as D. had been imprudent in taking hold of the wire the damages were reduced. *Caron* v. *The City of St. Henri*, Q.R. 9 S.C. 490.

—**Negligent operation of Electric Street Cars—Damages.**]—It is the duty of the motorman of a street car, when he sees a horse in the street before him greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse, and it is also his duty to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. If he fails to do this the company is liable in damages when an accident happens: *Ellis* v. *Lynn & Boston Railway Co.*, 160 Mass. 341, referred to. *Lines* v. *Winnipeg Street Railway Co.*, 11 Man. R. 77.

V. RAILWAY COMPANY.

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

tions of Fact.]—In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was no sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shown that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding. *Sénésac* v. *Central Vermont Railway Co.*, 26 S.C.R. 641.

—Fire—Sparks from Engine—Damages.]—Where property was destroyed by fire caused by sparks from a railway engine, and an insurance company paid the sum insured thereon, and under subrogation brought an action against the railway company to be reimbursed, it recovered damages though it was shown that the property not insured first took fire, which spread to those which were insured. *Central Vermont Ry. Co.* v. *Stanstead & Sherbrooke Ins. Co.*, Q.R. 5 Q.B. 224.

—Railway Company—Loan of Cars—Reasonable Care—Breach of Duty—Risk Voluntarily Incurred—"Volenti non fit Injuria."

See ACTION, IX.

—Jury—Answers to Questions—Railway Co.—Act of Incorporation—Change of Name.]—*Pudsey* v. *Dominion Atlantic Railway Co.*, 25 S.C.R. 691.

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

See RAILWAYS AND RAILWAY COMPANIES, I.

—Railways—Moving Train—Postal Car—Bare Licensee.]

See RAILWAYS AND RAILWAY COMPANIES, V.

—Government Railway—Injury to the Person—Undue Rate of Speed—Crossing—Liability of Crown—50 & 51 V., c. 16, s. 16 (c.)

See RAILWAYS AND RAILWAY COMPANIES, V.

VI. MISCELLANEOUS CASES.

—Action in Warranty—Joint Speculation—Partnership or Ownership par indivis.]—W. and D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other, and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his undivided interest. Upon the death of W. and D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book-keeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheque drawn in a similar way. M.N.D., who looked after the business for the representatives of D., paid diligent attention to the interests confided to him and received their share of such profits, but J.B.C., who acted in the W. interest, so negligently looked after the business as to enable the book-keeper to embezzle moneys, which represented part of the share of the profits coming to the representatives of W. In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses:—Held, affirming the judgment of the Superior Court and of the Superior Court sitting in review, that the facts did not establish a partnership between the parties, but a mere ownership *par indivis*, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them. Even if a partnership existed, there would be none in the moneys paid over to the parties after a division made. *Archbald* v. *deLisle*, *Baker* v. *deLisle*, *Mowat* v. *deLisle*, 25 S.C.R. 1.

—Principal and Agent—Negligence of Agent—Lending Money for Principal—Financial Brokers—Liability for Loss—Measure of Damages.]—Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him and in his interest, though their remuneration may come from the borrower.—An agent who invests moneys for his principal without taking proper precautions as to the sufficiency of the security is guilty of negligence, and if the value of the security proves less then the amount invested he is liable to his principal for the loss occasioned thereby.—The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land. *Lowenburg* v. *Wolley*, 25 S.C.R. 51.

—Unsafe Premises—Volunteer.]—A person entering upon premises on the express or implied invitation of the occupant is entitled to assume that they will be in a reasonably safe condition, but one who visits them for his own purposes and without the knowledge of the occupant, does so at his peril. Where, therefore, the superintendent of a coal company before the time arranged for delivery, without the knowledge of the defendants, went to a school-house to look at coal-bins in order to decide how he could most conveniently deliver coal ordered by the defendants, and was severely hurt by falling into an unguarded hole in the cellar, he was held not to be entitled to damages. *Rogers* v. *Toronto Public School Board*, 23 Ont. A.R. 597. Affirmed on appeal to the Supreme Court of Canada, 1st May, 1897.

—Action against Bailiff—Escape of Prisoner—Damages.]—To sustain an action against a bailiff who has arrested a debtor on a writ of capias and permitted him to escape from

custody, direct pecuniary damage must be proved. The possibility that the debt might have been paid if the prisoner had not escaped will not suffice. *Bernard* v. *Chales*, Q.R. 9 S.C. 168.

—Prairie Fire set for purposes of Husbandry—Damages.]—Where a person starts a fire on his property for purposes of husbandry he is bound to exercise caution and care proportionate to the risk of the fire spreading and doing damage; and whatever falls short of taking every precaution that is reasonably possible under the circumstances, to prevent the spread of the fire, will be held to be negligence, for which the person will be made liable in damages. *Booth* v. *Moffatt*, 11 Man. R. 25.

—Finding of Jury—New Trial where no Evidence to support finding of Negligence.]

See PRACTICE AND PROCEDURE, XXIII.

—Maritime Law—Collision—Rules of the Road—Narrow Channel—R.S.C. c. 79, s. 1 Arts. 15, 16, 18, 19, 21, 22 and 23—"Passing" Ships—Breach of Rules — Moiety of Damages — 36 & 37 V. (Imp.) c. 85, s. 17—Manœuvres—In "Agony of Collision."]

See SHIPPING, III.

NEGOTIABLE SECURITY.

Fraudulent Conversion—Past Due Bonds—Debentures Transferable by Delivery—Equity of Previous Holders—Estoppel—Implied Notice—Innocent Holder for Value—C.C. Arts. 1487, 1490, 2202 and 2287.]—A *bonâ fide* holder acquiring commercial paper after dishonour takes subject not merely to the equities of prior parties to the paper, but also to those of all parties having an interest therein: *In re European Bank. Ex parte, Oriental Commercial Bank* (5 Ch. App. 358) followed. *Young* v. *MacNider*, 25 S.C.R. 272.

NEW TRIAL.

Jury—Answers to Questions—Railway Co.—Negligence—Act of Incorporation—Change of Name.]—*Pudsey* v. *Dominion Atlantic Railway Co.*, 25 S.C.R. 691.

—Power of County Court Judge to entertain application for new Trial after six months from date of Judgment.]—See COUNTY COURT.

—Reforming Agreement on ground of Mistake—Strictness of Evidence required—Error by Judge—New Trial.]—See CONTRACT, III (*b*).

NON-SUIT.

County Court—Nonsuit by Judge ex mero motu—Appeal.]—See COSTS, V.

NOTARY.

Responsibility — Intrinsic Formalities — Acte of Sale of Lands — Description — Omission of Cadastral Number—Registry—Special Mandate—Proof.]—A notary is responsible for the observance of the intrinsic formalities prescribed for the validity of an *acte*, but is not obliged to register such *acte* without an express mandate.—The existence of such mandate cannot be established by parol evidence.—The omission of the cadastral number of a lot, otherwise described by tenants and particulars, does not make void as between the parties the *acte* of sale of said lot, nor make responsible the notary who signed such *acte* with the parties. *Morin* v. *Brodeur*, Q.R. 9 S.C. 352, affirming 7 S.C. 439.

NOTICE.

Mortgage — Agreement to Charge Lands — Statute of Frauds—Registry.]—The solicitor of the mortgagee wrote a memo. on one of his letter forms under the printed words "Dear Sir," his own name being at the bottom on the left side, and he made an affidavit, as subscribing witness, to have it registered. Lot 19 having been mortgaged to another person, one of the mortgagees of the Christoper farm brought an action to have it declared that she was entitled to a charge or lien thereon, in which action it was contended that the solicitor was not a subscribing witness, but only the person to whom the letter was addressed:—Held, affirming the judgment of the Court of Appeal, that the solicitor signed the agreement as a witness and the registration was, therefore, regular, but if not, as the document was upon the registry, the subsequent purchaser had actual notice by which he was bound notwithstanding the informality in the proof of execution, which did not make the registration a nullity. Held, per Taschereau, J., that the agreement did not require attestation, and if the solicitor was not a witness it should have been indorsed with a certificate by a county court judge as required by R.S.O. [1887] c. 114, c. 45, and it having been registered the court would presume that such certificate had been obtained. *Rooker* v. *Hoofstetter*, 26 S.C.R. 41.

—Bailees—Common Carriers—Express Company Receipt—Condition precedent—Notice of Claim.]

See ACTION, VII.

—Registry laws—Registered Deed—Priority over earlier Grantee—Postponement.]

See REGISTRY LAWS.

—Debtor and Creditor—Composition and Discharge — Acquiescence — New Arrangement of terms—Waiver of Time Clause—Principal and Agent—Notice of Withdrawal from Agreement.]

See DEBTOR AND CREDITOR, V.

— Principal and Agent — Agent's Authority — Representation by Agent—Principal affected by—Advantage to other than Principal—Knowledge of Agent—Constructive Notice.]

See PRINCIPAL AND AGENT, II.

—Principal and Surety—Guarantee Bond—Default of Principal—Non-disclosure by Creditor.

See PRINCIPAL AND SURETY, I.

—Assignment of Non-negotiable Chose in Action—Want of Notice—Equities.]

See CHOSE IN ACTION.

—Certiorari—Notice to Magistrate—Contempt of Court.]—See CONTEMPT OF COURT.

—Appearance—Default — Tender—Notice—Irregularity—Motion for Judgment.]

See PRACTICE AND PROCEDURE, XIII.

—Expropriation of portion of Land—Surrender of Residue—Time for giving Notice—Failure.]

See MUNICIPAL CORPORATIONS, VII.

NOTICE TO PRODUCE.

See PRACTICE AND PROCEDURE, XVIII.

NOVATION.

Accord and Satisfaction — Release — Taking sole note of one Partner for amount of joint account whether Release of the other.]—In an action against B. & S. as partners for goods sold and delivered, it appeared that the firm had dissolved, S. carrying on the business and assuming the liabilities. Plaintiffs having drawn on the firm for the amount, S. returned the drafts, stating the dissolution and that he had no right to accept in the firm name, but sent his own note. This note not being paid at maturity, plaintiffs drew on S., who did not accept; but in lieu sent four notes made by himself for the amount taken in the aggregate. These notes were held by the plaintiffs and sent for collection at maturity, and on non-payment they brought the action against B. & S.:—Held, per Drake, J., at the trial, that, though there was no express agreement to that effect, the acceptance of the four notes of S. and the retention of them, and forwarding them for collection, by plaintiffs, was *primâ facie* an acceptance of the sole liability of S. in the place of the joint liability of B. & S., and a discharge of B., there being no reservation of their rights against him:—Held, on appeal to the full Court, that the proper question for the trial judge was whether the plaintiffs had agreed to take, or did take, the notes of S. in satisfaction of the joint debt. That there was no evidence of such agreement, and the fact that the plaintiffs when taking the notes of S. did not expressly reserve their rights against B. was immaterial. *Gurney* v. *Braden*, 3 B.C.R. 474.

—Vendor and Purchaser—Agreement for Sale of Lands — Assignment — Principal and Surety—Deviation—Giving Time—Secret Dealings with Principal—Release of Lands—Arrears of Interest—Discharge of Surety.]

See PRINCIPAL AND SURETY, I.

NOVELTY.

See PATENT OF INVENTION.

NUISANCE.

Livery Stable — Offensive Odours—Noise of Horses.]—Though a livery stable is constructed with all modern improvements for drainage and ventilation, if offensive odour therefrom and the noise made by the horses are a source of annoyance and inconvenience to the neighbouring residents, the proprietor is liable in damages for the injury caused thereby. *Drysdale* v. *Dugas*, 26 S.C.R. 20.

—Constitutional Law—Navigable Waters—Title to bed of Stream—User—Obstruction to Navigation — Public Nuisance.]—An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance, though of a very great public benefit and the obstruction of the slightest possible degree. *The Queen* v. *Moss*, 26 S.C.R. 322.

—Stable—Voisinage.]—The owner of a house cannot compel the removal of a stable on an adjoining lot which was there when the house was built, which is properly equipped and managed, and the inconvenience is not excessive. *Forget* v. *Laverdure*, Q.R. 9 S.C. 98.

—Public Nuisance—Suppression by Municipal Corporation—Remedy—Powers of Corporation.]

See MUNICIPAL CORPORATIONS, X.

NULLITY.

Sale by Tutor—Third Party in Good Faith—False Statement to Family Council.]

See TUTOR.

—Action against Married Woman—Erroneous Description as Widow—Husband mise en cause—Judgment permitting.]—See ACTION, I.

—Of Sheriff's Sale—Mistake as to Identity of Immovable.]—See SALE, IV.

—Sheriff's Sale—Deposit from Bidders — Arts. 678, 679, C.C.P.]—See SALE, IV.

—Municipal Election—Demand of Poll—Refusal of.]—See MUNICIPAL CORPORATIONS, VI.

OPPOSITION.

Informality—Motion to reject — Substitution of proper Opposition.]—Where a motion is made to the Court for rejection of an opposition for irregularity, the opposant cannot, without permission of the Court, withdraw it and substitute a second opposition which is a reproduction of the first but omitting the irregularities complained of. *Leboutillier* v. *Carpenter*, Q.R. 9 S.C. 530.

—To Seizure under Execution — Unnecessary Proceeding—Interest of Opposant.]

See EXECUTION, VII.

ORDER IN COUNCIL.

Jurisdiction of Courts over.]—An order of the Lieutenant-Governor in Council, being an act of the executive power of the province, cannot be annulled by a court of justice at the instance of the Attorney-General or of a private person. *Casgrain* v. *School Commissioners of St. Gregoire*, Q.R. 9 S.C. 225.

PARENT AND CHILD.

—Purchase in name of Child—Intention to Advance—Presumption.]—Where a parent purchases land in the name of a child it is a question of evidence whether or not such purchase is intended as an advancement. Such intention will not be presumed. *Moore* v. *Moore*, 1 N.B. Eq. 204.

PARLIAMENTARY COMMITTEE.

Services rendered—Petition of Right—Liability.]—The Crown is not liable upon a claim for services rendered by any one to a Committee of the House of Commons at the instance of such Committee. *Kimmitt* v. *The Queen*, 5 Ex. C.R. 130.

PARLIAMENTARY ELECTIONS.

Ontario Voters' Lists Act, [1889]—Notice of Action—Action for Penalties—Officer—52 V., c. 3—R.S.O., c. 73.]—A clerk of a municipality is not an officer within the meaning of R.S.O., c. 73, in respect to the performance in that capacity of the duties prescribed by the Ontario Voters' Lists Act [1889], and is not entitled in an action for the penalties imposed for default in that regard, to the protection of the first mentioned statute. *McVittie* v. *O'Brien*, 27 Ont. R. 710.

PARTICULARS.

Demand for—Compliance—Restriction.]
See PRACTICE AND PROCEDURE, XVI.

PARTIES.

I. GENERALLY.

Devolution of Estates Act, 49 V. (O.) c. 22—Added Parties—Orders 46 & 48, Ontario Judicature Act—R.S.O [1887] c. 109, s. 30.]—A testator divided his real estate among his three sons, the portion of A. C., the eldest, being charged with the payment of $1,000 to each of his brothers, and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." A. C. died after the testator, leaving a widow but no issue:—Held, that the mortgagee of the reversionary interest of one of his brothers in the lands devised to A. C. was improperly added, in the master's office, as a party to an administration action, and could take objection at any time to the proceeding either by way of appeal from the report or on further directions, and was not limited to the time mentioned in order 48 of the Supreme Court of Judicature, which refers only to a motion to discharge or vary the decree. *Cowan* v. *Allen*, 26 S.C.R. 292.

—Motion to Add Parties—Consent—Amendment—Discretion.]—Defendant, in an action for the ratification of two mortgage deeds, sought to have certain persons alleged to be really beneficially interested, added as plaintiffs:—Held, that they could not be added without their consent in writing, under Ontario Rule 324 (b). Leave given to amend the defence by setting up that these persons were necessary parties:—Semble, however, that the Court has a discretion, under Rule 319, to proceed in the absence of some of the persons interested in the question under adjudication. *Major* v. *Mackenzie*, 17 Ont. P.R. 18.

—Unauthorized Proceedings—Solicitor—Judgment—Relief—Laches—Repayment of Moneys.]—A person who finds himself a party plaintiff to proceedings which he has not authorized, is entitled to be relieved from liability in connection with them, whether the solicitor in fault be solvent or not; and he is entitled to such relief notwithstanding the fact that an order dismissing has been taken out by the defendant before the plaintiff becomes aware that his name has been used: *Nurse* v. *Durnford*, 13 Ch. D. 764, followed. The plaintiff became aware that his name had been used on 1st Aug., 1895, and he then protested against it. He did not, however, move to set aside the proceedings until the 25th September following. No detriment to the defendants was shown to have resulted from the delay:—Held, that the delay did not preclude the plaintiff from relief.—The defendant applied for and obtained an order dismissing the action for want of prosecution with costs. An execution was placed in the sheriff's hands, under which he seized the plaintiff's goods. The plaintiff paid the amount of execution and costs to the sheriff, taking from him a receipt in writing in which the sheriff acknowledged the receipt of the same to be held by him "for ten days, as security for the goods seized, to be returned if writ set aside, and if not within that time to be applied in payment of execution." More than ten days having elapsed without the writ being set aside, the sheriff paid over the money to the defendant. The plaintiff having subsequently established his right to be relieved from liability:—Held, that he was entitled to be repaid the money by the defendants. *Morris* v. *Confederation Life Association*, 17 Ont. P. R. 24.

—Action to realize Charge on Land—Parties—Subsequent Encumbrancers—Varying Judgment—Notice—Marshalling.]—Plaintiff was the legatee of a sum equal to one-fifth of their value charged upon two parcels of land which were devised subject to the legacy—the extent of the devisee's interest in one parcel being uncertain. The plaintiff entered into an agreement with the devisee fixing the value of the legacy at $400. This agreement was not registered. The devisee mortgaged both parcels separately to different mortgagees, who registered. Plaintiff proceeded against the devisee alone for the sale of the parcel in respect of which the devisee's interest was certain, for payment of

the amount of the legacy as agreed upon. She obtained judgment by default, with a reference as to incumbrances upon such parcel. The incumbrancers were added as parties in the Master's office, and they thereupon moved to set aside or vary the judgment so as to be enabled to dispute the amount of the legacy as agreed upon between the plaintiff and defendant:—Held, that it was not necessary for the added parties to obtain an order to vary the judgment for this purpose, the question of the value of the charge being open, as between them and the plaintiff, in the Master's office, in the absence of notice on their part of the agreement when they registered their mortgages.—That while the mortgagees had the right of marshalling, the right was purely equitable; and as the plaintiff had obtained a valid judgment she possessed a superior equity to that of the mortgagees, and they could not involve her in the expense of construing the testator's will, and of ascertaining what rights of the defendant in the parcel in respect of which his interest under the will was uncertain were subject to the charge. It was open to them, however, to bring an independent suit offering to redeem the plaintiff, and, that being done, to stand in her place and at their own expense have recourse to the parcel last mentioned. *Rutherford* v. *Rutherford*, 17 Ont. P.R. 228.

—**Co-plaintiffs — Separate Causes of Action—Joinder—Ont. Rule 300.**]—Two plaintiffs, H. and M., joined two separate causes of action. H. sued for damages for the wrongful interference of the defendants with him in the completion of a building, and for assaulting and arresting M., his co-plaintiff and servant, who was engaged in doing the work; and M. sued for damages for the same assault and arrest:—Held, that although each of the causes of action arose, in part at all events, out of the same alleged wrongful acts of the defendants, each was a separate and distinct cause of action, and could not be properly joined under Rule 300: *Smurthwaite* v. *Hannay* [1894] A.C. 494, and *Carter* v. *Rigby* [1896] 2 Q.B. 113, followed; *Booth* v. *Briscoe*, 2 Q.B.D. 496, distinguished. *Mooney* v. *Joyce*, 17 Ont. P.R. 241.

—**Suit for Partition and Sale—Wife of Tenant in Common.**]—In a suit for the partition of land held in common, in which a sale is asked for, the wife of a tenant in common is a proper party. *Hannaghan* v. *Hannaghan*, 1 N.B. Eq. 302.

—**Parties to—Rule 98.**]—Under rule 98 (B.C.) trustees may sue on a contract in their own names without joining the cestui que trusts. *Smith* v. *Mitchell*, 3 B.C.R. 450.

—**Administration Order—Executor—Reference—Conduct of—Parties.**

See PRACTICE AND PROCEDURE, XV.

—**Master and Servant—Hiring of Husband and Wife—Parties—Joinder of Action.**

See MASTER AND SERVANT, I.

II. THIRD PARTY PROCEDURE.

—**Third Party Procedure—Ont. Rules 328-332—Order—Discretion — Appeal.**]—The plaintiff brought his action against two defendants, seeking to establish a liability against both of them. The one made no defence, and final judgment was signed against him. The plaintiff proceeded with his claim against the second, which subsisted in the assignment of a claim by the first defendant for indemnity against the second defendant in respect of the claim in which the judgment by default had been entered. The trial judge decided that the assignment was inoperative. Thereupon an appeal was taken by the plaintiff to a Divisional Court, and that court made an order directing that the first defendant, notwithstanding the assignment to the plaintiff, have leave to amend the pleadings by claiming over against the second defendant, who should be allowed to plead to the amendments, and if further evidence were required by the amendments such evidence might be taken in the Divisional Court:—Held, that this order was not a mere discretionary order, and was, therefore, appealable: *Hately* v. *Merchants' Despatch Transportation Co.*, 12 Ont. A.R. 640, followed. That Rules 328-332 (1313) are intended for the benefit of defendants and not of plaintiffs; and it is too late for a defendant after final judgment signed against him to invoke the benefit of such rules. *Boultbee* v. *Cochrane*, 17 Ont. P.R. 9.

—**Third Party Procedure—Indemnity—Breach of Contract—Rule 328.**]—The plaintiff brought action, on behalf of himself and all other subjects of Her Majesty entitled to use a certain road, to have it declared that the defendants, who were the lessees of the road, had no right to exact tolls on it, etc. The defendants claimed to be indemnified by their lessors upon the ground that the latter had warranted their title to the road by the lease; and served the lessors with third party notice under Ont. Rule 328 (1313):—Held, that this was not a "claim to indemnity" within the meaning of the said Rule. 2. That the Rule applies only to claims to indemnity as such, either at law or in equity; and does not apply to a right to damages arising from breach of contract, the latter being a right given by law in consequence of the breach of the contract between the parties, while the former is given by the contract itself: *Birmingham, etc., Land Co.* v. *London and North Western Railway Co.* 34 Ch. D. 261, followed; *Page* v. *Midland Railway Co.*, [1894] 1 Ch. 11, distinguished. *Payne* v. *Coughell*, 17 Ont. P.R. 39.

—**Intervention — Tierce-Opposition.**]—A third party whose interests were affected by the judgment in a cause decided by the Superior Court petitioned to be allowed to intervene, which the Court refused. On appeal, the Court of Review ordered that his petition be granted, and the record remitted to the Superior Court to proceed on the intervention. The Court of Queen's Bench reversed the latter judgment, holding that the intervention would have been proper if it was sought only to delay the execution of the judgment until the parties' rights were determined, but as he sought to set aside the judgment he should have proceeded by *tierce-opposition*. *Warminton* v. *Bulmer*, Q.R. 5 Q.B. 120.

—**Third Party—Defendant to Action.**]—Only a defendant to an action can issue a third party notice under Rule 128 (B.C.) and when a defendant has brought in by such notice a person liable

to indemnify him, such person is not himself a defendant, and cannot bring in a fourth party against whom he claims indemnity. If a third party is admitted to defend the action as against the plaintiff, he is a defendant within the meaning of said rule. *Northern Counties Investment Trust* v. *Ross, McFie* (third party), 4 B.C.R. 253.

—**Third Party—Indemnity—Security for Costs.**]—If parties liable to indemnify the defendant to an action are brought in on third party notice they should be made co-defendants. If substituted for the defendant at their own request they may be required to give security for the amount of plaintiff's claim and costs. *Wilkerson* v. *City of Victoria*, 3 B.C.R. 367.

—**Third Parties—Adding Defendants.**]—If the defendant to an action of damages for personal injuries claims that other persons, if any, are responsible therefor, he can only bring the latter in as third parties, and cannot have them made co-defendants. *Holmes* v. *The City of Victoria*, 4 B.C R. 567.

—**Unauthorized Proceedings—Solicitor—Judgment—Relief—Laches—Repayment of Moneys.**]
See COSTS, II.

—**Third Parties—Indemnity—Costs.**]
See COSTS, IV (*c*).

PARTITION.

Partition — Summary Application — Mortgagee.]—A mortgagee is not entitled to an order for partition upon a summary application under Rule 989 Consol. Rules Ont., until he has perfected his title by foreclosure or otherwise.—*Mulligan* v. *Hendershott*, 17 Ont. P.R. 227.

—**Suit for—Standing Grass—Order for Sale.**]—During the pendency of a partition suit the Court will not, in opposition to the tenant in possession, order the sale of standing grass and payment of the proceeds into Court unless it is necessary in the interest of the co-tenants. *Smith* v. *Smith*, 1 N. B. Eq. 320.

—**Land held in Common—Sale—Joinder of Married Woman.**]—See PARTIES, I.

—**Partnership—Division of Assets—Art. 1898 C.C.—Mandate—Debtor and Creditor—Account.**]
See PARTNERSHIP, V.

PARTNERSHIP.

I. ACTIONS AND PROCEEDINGS BY AND AGAINST.

Judgment against Firm—Liability of Reputed Partner—Action on Judgment.]—Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker.—In an action upon a promissory note against M. I & Co., as makers, and J. I. as indorser, judgment was rendered by default against the firm, and a verdict was found in favor of J. I. as it appeared by the evidence that he had indorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note:—Held, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as a maker or indorser. *Isbester* v. *Ray, Street & Co*, 26 S.C.R. 79.

—**Covenant in Firm Name—Liability.**]—One member of a partnership cannot on behalf of his firm make a valid covenant to pay money to a third party unless his act in so doing is expressly sanctioned by the other partners, or by the course of dealing between the firm and such third party, or by the partnership articles. *Hamilton Provident and Loan Society* v. *Steinhoff*, 23 Ont. A.R. 184.

—**Novation—Accord and Satisfaction—Release—Sole Note of one Partner—Release.**]—In an action against B. & S. as partners for goods sold and delivered, it appeared that the firm had dissolved, S. carrying on the business and assuming the liabilities. Plaintiffs having drawn on the firm for the amount, S. returned the drafts, stating the dissolution and that he had no right to accept in the firm name, but sent his own note. This note not being paid at maturity, plaintiffs drew on S., who did not accept; but in lieu sent four notes made by himself for the amount taken in the aggregate. These notes were held by the plaintiffs and sent for collection at maturity, and on non-payment they brought the action against B. & S.:—Held, per Drake, J., at the trial, that, though there was no express agreement to that effect, the acceptance of the four notes of S., and the retention of them, and forwarding them for collection, by plaintiffs, was *primâ facie* an acceptance of the sole liability of S. in the place of the joint liability of B. & S., and a discharge of B., there being no reservation of their rights against him:—Held, on appeal to the full Court, that the proper question for the trial judge was whether the plaintiffs had agreed to take, and did take, the notes of S. in satisfaction of the joint debt. That there was no evidence of such agreement, and the fact that the plaintiffs when taking the notes of S. did not expressly reserve their rights against B. was immaterial. *Gurney* v. *Braden*, 3 B.C.R. 474.

II. DISSOLUTION.

—**Judicial Abandonment—Composition—Subrogation—Confusion of Rights—Compensation—Arts. 772 and 778 C.C.P.**]—A partner in a commercial firm, which made a judicial abandonment was indebted to the firm at the time of abandonment, in a large amount overdrawn upon his personal account. Subse-

quently he made and carried out a composition with the creditors of the firm and with the approval of the court the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm," * * * "as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect to the partnership:—Held, affirming the decision of the court below, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estate of each partner as well as the partners' individual rights as between themselves:—Held, reversing the decision of the court below, that the assignment of the estate by the curator, and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally, and could not revive the individual rights of the partners as between themselves, and that, in consequence, any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion. *MacLean* v. *Stewart*, 25 S.C.R. 225. This last holding was reversed by the Privy Council. See ABANDONMENT.

—**Action for Dissolution—Appointment of Liquidator—Assets in possession of third parties.**]

See LIQUIDATOR.

III. EVIDENCE.

—**Proof of Partnership—Evidence of one Partner.**]—To establish a partnership the statements of one of the alleged partners is not admissible against the other. *British Columbia Iron Works Co.* v. *Buse*, 4 B.C.R. 419.

IV. LIABILITY OF PARTNERS TO THIRD PERSONS.

—**Will—Legacy—Bequest of Partnership business—Acceptance by Legatee—Right of Legatee to an account.**]—J. and his brother carried on business in partnership for over thirty years, and the brother having died his will contained the following bequest: "I will and bequeath unto my brother J. all my interest in the business of J. & Co. in the said city of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible;"—Held, affirming the decision of the Court of Appeal, that J. on accepting the legacy was under no obligation to indemnify the testator's estate against liability for the debts of the firm in case the assets should be insufficient for the purpose, and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency. *Robertson* v. *Junkin*, 26 S.C.R. 192.

—**Promissory Note—Maker and Indorser.**]—Where the two persons composing a partnership respectively signed and indorsed a promissory note the Court refused to set aside an action on said note against them in the name of the partnership. The plaintiff in such action had a right by *saisie-arrêt* before judgment to seize partnership property which was responsible for the obligations of the individual members, subject to the right of preference to creditors of the partnership. *Grothé* v. *Lafleur*, Q.R. 9 S.C. 156, reversing 8 S.C. 388, sub. nom., *Gauthier* v. *Lafleur*.

V. RIGHTS AND LIABILITIES OF PARTNERS BETWEEN THEMSELVES.

—**Joint Speculation—Partnership or Ownership par indivis.**]—W. and D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other, and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his undivided interest. Upon the death of W. and D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book-keeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheques drawn in a similar way. M. N. D., who looked after the business of the representatives of D., paid diligent attention to the interests confided to him and received their share of such profits, but J.C.B., who acted in the W. interest, so negligently looked after the business as to enable the book-keeper to embezzle moneys which represented part of the shares of the profits coming to the representatives of W. In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses.—Held, affirming the judgment of the Superior Court, and of the Superior Court sitting in review, that the facts did not establish a partnership between the parties, but a mere ownership *par indivis*, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them. Even if the partnership existed, there would be none in the moneys paid over to the parties after a division made. *Archbald* v. *deLisle*, *Baker* v. *deLisle*, *Mowat* v. *deLisle*, 25 S.C.R. 1.

—**Division of Assets—Art. 1898 C.C.—Mandate—Debtor and Creditor—Account.**]—In the province of Quebec, when there is no other arrangement between the partners, the partition of the property of a commercial partnership must be made according to the rules laid down in the Civil Code in relation to the partition of successions, in so far as they can be made to apply. Upon the dissolution of a partnership where one of the partners has been entrusted with the collection of moneys due as

the mandatory of the others, any of his co-partners may bring suit ugainst him directly either for an account under the mandate, or for money had and received. *Lefebvre* v. *Aubry*, 26 S.C.R. 602.

—Contract for—Non-Performance of Stipulations—Rescission.]—See CONTRACT, VII.

PASSAGE.

Division of Land into Lots—Passage for Lots—Property in on Sale of Lots—Expropriation.] —If the owner of land divides it into lots for which he establishes a passage, he remains, notwithstanding all the lots are sold, proprietor of the land constituting the passage, and upon expropriation of part of the passage, which does not damnify the proprietors of the lots, he has the sole right to the indemnity. *City of Montreal* v. *Bury*, Q.R. 9 S.C. 486.

PASSATION DE TITRE.

Action for Title—Usufruct Donation with Reserve of.]—See ACTION, IX.

PASSENGER.

On Street Railway—Ejectment from Car—Limited Tickets.]—See STREET RAILWAY.

PATENT OF INVENTION.

I. ILLEGAL IMPORTATION.

—R.S.C., c. 61, s. 37, and amendments—Importation after prescribed time—Sale, effect of—Importation of Parts, effect of.]—The A. D. T. Co. were the assignees of Patent No. 38,284 for an improvement in tires for bicycles. They imported, after the period allowed by the Patent Act for importations of the patented invention to be lawfully made, some twenty-two tires in a complete and finished state, and fifty-nine covers that required only the insertion of the rubber tube to complete them. In the completed tires and in the covers in the state in which they were imported was to be found the invention protected by the said patent. These tires and covers were not imported by the Company for sale, but to be given to expert riders to be tested, and for the purpose of advertising the tire so patented. However, one pair of such tires were sold through inadvertence or otherwise, but they were not imported for sale. The Company had a factory in Canada, where the invention patented was manufactured, and the value of the labour displaced by the importation complained of only amounted to two dollars and eighteen cents:—Held, in accordance with the decision in *Barter* v. *Smith* (2 Ex. C.R. 455), which the Court felt bound to follow, that the facts did not constitute sufficient ground for cancellation of the patent under the provisions of the 37th s. of the Patent Act. In order to avoid a patent for illegal importation, the thing imported must be the patented article itself, and not merely consist of materials which, while requiring but a trifling amount of labour and expense to transform them into the patented invention, yet do not in their separate state embody the principle of the invention. *Anderson Tire Company of Toronto* v. *The American Dunlop Tire Company*, 5 Ex. C.R. 82.

II. INFRINGEMENT.

—Illuminant Device—Infringement—Process—Reissue—Equivalents—Manufacture—Importation—Price.]—An inventor, in the specification of his first Canadian patent, after disclaiming all other illuminant appliances, for burners, claimed: "An illuminant appliance for gas and other burners consisting of a cap or hood made of fabric impregnated with the substances hereinbefore mentioned and treated as herein described." In the specification the substances and the proportions in which they might be combined were stated. Eight years afterwards the owner of the original patent surrendered the same and obtained a reissue, the specification whereof differed from that of the original only in respect of the claim, which was as follows: "The method herein described of making incandescent devices, which consists in impregnating a filament, thread or fabric of combustible material with a solution of metallic salts of refractory earths suitable when oxidized for an incandescent, and then exposing the impregnated filament, thread or fabric to heat until the combustible matter is consumed":—Held, that although in the claim of the reissue there were no words of reference or limitation to the refractory earths mentioned in the specification, yet the words "salts of refractory earths" occurring in the claim must be limited or restricted to such refractory earths as were mentioned in the preceding part of the specification or to their equivalents.—That the reissue was for the same invention as that which was the subject of the earlier patent.—The reissue being for the same invention as the original patent, delay in making the application for the reissue did not invalidate the same.—That the Act 55 & 56 V., c 77, passed for the relief of Von Welsback and Williams, the original patentees, was effective although at the time it was passed others than they were interested in the patent.—To give the Commissioner jurisdiction to authorize the reissue of a patent it is not necessary that the patent be defective or inoperative for some one of the reasons specified in s. 23 of The Patent Act. It is sufficient to support his jurisdiction that he deems the patent defective or inoperative for any such reasons, and his decision as to that is final and conclusive.—That it was open to the owners of the patent to import the impregnating fluid or solution mentioned in the specification of their patent, without violating the provisions of the law as to manufacture.—That although the plaintiffs had at the outset put an unreasonable price upon their invention, yet as it was not shown that during such time any one desiring to obtain it had been refused it at a lower and reasonable price, the plaintiffs had not violated the provisions of the law as to the sale of their

invention in Canada.—That it is not open to any one in Canada to import for use or sale illuminant appliances made in a foreign country in accordance with the process protected by the plaintiff's patent. *The Auer Incandescent Light Manufacturing Company* v. *O'Brien*, 5 Ex. C. R. 243.

—**Patent of Invention—Pneumatic Bicycle Tires —Infringement.**]—The plaintiffs were the owners of letters patent No. 38,284, for improvements in bicycle tires. The inventors' object was to produce a pneumatic tire combining the advantages of both the "Dunlop" tire and the "Clincher" tire, and that was done by finding a new method of attaching the tire to the rim of the wheel. They used for this purpose an outer covering, the two edges of which were made inextensible by inserting in them endless wires or cords, the diameter of the circle formed by each wire being something less than the diameter of the outer edge of the crescent or "U" shaped rim that was used, and into which the tire was placed. Then when the inner or air tube was inflated, the edges of the outer covering were pressed upwards and outwards, as far as the endless wires would permit, and were there held in position by the pressure exerted by the air tube. In the second and third claims made by the plaintiffs, and in their description of the invention, they describe a rim "provided with an annular recess near each edge into which enters the wired edge of the outer tube or covering." In their first or more general statement of the claim is described "a rim, the sides of which are so formed as to grip the wired edges of the outer tube":—Held, that a rim with annular recesses did not constitute an essential feature of the invention, the substance of which consisted in the use of an outer covering having inextensible edges which are forced by the air tube when inflated into contact or union with a grooved rim, the diameter of the outer edges of which are greater than the diameters of the circles made by such inextensible edges.—The defendants manufactured a pneumatic tire with an outer covering, through the edges of which was passed an endless wire forming two circles instead of one. The wire was placed in pockets in the outer covering, which ran nearly parallel to each other except at one point where the two circles crossed each other. The wire being endless the two circles performed in respect of the inextensibility of the edges of the outer covering, the same part and office that the wire with a single coil or circle in the plaintiffs' tire performed. There was, however, this difference, that the two circles, into which the wire would form itself in the defendant's tire when the inner tube was inflated, would not be concentric, but as one circle became larger the other would become smaller:—Held, that while the defendants' tire might have been an improvement on that of the plaintiffs, it involved the substance of the plaintiffs' patent and constituted an infringement upon it. *The American Dunlop Tire Company* v. *The Anderson Tire Company*, 5 Ex. C.R. 194.

—**Innocent Agent — Indemnity.**]—The School Trustees of Victoria gave a contract to a local firm for the manufacture of school desks. Another firm was given a sub-contract for the iron work, and the desks were delivered to the trustees, both contractors being ignorant of the fact that an existing patent had been infringed by such manufacture. On a case stated for the opinion of the Court:—Held, that the contractors, not having been intentional wrong doers, and having honestly and in good faith executed the contract given them by the trustees, the latter were bound to indemnify them against the consequences:—Held, further, that as the contractors did not claim indemnity in the suit, and so caused additional litigation, they should have no costs and should pay the trustees' costs of the suit. *Victoria School Trustees* v. *Muirhead*, 4 B.C.R. 148.

III. Novelty.

—**Sale of Interest in—Improvement or New Invention.**]—R., the inventor and owner of a patented snow-plough, sold to K. by agreement in writing, a one-half interest in the invention and in all future improvements thereon. The invention not proving satisfactory, R. constructed a new plough, which was an improvement in many important respects on the original, and sufficiently unlike it not to be an infringement on the patent. This improved plough was patented as a new invention by R., against whom a suit was brought by K.'s administrators for a half-interest in the second patent under the agreement. R. contended that the second plough was not an improvement on the patent mentioned in the agreement, but a new invention:—Held, that it did not amount to more than an improvement under the agreement. *Jones Administrator, &c.* v. *Russell*, 1 N.B. Eq 232.

PAYMENT.

Practice — Payment into Court — Conditional Tender — Withdrawal by Plaintiff — Right to subsequent proceedings.]—In an action for damages defendant pleaded that he had tendered a sum sufficient to compensate plaintiff for all injury suffered, and he renewed the offer by his plea, paying the amount into court. The plea alleged the sufficiency of the sum, and that it was offered without admitting liability; concluding "wherefore the defendant prays that the tender and offer hereinabove made may by the judgment of this honorable court be declared sufficient, and that the plaintiff's action for any sum over and above the amount so tendered may be hence dismissed with costs.":—Held, that this was not a conditional tender within the meaning of art. 543 C.C.P., and plaintiff was entitled to receive the money paid in without prejudicing his claim to the balance of his demand. *Bédard* v. *Hunt*, Q.R. 9 S.C. 6, reversing 8 S.C. 148.

And see Appropriation of Payments.
" " Debtor and Creditor.
" " Sale, II.

PEACE OFFICER.

Criminal Code, s. 575—Persona designata—Officers de Facto and de Jure—Chief Constable—Common Gaming House—Confiscation of Gambling Instruments, Money, etc.]

See Criminal Law, III.

PEDLARS.

Municipal Corporations—By-Law—Ultra Vires—Damages.]

See MUNICIPAL CORPORATIONS, VIII.

PELAGIC SEALING.

See BEHRING SEA AWARD ACT, 1894.

PENALTY.

Jurisdiction of Exchequer Court of Canada in suits for Penalty under Customs Acts.]

See EXCHEQUER COURT OF CANADA.

PEREMPTION.

Interruption of—Taxation of Costs.]

See LIMITATION OF ACTIONS, III.

PETITION OF RIGHT.

Constitutional Law — Powers of Executive Councillors—"Letter of Credit" — Obligations Binding on Provincial Legislatures—Government Expenditures — Negotiable Instrument—"Bills of Exchange Act, 1890"—"The Bank Act," R.S.C. c. 120.]—See CONSTITUTIONAL LAW, I (*b*).

—Petition of Right for Services rendered to a Parliamentary Committee—Liability of Crown.]

See PARLIAMENTARY COMMITTEE.

—Customs Laws—Petition of Right for Damages for Wrongful Seizure and Detention of Ship.]

See REVENUE.

PHARMACY.

Sale of Drugs by Uncertificated Vendor—Ontario Pharmacy Act, R.S.O. c. 151—Breach.]

See DRUGGIST.

PILOT.

Suspension of—Act of Harbour Commission—Appeal from—Deposition of Witnesses—Stenographer.]—See EVIDENCE, VII.

PLEA.

Libel of opposing Attorney in—Action for.]

See LIBEL AND SLANDER, III.

PLEADING.

I. COUNTER CLAIM.

—Counter Claim—Recovery of Land—Mortgage Action—Joinder of Causes—Rule 341 (Ont.)—Leave.]—A counter-claim for the recovery of land is an action for the recovery of land, and falls within Rule 341, as to joinder of causes of action: *Compton* v. *Preston*, 21 Ch. D. 138, followed.—Rule 341 (*a*), excluding actions on mortgages from the operation of the first clause of the Rule, applies equally to claims and counter-claims; and one rightly counter-claiming in respect of a mortgage can ask for all the remedies incident to the position of a mortgagee.—Where the plaintiff asks that the mortgage accounts be taken, and he offers to pay what is due, the defendant has the correlative right to ask foreclosure and possession in case the plaintiff fails to redeem, and, if necessary, leave will be granted for that purpose. *Hunter* v. *Stark*, 17 Ont. P.R. 47.

—Transfer of Action from County Court—Manitoba Queen's Bench Act, 1895.—Where an action is transferred from the County Court to the Queen's Bench, under sec. 80 of the Queen's Bench Act, 1895, the plaintiff must file and serve a statement of claim in the latter court before taking any other step in the cause. *Doll* v. *Howard*, 11 Man. R. 73.

—Landlord and Tenant—Counter Claim—Striking out Defence—Appeal from Order.]—In an action for possession of land by a landlord against his tenant, the defendant may counter-claim against the plaintiff for damages for illegal seizure, distress and sale of his goods under an alleged claim for rent of the same land; and the paragraph of the statement of defence setting up such counter-claim will not be struck out on the ground that it raises an issue which should be tried by a jury: *Dockstader* v. *Phipps*, 9 Ont. P. R. 204; and *Goring* v. *Cameron*, 10 Ont. P. R. 496, followed. The order appealed from, in another clause, permitted the defendant to amend another paragraph of his defence, within six days, in default of which it was to be struck out, and the defendant availed himself of the privilege of amending that paragraph:—Held, that by compliance with such part of the order, he had not precluded himself from appealing against the other part. *Gowenlock* v. *Ferry*, 11 Man. R. 257.

—Petition of Right—Counter Claim.]—There cannot be a counter claim to a petition of right. *Spiers* v. *The Queen*, 4 B.C.R. 388.

II. Demurrer.

—**Striking Out Pleas—Amendment—Manitoba Queen's Bench Act, 1895, Rule 318.**]—Inasmuch as the Manitoba Queen's Bench Act, 1895, makes no provision for a plaintiff demurring to the statement of defence, any pleas which would have been held bad on demurrer under the former practice should now be struck out on application, or, in a proper case amended on terms. Where certain paragraphs of the defence alleged payment, but omitted the words "before action," leave was given to amend these paragraphs, but the other paragraphs objected to were all held to be bad in law, and struck out with costs, to be costs in the cause to the plaintiffs in any event. *Aetna Life Insurance Co.* v. *Sharp*, 11 Man. R. 141.

—**Arbitration and Award—Expropriation—Estoppel—Waiver—By-law—Demurrer—Pleading.**]
See Arbitration and Award, II.

III. Statement of Claim.

—**Railway Company—Carriers—Connecting Lines—Special Contract—Loss by Fire—Negligence.**]—In a statement of claim to anticipate and reply to matters of defence, is a highly improper practice. *The Lake Erie and Detroit Railway Co.* v. *Sales*, 26 S.C.R. 663.

—**Failure of Defendant to Deny Allegation in Statement of Claim.**]—An acceptance which had been discharged by an agreement between the drawer and acceptor, was subsequently put in suit by the cashier of a bank to which it had been endorsed, and the acceptor was obliged to pay the same. He then brought action against the drawer to recover the amount thereof, alleging that the acceptance was endorsed as mentioned:—Held (per Graham, E. J., and Henry, J.), that defendant having neglected to reply to the paragraph in the statement of claim, alleging the indorsement, was estopped from denying it.—(Per Meagher, J.): That defendant was entitled to amend his defence in that behalf, and that there should be a new trial. *Seeley* v. *Cox*, 28 N.S.R. 210. Affirmed on appeal to Supreme Court of Canada, May 6th, 1896.

—**Action against Street Railway Company—Allegation of Habitual Negligence—Demurrer.**]—In an action against a street railway company for damages, based on its alleged negligence in running its cars too fast, an allegation that the company habitually runs its cars faster than is permitted by law is demurrable, unless (where *preuve avant faire droit* is ordered) the habitual carelessness alleged be connected with the injury complained of. *Gauthier* v. *Montreal Street Railway Company*, Q.R. 9 S.C. 379.

—**Embarrassing Allegations—Deductions.**]—General allegations in a statement of claim, where the defendant has, and the plaintiff has not, the means of knowing the details of the matters charged, will not be struck out as embarrassing. Nor will allegations of facts stated to be such, as far as plaintiff can discover. A deduction of liability from facts set out is not objectionable. *Garesche* v. *Garesche*, 4 B.C.R. 444.

IV. Statement of Defence.

—**Defence by Municipal Corporation of want of Notice of Action for Negligence—When to be raised.**]—See Negligence, III.

V. Sufficiency of Pleading.

—**Bailees—Common carriers—Receipt—Money had and received—Special Pleas—"Never Indebted."**]—An express company gave a receipt for money to be forwarded with the condition endorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed:—Held, that in an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" put in issue all material facts necessary to establish the plaintiff's right of action. *The Northern Pacific Express Co.* v. *Martin*, 26 S.C.R. 135.

—**Res judicata—Defence by—Judicature Act.**]
Under the Judicature Act of Ontario *res judicata* cannot be relied on as a defence unless specially pleaded. *Cooper* v. *Molsons Bank*, 26 S.C.R. 611.

—**Answer to Plea.**]—In an action for damages in consequence of a portion of goods sold being of a quality inferior to that agreed upon, defendant pleaded that the complaint was not made within a reasonable time, to which plaintiff answered that he had complained immediately upon discovery of the breach of contract:—Held, a good answer and that plaintiff was not called upon to anticipate the defence raised in the plea and allege speedy complaint in his declaration. The contract for sale of goods was signed C. & Co., and the action was against C. personally. Plea that C. & Co. was a firm of which defendant was only the agent:—Held, that plaintiff was entitled to answer that defendant was sole owner and proprietor of a firm of C. & Co., which he had with intent to deceive caused to be registered under his wife's name, and had since personally traded under said registration. *Meyer* v. *Cardinal*, Q.R. 9 S.C. 34.

—**Goods Sold on Credit—Plea to Action—Temporary Exception.**]—To an action for the price of goods sold on credit the terms of payment must be pleaded affirmatively by temporary exception; an incidental allegation that the action is premature is not sufficient—such allegation must be followed by corresponding conclusions. *Eglinton* v. *Ashmead*, Q.R. 9 S.C. 427.

—**Action against Municipality—Non-repair of Streets—Want of Notice.**—Failure to give fifteen days' notice, as required by Art. 793 of the Municipal Code, of intention to bring an action against a municipal corporation for injuries caused by the bad condition of the streets, affects the demand and not the right of action, and should, therefore, be pleaded by *exception à la forme* and not by *une défense en droit*. *Gauthier* v. *Municipality of St. Louis du Mile End*, Q.R. 9 S.C. 453.

— **Estoppel — Particulars — Discovery.**] — The statement of defence to an action for trespass in erecting a building on plaintiff's land alleged that such building was on defendant's side of the boundary fixed by agreement of the parties, and that plaintiff was estopped by his conduct and representations from denying that the boundaries were as so claimed:—Held, that the specific acts and representations constituting the alleged estoppel should have been pleaded, and that an order for particulars was properly made.—If a party is entitled to particulars it is no ground of objection to an order therefor that the names of witnesses will necessarily be disclosed by furnishing them. *Guichon* v. *The Fishermen's Cannery Co.*, 4 B.C.R. 516.

See also PRACTICE AND PROCEDURE, III.

PLEDGE.

Trustees and Administrators — Fraudulent Conversion—Past due Bonds, Transfer of—Equity —Art. 2287 C.C.—Estoppel—Brokers and Factors —Implied Notice — Duty of Pledgee to make Inquiry — Innocent Holder for Value — Arts. 1487, 1490 and 2202 C.C.]—The Quebec Turnpike Trusts bonds issued under special Acts and Ordinances (R.S. Q., 1888, Sup., p. 505) are payable to bearer and transferable by delivery. Certain of these bonds belonging to the estate of the late D. D. Young, had been used as exhibits and marked as such in the case of *Young* v. *Rattray*, and having been afterwards lost were advertised for in a newspaper in Quebec in the year 1882. About ten years afterwards W., who was the agent and administrator of the estate and had the bonds in his possession as such, pledged them to a broker for advances on his own account, the bonds being then long past due, but payment being provided for under the above cited statutes:—Held, affirming the judgment of the Court of Queen's Bench, that neither the advertisement, nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to pledgee of defects in the pledgor's title; and that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a *bonâ fide* holder:—Held, also (affirming the opinion of the trial judge), that a *bonâ fide* holder acquiring commercial paper after dishonour takes subject not merely to the equities of prior parties to the paper, but also to those of all parties having an interest therein: *In re European Bank. Ex parte the Oriental Commercial Bank*, 5 Ch. App. 358, followed. *Young* v. *MacNider*, 25 S.C.R. 272.

PNEUMATIC TIRES.

Bicycles—Infringement of Pneumatic Tires for.]
See PATENT OF INVENTION, II.

POLICE CONSTABLE.

See ACTION, I.
" CRIMINAL LAW, III.

POLICE MAGISTRATE.

Ratepayer—Municipal Officer — Salary — Disqualification.]—Sec. 419 (a) of the Ontario Municipal Act 1892, which provides that a magistrate shall not be disqualified from acting as such by reason of the fine or penalty, or part thereof, on conviction going to the municipality of which he is a ratepayer, includes a police magistrate.—Where a police magistrate appointed under R.S.O. c 72, is paid a salary by the municipality instead of by fees, such salary being in no way dependent on any fines which he may impose, he has no pecuniary interest in the fines, and so is not thereby disqualified:—Semble, that in such a case there would have been no disqualification at common law. *The Queen* v. *Fleming*, 27 Ont. R. 122.

And see JUSTICE OF THE PEACE.

POLICE REGULATIONS.

Master and Servant — Negligence — Quebec Factories Act —R.S.Q. Arts. 3019 to 3053—Art. 1053 C.C.—Accident, cause of — Evidence—Onus of Proof—Statutable Duty.]—See EVIDENCE, V.

POLL.

In Municipal Election—Refusal of Demand for.]
See MUNICIPAL CORPORATIONS, VI.

PORT.

Marine Insurance — Voyage Policy "At and From"—Construction of Policy—Usage.]—
See INSURANCE, V.

POSSESSION.

Title by Possession—Trespasser—Tax Title—R.S.O. c. 111, s. 5, s.s. 4.]
See LIMITATION OF ACTIONS, I.

—Of Mine—Common Possession—Title in name of one—Sale.]—See ACTION, I.

PRACTICE AND PROCEDURE.

I. ACTIONS.

(a) *Generally.*

Appeal for Costs—Action in Warranty—Proceedings by Warrantee before Judgment on Principal Demand.]—It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises, and he suffers no prejudice thereby. But if a warrantee elects to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences. *Archbald* v. *deLisle*, *Baker* v. *deLisle*, *Mowat* v. *deLisle*, 25 S.C.R. 1.

—Replevin — Equitable Title.]—Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin. *Carter* v. *Long & Bisby*, 26 S.C.R. 430.

—Covenant—Unexecuted Deed—Acquiescence.]—An action of covenant cannot be maintained on a deed, executed by the grantor, purporting to contain a certain covenant by the grantee, but which has not been executed by him, although he has accepted the benefit of the deed. *Credit Foncier Franco-Canadian* v. *Lawrie*, 27 Ont. R. 498.

—Joinder—Recovery of Land—Motion for Judgment.]—Plaintiff, without obtaining leave therefor, indorsed his writ as follows: "The plaintiff's claim is for recovery of possession and setting aside the conveyance of T. and L. to the defendant of lots G, H, I, etc." Defendant was served, but failed to appear. Plaintiff then served a statement of claim by posting it up in the office in which the proceedings were being conducted, and upon the defendant's further default in delivering a defence, the plaintiff set the action down upon motion for judgment upon the statement of claim under Ont. Rule 728. The facts alleged in the statement of claim showed that the setting aside of the conveyance referred to in the indorsement was sought by the plaintiff as a part of what was necessary to establish his title:—Held, that the claim so combined was to be treated either as an action for the recovery of land merely, in which, upon default of appearance by defendant, the plaintiff was entitled, under Rule 714, to enter judgment for possession without a motion; or as an action for such recovery coupled, without leave therefor, with another cause of action. In either view the plaintiff was wrong in setting the case down on motion for judgment, and the motion should be refused: *Gledhill* v. *Hunter*, 14 Ch. D. 492, followed. *May* v. *Drummond*, 17 Ont. P.R. 21.

—Administration Action—Receiver—Status.]—Where a receiver, appointed at the instance of judgment creditors to receive the interest of the judgment debtor in the estate of his father in satisfaction of the judgment debt, applied for leave to bring an action for administration, leave was granted without any expression by the Court as to the status of the applicant. *Mones & Co.* v. *McCallum*, 17 Ont. Pr. R. 102.

— Parties — Joinder — Ontario Rule 300.]—Two plaintiffs, H. and M., joined two separate causes of action. H. sued for damages for the wrongful interference of the defendants with him in the completion of a building and for assaulting and arresting M., his co-plaintiff and servant, who was engaged in doing the work; and M. sued for damages for the same assault and arrest:—Held, that although each of the causes of action arose, in part, at all events, out of the same alleged wrongful acts of the defendants, each was a separate and distinct cause of action, and could not properly be joined under Rule 300. *Smurthwaite* v. *Hannay* [1894] A.C. 494, and *Carter* v. *Rigby* [1896], 2 Q.B. 113, followed. *Booth* v. *Briscoe*, 2 Q.B.D. 496, distinguished. *Mooney* v. *Joyce*, 17 Ont. P.R. 241.

—Action to Realize Charge—Parties—Varying Judgment—Notice—Marshalling.]—Plaintiff was the legatee of a sum equal to one-fifth of their value charged upon two parcels of land which were devised subject to the legacy—the extent of the devisee's interest in one parcel being uncertain. The plaintiff entered into an agreement with the devisee fixing the value of the

legacy at $400. This agreement was not registered. The devisee mortgaged both parcels separately to different mortgagees, who registered. Plaintiff proceeded against the devisee alone for the sale of the parcel in respect of which the devisee's interest was certain, for payment of the amount of the lagacy as agreed upon. He obtained judgment by default, with a reference as to incumbrances upon such parcel. The incumbrancers were added as parties in the Master's office, and they thereupon moved to set aside or vary the judgment so as to be enabled to dispute the amount of the legacy as agreed upon between the plaintiff and defendant:—Held, that it was not necessary for the added parties to obtain an order to vary the judgment for this purpose, the question of the value of the charge being open, as between them and the plaintiff, in the Master's office, in the absence of notice on their part of the agreement when they registered their mortgages. That while the mortgagees had the right of marshalling, the right was a purely equitable one; and as the plaintiff had obtained a valid judgment she possessed a superior equity to that of the mortgagees, and they could not involve her in the expense of construing the testator's will, and of ascertaining what rights of the defendant in the parcel in respect of which his interest under the will was uncertain were subject to the charge. It was open to them, however, to bring an independent suit offering to redeem the plaintiff, and, that being done, to stand in her place, and at their own expense have recourse to the parcel last mentioned. *Rutherford* v. *Rutherford* 17 Ont. P.R. 228.

—School Trustees — Improper Use of School Buildings—Proceedings to Restrain — Information by Attorney-General.] — Proceedings to restrain school trustees from permitting school premises to be used for sectarian schools, and employing improper persons as teachers, affect the whole public as involving a breach of a public trust; they should, therefore, be brought by the Attorney-General on information by a relator.—If the Attorney-General consents a bill in equity may, even at the hearing, be converted into an information by the Attorney-General. *Rogers* v. *The Trustees of School District No. 2 of Bathurst*, 1 N.B. Eq. 266.

—Action on Contract—Relief—Rescission—Specific Performance—Damages.]—In an action on a contract a decree cannot be made both for specific performance and for rescission, and if the contract is rescinded the plaintiff cannot have damages. *Smith* v. *Mitchell*, 3 B.C.R. 450.

— Costs — Security for — Action for Penalty — Rule 1244, C.R. Ont.—Dismissal of Action—Indulgence.]—See COSTS, III.

—Transfer of Action from County Court.]

See PLEADING, I.

—Counterclaim—Recovery of Land—Joinder of Causes of Action—O.R. 341—Mortgage Action—Leave.]—See PLEADING, I.

—Master and Servant—Hiring of Husband and Wife—Parties—Joinder.]

See MASTER AND SERVANT, I.

(b) Dismissal of Action.

—Inquiry before Suit of Defendant's Interest—Disclaimer to Bill—Dismissal of Bill—Costs.]—G., being asked by L. if he claimed any interest in certain machinery upon premises mortgaged to G., made use of equivocal language not amounting to a disclaimer. Being made party to a suit by L. for the recovery of the machinery, he disclaimed, but his disclaimer was not accepted, and the cause proceeded to hearing:—Held, that the bill should be dismissed as against G., but without costs. *Lamé* v. *Guerette*, 1 N.B. Eq. 199.

—Dismissal of Action—Notice—S.C. Rule 749, B.C.]—A motion to dismiss an action for want of prosecution is a proceeding in the cause and requires a month's notice under S. C. Rule 749. *Macdonald* v. *Jessop*, 3 B.C.R. 606.

—Dismissal of Action for want of Prosecution—S. C. Rules 340, 353, B.C.—Adjourned Hearing.]—Where the trial of an action has been begun and adjourned the defendant cannot take advantage of S C. Rule 340 and move to dismiss for want of prosecution within six weeks from the close of the pleadings. His proper course is to set the case down for trial, and, if plaintiff does not appear, ask for judgment dismissing the action under rule 353. *Boscowitz* v. *Cooper*, 4 B.C.R. 88.

II. AFFIDAVIT.

—Suit in Equity—Application to set Cause down for Hearing—Service of Affidavit—53 V., c. 4., s. 94 (N.B.).]—By sec. 94 of the Supreme Court in Equity Act of New Brunswick (53 Vict., c. 4), affidavits for use on a motion must be served six days at least before the day on which the motion is to be heard. A summons to have a cause set down for hearing was returnable on the 24th of the month, and the affidavit on which it was granted was served on the 18th:—Held, that the service was insufficient, and the summons should be dismissed with costs. *Welsh* v. *Nugent*, 1 N.B. Eq. 240.

—Commission to Examine Witness Abroad—Affidavit.]—The affidavit in support of an application for a commission to examine witnesses abroad must state the names of the witnesses proposed to be examined. *Hermann* v. *Lawson*, 3 B.C.R. 353.

—Affidavit to Hold to Bail—Statement of Cause of Action.]—An affidavit to hold to bail, setting out facts constituting, and amounts due for, the several causes of action, and stating in a separate paragraph that "the defendant is justly and truly indebted to the plaintiff in the sum of——" is bad, as it fails to connect the liability with the facts stated.—Where the indebtedness was stated to be for premiums of insurance paid for the defendant on a policy deposited with plaintiff as collateral security:—Held, bad for want of an averment that the payments were made at defendant's request. *Williams* v. *Richards*, 3 B.C.R. 510.

—Affidavit to Hold to Bail—1 & 2 V. c. 10 (Imp.)—The affidavit to hold the defendant in an action to bail is governed by the Imperial Statute

1 & 2 Vict., c. 10, and the allegations required in an affidavit for a ca. sa. by s. 10 of the Executions Act, C.S.B.C., c. 42, are not necessary. *Kimpton* v. *McKay*, 4 B.C.R. 196.

III. Amendment.

—Amendment of Writ and Declaraton—Arts. 49 and 51 C.C.P.]—The writ and declaration in a cause may be amended, notwithstanding the provisions of Arts. 49 and 51 C.C.P., by supplying the omission therein of the surname of the plaintiff, *Hicks* v. *Canada Axe and Harvest Tool Co*, Q.R. 9 S.C. 40.

—Action on Mortgage—Amendment of Defence at Trial—Costs.]—Plaintiffs brought an action to set aside two mortgages as made fraudulently, and with intention of defrauding creditors. Defendants pleaded that one of the mortgages attacked was made to secure a debt then due, and the other to secure future advances. The evidence produced on the trial showed that both mortgages were made to secure a past indebtedness as well as future advances;—Held, that defendants were entitled to amend their defence in accordance with the testimony:—Also, that the suit having been tried as if the amendment asked for at the argument were on the record, the amendment should not affect the costs. *Bauld* v. *Challoner*, 28 N.S.R. 205.

—Amendment of Plea.]—An amendment to the pleadings in an action, by the addition of a plea, was allowed after argument before the full Court. *Murray* v. *Duff*, 33 N.B.R. 426.

—Delay—It is no ground for rescinding an order allowing a plaintiff to amend his statement of claim that it was obtained after long delay in the proceedings. The defendant's sole remedy was to move to dismiss. *Clark* v. *Eholt*, 3 B.C.R. 442.

IV. Appellate Court.

—Case in Appeal—Additions made to Judgments after Institution of Appeal.]—Per Taschereau, J.—Where a court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted certain of the judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, such documents were improperly allowed to form part of the case on appeal, and could not be considered by the appellate court. *Mayhew* v. *Stone*, 26 S.C.R. 58.

—Defence raised for first time in Appellate Court.]—Certain promissory notes, upon which defendants were sued, appeared by the endorsements to have been held by a bank at maturity, and defendants claimed that the right of action was not in the plaintiffs, but they had not raised this defence by their pleadings or at the trial:—Held, that effect should not be given to it now, as plaintiffs might have been able to show that the notes had only been indorsed for collection, or had been taken up since by them. *Waterous Engine Works Co.* v. *Wilson*, 11 Man. R. 287.

—Ex parte Order—Appeal—Motion to rescind.]—The Divisional Court will not entertain an appeal from an *ex parte* order of a judge. A motion should be made in the first instance to the judge to rescind. *Hudson's Bay Co.* v. *Hazlett*, 4 B.C.R. 450.

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

See Appeal, VIII.

—Appeal—Final Judgment—Petition for Leave to Intervene—Judgment on—Interlocutory Proceeding.]—See Appeal, VII.

—Appeal—Bond—Affidavits of Execution and Justification.]—See Appeal, IX.

—Appeal—Bond—Condition.]—See Appeal, IX.

—Appeal — Findings of Fact — Inferences adverse to those of Trial Judge.]—

See Appeal, VI.

—Appeal to Divisional Court from Trial Judge.]

See Appeal, III (*d*).

—Dominion Railway Act, R.S.C. c. 109—Order of Judge—Persona Designata—Appeal.]

See Appeal, I.

—Solicitor's Costs—Taxation—Appeal.]

See Costs, I.

—Costs—Security for—Appeal—Rule 1487 (803) Consol. Rules, Ont.]—See Appeal, IX.

—Appeal to Court of Appeal from Divisional Court—Judgment in Preliminary Issue—Leave—Judicature Act (Ont.) 1895, ss. 72, 73.]

See Appeal, VIII.

—County Court—Appeal from—Transfer of Action to Queen's Bench—Jurisdiction.]

See Appeal, III (*g*).

—Nonsuit by Judge ex mero motu—Costs—Appeal.]—See Costs, II (*a*).

—Costs in Action of Slander—Interference by Court of Appeal with Trial Judge's discretion in withholding Costs.]

See Costs, II (*b*).

V. Applications.

—Application for Administration after grant of Probate to Executrix—Failure of Executrix to Account—Summary Order.]—An application was made by legatees for a summary administration order more than a year after the grant of probate to the sole executrix named in a will, upon the ground that the executrix, who for several years before the death of the testator had managed his business affairs, had refused to account for her dealings with his moneys, and now claimed an allowance from the estate for her services before testator's death and as executrix, and denying that any sum was due by her to the estate:—Held, that under such circumstances the applicants should not be compelled to resort to an administration action, but that they

were entitled to the usual administration order referring the matter to a Master for the purpose of making all the necessary inquiries. *Re Bagwell; Anderson* v. *Henderson*, 17 Ont. P. R. 100.

—**Division Courts—Garnishee Plaints—Application to remove — Judgment against Primary Debtor only.**]—An application under sec. 79 of the Ontario Division Courts Act, R.S.O., c. 51, to remove an action from a Division Court into the High Court, will not lie after judgment in the Division Court; and this rule will be applied where the action in the Division Court is brought under sec. 185, the garnishee being a party to the proceedings from the beginning, if final judgment has been obtained against the primary debtor, even though the liability of the garnishee has not been determined: *Gallagher* v. *Bathie*, 2 U.C.L.J. (N.S.) 73, applied and followed. *Re Brodericht* v. *Merner*, 17 Ont. P.R. 264.

VI. Bail.

—**Special Bail—Discharge—Delay.**]—After special bail was entered in an action the plaintiff allowed seven months to elapse before entering the cause and filing the affidavit to hold to bail. On return of a rule *nisi* to rescind a judge's order discharging the bail, the delay was sought to be excused on the ground that defendant's attorney had offered to confess judgment but failed to do so. The court held the excuse insufficient, and discharged the rule. *Ritchie* v. *Lawlor*, 33 N.B.R. 381.

VII. Certiorai.

—**Summary Conviction—Duty of Court as to Reviewing Evidence.**]—When a summary conviction is removed by *certiorari* and a motion made to quash it, it is the duty of the court to look at the evidence taken by the magistrate, even where the conviction is valid on its face, to see if there is any evidence whatever showing an offence, and, if there is none, to quash the conviction as made without jurisdiction; but if there is any evidence at all, it is not the province of the Court to review it as upon an appeal: *Regina* v. *Coulson*, 24 Ont. R. 246, not followed. *Regina* v. *Coulson*, 27 Ont. R. 59.

—**Division Court—Garnishee Plaint—Certiorari—R.S.O. c. 51, s. 79.**]—Several suits were brought in a Division Court against the same primary debtor, and in each case the same person was brought in as garnishee. The cases were all proceeded with there to judgment against a primary debtor. The plaintiffs then moved for a right of certiorari to have the several cases removed into the High Court and consolidated for the purpose of deciding certain questions affecting the liability of the garnishee:—Held, that as the judgment of the Division Court against the primary debtor was valid and complete, and the garnishee was a party to the proceedings from the beginning, a writ of *certiorari* did not lie in such a case under the provisions of s. 79 of the Division Courts Act, R.S.O. c. 51: *Gallagher* v. *Bathie*, 2 U.C.L.J. (N.S.) 73, applied and followed. *Re Brodericht* v. *Merner*, 17 Ont. P.R. 264.

—**Affidavits—Copy of original Proceedings.**]—A rule *nisi* for certiorari was discharged because a copy of the original proceedings was not attached to the affidavits upon which it was granted nor its absence accounted for, and the nature of the proceedings was not disclosed by the affidavits. *Ex parte Emmerson*, 33 N.B.R. 425.

—**Imperial Statute—13 Geo. 2, c. 8, s. 5—Criminal Law—Certiorari—Notice—Defective Warrant.**]—The Imperial Statute, 13 Geo. II, c. 8, s. 5, requiring six days' previous notice to convicting Justices of motion for certiorari, is in force in British Columbia. Service of a rule *nisi* for certiorari, more than six days before it is returnable, is not a compliance with the statute. After service of the rule for certiorari the Justices may substitute a good warrant of commitment for that objected to, which is defective, and thereupon the rule will be discharged. *In re Plunkett*, 3 B.C.R. 484.

VIII. Discontinuance.

—**Non-payment of Costs.**]—Where an action has been discontinued on terms the non-payment of costs may be pleaded as a bar to a second action. The defendant need not proceed by dilatory exception, though he may. *Montreal Street Railway Co.* v. *Alley*, Q.R. 5 Q.B. 179.

IX. Discovery.

—**Action of Crim. Con.—Discovery—R.S.O. c. 61, s. 7.**]—Under the provisions of the Witnesses and Evidence Act, R.S.O. c. 61, s. 7, the defendant in an action for criminal conversation with plaintiff's wife cannot be compelled to submit to an examination for discovery. *Mulholland* v. *Misener*, 17 Ont. P.R. 132.

—**Crim. Con.—Alienation of Wife's Affections—Discovery—R.S.O., c. 61, s. 7.**]—The plaintiff cannot enforce the attendance or examination of the defendant as a witness, or for discovery, when the proceeding is one instituted in consequence of adultery: *Mulholland* v. *Misener*, 17 Ont. P.R. 132, followed. Where, however, the plaintiff also claimed damages for the alienation of the affections and loss of the society of his wife, the defendant has no protection or privilege that shields him from compulsory examination on that part of the case. *Taylor* v. *Neil*, 17 Ont. P.R. 134.

—**Examination for Discovery—Parties.**]—In an action against trustees a Judge in Chambers refused an order for the examination of a defendant for discovery because the *cestuis que trusts* were not before the Court. On appeal to the Divisional Court:—Held, that the want of parties was not a ground for refusing the order. *Beaven* v. *Fell*, 4 B C.R. 334.

X. Equity Practice.

—**Answer to Interrogatories—Exception for Insufficiency.**]—In a suit in equity to set aside conveyances made by one of the defendants in 1890 as fraudulent and void, the bill alleged that after their execution said defendant built a dwelling house upon the land with money

obtained from a surrender of one life policy taken out in 1879, and the hypothecation of another issued in 1883, on the life of his wife, and that the policies were effected and maintained by said defendant when in insolvent circumstances. The defendants were required by the interrogatories to give an exact state of their business at the time the policies were effected, and at the several times at which the premiums were paid. Having only partially answered, defendants contended, on exception by plaintiff to the sufficiency of the answer, that the discovery sought was not pertinent and material to the suit:—Held that the interrogatories were proper, and defendants must answer according to the best of their information.—Where substantial information is given by the answer to an interrogatory, the court discourages exceptions for insufficiency, and will not require minute and vexatious discovery. *Wiley* v. *Waite*, 1 N.B. Eq. 150.

—**Trustees—Application to Court for Advice—Competing Parties to fund—53 V., c. 4, s. 212 (N.B.)**]—The Court of Equity will not, as a rule, under s. 212 of The Supreme Court in Equity Act (53 V., c. 4) determine the rights of competing parties to a fund in the hands of trustees. The section is intended to enable the Court to advise executors and trustees in respect to matters of discretion vested in them. *In re Martha A. Foxwell's Estate*, 1 N. B. Eq. 195.

—**Illegal Agreement—Enforcement of—Pleading.**]—Though the defendant to a suit in equity has not by his answer pleaded the illegality of an agreement between him and the plaintiff, yet if such illegality is disclosed by the pleadings the agreement will not be enforced. *Irving* v. *McWilliams*, 1 N.B. Eq. 217.

—**Foreclosure Suit—Appearance—Assessment of Damages.**]—Where the defendant appears in a suit for foreclosure the Court will not assess the damages on motion to have the bill taken *pro confesso*. The proper practice is to assess upon a subsequent motion after notice. *Hanford* v. *Howard*, 1 N.B. Eq. 241.

—**Equity Practice—Trust Property—Trust for Infants—Sale of Land—53 V., c. 4, s. 213 (N.B.)**]—Sec. 213 of the Supreme Court in Equity Act of New Brunswick (53 V., c. 4) does not authorize the Court of Equity to order the sale or disposal of land held in trust for an infant to pay for past expenditures by the trustees upon the trust property. *In re Steen's Estate*, 1 N.B. Eq. 261.

XI. Extension of Time.

—**Commencement of Proceedings—Statutory Limitation—Extension of Time.**]—The Mineral Act of 1891 (B.C.) as amended by the Act of 1892, s. 14, s.s. 2, provides that "an adverse claimant shall within thirty days after filing his claim (unless such time shall be extended by special order of the Court upon cause being shown) commence proceedings in a court of competent jurisdiction to determine the right," etc.:—Held, that the time could be extended as well after the thirty days had elapsed as before. *In re Good Friday Mineral Claim*, 4 B.C.R.496.

—**Appeal to Supreme Court—Delay for.**]
See Appeal, VIII.

—**Irregularity of Extension—Waiver.**]
See Arbitration and Award, II.

XII. Interpleader.

—**Interpleader by Bailees—Inability to deliver Specific Property—Damages.**]—A carload of wheat was received by a railway company under a grain consignment note upon which was indorsed a condition that the wheat might be deposited in the railway company's elevators in common with other grain of a like grade. The railway company deposited the grain at its destination in one of their elevators and mixed it with other grain as permitted by the said condition. Thereafter it was claimed by the indorsees of the bill of lading and by an investment company under a mortgage from the shipper. Upon an application by the railway company for an interpleader order:—Held, that an interpleader order should be granted notwithstanding that the specific grain could not be delivered, owing to its having been mixed with other grain in the elevator, and notwithstanding that the investment company's claim against the railway company was, as contended, one for unliquidated damages for conversion of the grain: *Attenborough* v. *St. Katherine's Dock Co.*, 3 C.P.D. 450, followed. *Re Canadian Pacific Ry. Co. and Carruthers*, 17 Ont. P.R. 277.

—**Costs—Security for—Interpleader—Party out of Jurisdiction.**]—See Costs, III.

—**Interpleader Issue—Sale of Goods—Delivery.**]
See Sale, I. (*b*).

XIII. Judgment.

—**Judgment by Consent—Setting aside—Company—Ultra vires Contract.**]—If a company enters into a transaction which is *ultra vires* and litigation ensues in the course of which a judgment is entered by consent, such judgment is as binding on parties as one obtained after a contest, and will not be set aside because the transaction was beyond the power of the company. *Charlebois* v. *Delap*, 26 S.C.R. 221.

—**Mortgage Action—Appearance—Rule 718 (1349), Ont.—Judgment.**]—If a defendant in a mortgage action desires only to dispute the amount claimed, but, instead of availing himself of the provision of Rule 718 (1349) as to filing and serving a notice for that purpose, enters an appearance in which he disputes the amount claimed, judgment cannot then be entered upon *præcipe*, and the plaintiff is entitled to move for leave to enter judgment, and the defendant must pay the plaintiff's costs of such motion:—Semble, that in such a case when there are several defendants, there should be only one judgment against them all. *Rice* v. *Kinghorn*, 17 Ont. P.R. 1.

—**Actions—Recovery of Land—Ancillary Claim—Joinder—Motion for Judgment.**]—The plaintiff without leave indorsed his writ of summons with a claim for recovery of land and to set aside a conveyance. The writ was person-

ally served, and the defendant not appearing, the plaintiff delivered a statement of claim, and in default of defence, moved the court for judgment. It appeared from the statement of claim that the setting aside of the conveyance mentioned in the indorsement was sought by the plaintiff as a part of what was necessary to establish his title:—Held, following *Gledhill* v. *Hunter*, 14 Ch. D. 492, that the action was to be treated as one for the recovery of land merely, in which judgment for default of appearance could have been entered without a motion; or, if not, that the plaintiff had improperly joined another claim with a claim for the recovery of land, without leave, and in either case the motion must fail. *May* v. *Drummond*, 17 Ont. P.R. 21.

—**Summary Judgment—Ont. R. 739—Unconditional leave to Defend.**]—In an action upon a covenant for payment contained in a mortgage, the defendant entered an appearance, but the plaintiff, under Rule 739 (Ontario), applied for an order to be allowed to sign summary judgment. The defendant opposed the motion and swore that he had a good defence upon the merits, and that the mortgage was signed by him on the express understanding that he was not to be personally liable. This was supported by the affidavit of another person; and it, moreover, appeared that the blanks in the printed form of the covenant to be filled up by the person covenanting had not been filled up:—Held, that the defendant should have unconditional leave to defend.—The intendment of Rule 739 is to prevent defences being set up against good faith for the mere purpose of gaining time; and where there is a fair probability of a good defence to the action on the merits, shown by the defendant, he ought to be allowed to defend unconditionally. *Munro* v. *Orr*, 17 Ont. P.R. 53.

—**Power of Judge to vary Judgment.**]—Where the judgment as pronounced expresses precisely what the judge intended, and contains no clerical error, inadvertence, or oversight, the judge has no power to vary it. *Port Elgin Public School Board* v. *Eby*, 17 Ont. P.R. 58.

—**Summary Judgment—Promissory Note—Unconditional leave to Defend—Disclosure of facts of Defence.**]—Upon a motion for summary judgment under Rule 739 (Consol. Rules Ont.) in an action upon a promissory note, one of the defendants deposed to facts showing that the note was without consideration, invalid, and fraudulent as to the first holders, and stated his belief that the plaintiffs were suing on behalf of the first holders and had notice of the circumstances invalidating the note. His affidavit, however, did not state the facts as to such notice:—Held, that the defendant should have unconditional leave to defend.—Under the Rule in question it is not necessary for the defendant, in opposing a motion for summary judgment, to state the facts of his defence if the Court is satisfied that there is a good defence on the merits, or that the case is of such a nature that the trial should proceed in the usual way. *Farmer's Bank* v. *Sargent*, 17 Ont. P.R. 67.

—**Judgment Debtor—Examination touching Gambling Transactions.**]—Upon an application to commit a judgment debtor for unsatisfactory answers upon his examination, the Court should not be called upon to inquire into gambling transactions, that is, practically, to take an account to ascertain what money was made and subsequently lost in that way by the judgment debtor, so as to determine whether, arising therefrom, any profits remained as estate in the debtor's possession. *Harvey*, v. *Aikine*, 17 Ont. P.R. 71.

—**Summary Judgment—Specially indorsed Writ—Promissory Note—Amendment.**]—Since the Bills of Exchange Act, 1890, interest on an overdue promissory note may be specially indorsed for, and may be simply claimed for "as interest," meaning interest at the statutory rate from maturity, which is now given as liquidated damages: *McVicar* v. *McLaughlin*, 16 Ont. P. R. 450, followed. Where it appeared on the writ that C. sued as liquidator of the O.C.Co., his co-plaintiff being the L.V.C. Co., the Court held that an indorsement "for goods sold and delivered during the year 1894 to the defendant by the O.C.Co., whereof the plaintiff C. is liquidator, $353," was a good specially indorsed claim on the part of C. Further, that an indorsement claiming on promissory notes made by defendant, giving dates, amounts, and times when payable, and adding "and assigned to the L.H.C.Co., one of the plaintiffs herein," was a good claim specially indorsed as to the L.V.C.Co., although the way in which that company became assignee was not detailed, there being no suggestion that they were not the legal holders.—Where upon a motion for summary judgment under Rule 739 it appeared by the affidavits in support of the motion that the special indorsement on the writ was not in conformity with the facts and so failed to verify the claim, the Court held that no amendment could be permitted upon the motion; nor could judgment be given in accordance with the special indorsement, as to one part in favour of the liquidator, and as to the other in favour of the company. *Clarkson* v. *Dwan*, 17 Ont. P. R. 92. Affirmed on appeal, see 17 Ont. P. R. 206.

—**Judgment—Re-opening—New Evidence—Rule 782 Consol. Rules Ont.**]—An application after judgment in an action "for an order to rehear the action, or for a new trial," upon the ground of newly discovered material evidence, is provided for by Rule 782. It should be made in Court to the Judge who tried the action; and is a proceeding in the cause: *Waterhouse* v. *Lee*, 10 Gr., at p. 193, referred to. *Armour* v. *Merchants Bank of Canada*, 17 Ont. P.R. 108.

—**Ontario Law Courts Act, 1896—Pending Actions—Judgment Pronounced but not Entered up.**]—The Ontario Law Courts Act [1896] as amending sec. 73 of the Ontario Judicature Act [1895] being a matter of procedure, applies to pending actions; and where, at the time the amending statute was passed, judgment in an action had been pronounced but not entered up, the Court held that the action was still pending. *Spence* v. *Grand Trunk Railway Co.*, 17 Ont. P.R. 172.

—**When Complete—Law Stamps—Appearance tendered before Judgment fully entered—Notice.**]
A judgment is not complete, valid, and effect-

ive until the law stamps representing the fees payable in respect of the proceedings have been impressed or placed thereon. — An appearance tendered to be filed after all the work of signing judgment for default has been completed, except the attaching of the stamps, should be received and entered.—*Harris* v. *Andrews*, 3 U.C.L.J. 31, followed. The appearance, though tendered before, was not entered by the officer until after judgment:—Held, that it could not become an effective appearance until after the judgment had been set aside, and that the defendant could not be said to be in default for not having given notice of the appearance on the day on which it was entered, in pursuance of Rule 281 Consol. Rules Ont.—Where a plaintiff has signed judgment in default of appearance, while he insists upon the regularity of this judgment he cannot take the alternative course of treating the case as one in which an appearance had been regularly entered, and move for judgment under Rule 739.—Where an appearance is entered after the last day for appearance, but before judgment, the defendant has the whole of the day on which it was entered to give notice of the appearance under Rule 281. *Smith* v. *Logan*, 17 Ont. P. R. 219, reversing 17 Ont. P.R. 121.

—**Action to realize Charge on Land—Varying Judgment.**]—Legacy to plaintiff of a sum equal to one-fifth of their value charged upon two parcels of land, A and B. Devise of both parcels subject to the legacy. Agreement between the devisee and plaintiff fixing value of legacy at $400, not registered. The devisee mortgaged both parcels separately to different mortgagees who registered. Plaintiff proceeded against the devisee alone for the sale of parcel B only for payment of the legacy as fixed by agreement, and obtained judgment by default with reference as to incumbrances. Upon motion by the incumbrancers upon parcel B, who were added as parties in the Master's office, to set aside or vary the judgment:—Held, that there was no necessity, and no right on the part of the added parties, to alter or vary the judgment to enable them to question and reduce the amount of the charge fixed thereby as between the plaintiff and the defendant; and that as between them and the plaintiff the value of the charge was open in the Master's office, in the absence of notice.—That the added parties had the right of marshalling; but the plaintiff, having obtained a regular judgment, had a superior equity to theirs, and they had no right to deprive her of it, nor to involve her in the expense of construing the testator's will, and ascertaining what rights of the defendant in parcel A were subject to the charge. If they chose they could redeem the plaintiff, and standing in her place at their own expense, have recourse to the west half. *Rutherford* v. *Rutherford*, 17 Ont. P.R. 228.

—**Foreign Judgment—Rule 739 Consol. Rules Ont.—Appearance — Jurisdiction — Judicature Act [1895] s. 124 — Merits.**]—Plaintiff appealed from an order by a local Judge refusing summary judgment under Rule 739, in an action upon a foreign judgment. Both plaintiff and defendant resided out of the jurisdiction, and neither of them was a British subject. The cause upon which the judgment was recovered arose out of Ontario. The plaintiff's right, if any, depended upon s 124 of the Judicature Act [1895]. Defendant filed an appearance under protest, and raised the question of jurisdiction:—Held, that although the defendant failed to show that he had a good defence on the merits, yet, having regard to the nature of the jurisdiction which is conferred by s. 124, and the provisions requiring, even where no appearance is entered, the plaintiff's claim to be proved before he obtains judgment, the Court ought not to interfere with the discretion exercised by the local Judge in refusing the order for summary judgment. *Campau* v. *Randall*, 17 Ont. P.R 243.

—**Summary Judgment — Rule 739—Defence—Disclosure of Facts—Appeal—Judge in Chambers—Divisional Court.**]—In answer to a motion by the plaintiffs for summary judgment under Rule 739 in an action upon a promissory note made by the defendant in favour of a trading company and indorsed by them to the plaintiffs, whose manager swore that they were the holders thereof in due course for value, the defendant made an affidavit in which he stated that he had never received any consideration for the note; that he made it for the accommodation of the company; that he had heard the local manager of the plaintiffs say that the note was not discounted by them, but was simply left with them; that he believed that the local manager was aware when he received the note that it was an accommodation one, and was also aware of the arrangement entered into between the company and the defendant at the time the note was made; and that an accountant placed by the plaintiffs in charge of the books of the company was present when that arrangement was made. He did not state that the local manager had the requisite notice to affect the plaintiffs, nor the grounds of his belief that he had such notice; nor did he state that the accountant referred to had any notice or knowledge of this agreement referred to; nor did he adduce any hearsay evidence in support of the defence attempted to be set up:—Held, that the defendant had not shown satisfactorily that he had a good defence on the merits, nor disclosed such facts as should be deemed sufficient to entitle him to defend.—An order of a Judge in Chambers, made upon appeal from an order of the Master-in-Chambers, allowing summary judgment under Rule 739 to be entered, is an interlocutory order, but an appeal lies from it to a Divisional Court. *Bank of Toronto* v. *Kielty*, 17 Ont. P.R. 250.

—**Order 14, R. 2 (B.C.)**]—A Judge has no power to shorten the four days' notice of motion for judgment under Order 14, Rule 2. *Wheaton* v. *Allice*, 3 B.C.R. 306.

—**Judgment on Default — Specially Indorsed Writ — Demand of Statement of Claim.**]—The right of a plaintiff to sign judgment on default of pleading, is not confined to cases in which the writ is specially indorsed. If the defendant does not serve plaintiff with a notice demanding a statement of claim, no statement need be delivered, but judgment on default may be entered. *Mason* v. *Nason*, 4 B.C.R. 172.

XIV. Juries and Jury Notice.

—**Jury Notice — Striking out — Discretion of Local Judge—Equitable Issues.**]—The effect of sub-sec. 5 of sec. 185 of the (Ontario) Judicature Act, [1895] is to give a local Judge in Chambers power as a matter of discretion to make an order under sec. 114 thereof to strike out a jury notice. 2. Where the issues raised on the pleadings are mainly equitable, and it appears probable that any judge before whom the action would come for trial would dispense with the jury, the local judge should exercise his discretion and strike out the jury notice:—Semble, that where there are both legal and equitable issues on the record, and where there is no order to the contrary under sec. 114 of the Judicature Act, [1895] Rule 678 (Consol. Rules, Ont.) alone, or taken in connection with Rule 677 and sec. 110 of the said Act, does not deprive a party of his right to have the legal issues tried by a jury. *Baldwin* v. *McGuire*, 15 Ont. P.R. 305, commented on. *Fox* v. *Fox*, 17 Ont. P.R. 161.

—**Jury Notice—Crown Suit—Ontario Rule 364—Trial Judge.**] – In an action by the Crown upon an official bond, a Judge on the application of the Crown, has power, under Rule 364, to make an order striking out a jury notice given by the defendants.—(Per Osler, J.A.): If before the trial the Court or Judge has ordered that the action may be tried without a jury, the Judge presiding at the trial has no power to direct it to be tried by a jury. *The Queen* v. *Grant*, 17 Ont. P.R. 165.

—**Trial by Jury—Commercial Matter—Art. 348, C.C.P.**]—By Art. 348 C.C.P. there may be a trial by jury in any action founded upon a debt, promise or agreement of a mercantile nature, and also for damages for offences or quasi-offences against movable property:—Held, that an action charging that defendant in collusion with a clerk of the plaintiff, had obtained the advances to recover which the action was brought on false certificates, was not within the terms of said article. Where the action was founded on two causes, the one of a mercantile nature and the other not:—Held, that the defendant was not entitled to a trial by jury. *Demers* v. *The Bank of Montreal*, Q.R. 5 Q.B. 535.

—**Jury Trial—Waiver.**]—If a party to an action has a right to a trial by jury, such right is not waived by going to trial without a jury, and the trial having been postponed, by taking evidence *de bene esse*. In an action by an engineer for services in examining a mineral claim in which the defence was denial of any contract and that the engineer's report was of no value, either party may ask for a jury under Rule 333. *Ferguson* v. *Thain*, 3 B.C.R. 447.

—**Jury Trial—Rules 81, 330 (B.C.)**]—Rule 330 providing that "causes or matters referred to in Rule 81 of these Rules shall be tried by a judge without a jury," is imperative, and a judge has no discretion to grant a jury in any of such causes or matters. *Stewart* v. *Warner*, 4 B.C.R. 298.

—**Trial by Jury—Number of Jurors—C.S.B.C. [1888], c. 31, s. 47.**]—The provisions of C.S.B.C. [1888], c. 31, s. 47, requiring civil causes to be tried before eight jurors, is in force in the districts of Cassiar and Kootenay, and apply to both special and common jury actions. *Hogg* v. *Farrell*, 4 B.C.R. 534.

XV. Orders.

—**Administration Order—Conflicting Interests—Conduct of Reference—Parties.**]—An accounting party should not have the carriage of the proceedings in the Master's office, especially where there is a competition between an executor and beneficiaries as to who should be first in obtaining an administration order—An administration order giving the executor the conduct of the reference had been made *ex parte* on the application of the executor and without the judge's attention having been directed to the course of practice:—Held, that the judge had exercised no discretion to prevent the interference of the Court on appeal, and that the order should be varied so as to give the conduct of the reference to two of the legatees:—Held, also, that the order should not have been made in the first instance without notice to the legatees, who were named as parties defendant in the proceedings taken by the executor. *Re Curry, Curry* v. *Curry*, 17 Ont. P.R. 69.

—**Attachment of Debts—Rule 536—Ex parte Order—"Party Affected"—Mortgagees—Tenants—Attornment.**]—Mortgagees who have served notice upon tenants of the mortgagor, in occupation of the mortgaged premises, to pay the rents to them, and to whom the tenants have attorned, are "parties affected," within the meaning of Rule 536, by *ex parte* orders obtained by a judgment creditor of the mortgagor attaching such rents as debts:—Semble, (per Osler, J.A.) that in the absence of the Rule, the practice would have warranted a substantive motion by a third party interested to discharge the attaching orders:—Held, that the attaching orders ought to be set aside (1st) because there was satisfactory evidence of an attornment by the tenants; and (2ndly) because the notice to the tenants signed by the mortgagor under the words "I approve of the above" operated as an assignment of the rents to the mortgagees. (Per Osler, J.A.) The practice under the Judicature Act in respect of attaching orders follows the former practice at law, and they bind only such debts as the debtor can honestly deal with without interfering with the interests of third persons. *Parker* v. *McIlwain*, 17 Ont. P.R. 84.

—**Administration Order—Summary Order—Executors and Administrators—Account.**]—More than a year after the grant of probate to the sole executrix named in the will of the testator, three legatees applied summarily for an administration order, upon the ground that the executrix, who for several years before the death of the testator had managed his business affairs, had refused to account for her dealings with his moneys, and now claimed an allowance from the estate for her services before the death of the testator and as executrix, and denying that any sum was due by her to the estate:—Held, that the legatees were entitled to the usual administration order, under which the Master

could make all the necessary inquiries, and were not driven to an action for administration. *Re Bagwell, Anderson* v. *Henderson*, 17 Ont. P.R. 100.

—**Dominion Railway Act, 51 V., c. 29—Judge—"Persona designata"—Appeal.**]—A judge making an order under s. 165 of the Dominion Railway Act, 51 V., c. 29, for payment out of court of compensation moneys, acts not for the Court, but as *persona designata* by the statute; and no appeal to a Divisional Court lies from his order: *Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Thérèse*, 16 S.C.R. 606, followed. *Re Toronto, Hamilton and Buffalo Railway Co., and Hendrie*, 17 Ont. P.R. 199.

—**Trespass to Mine—Order for Inspection—View—Discretion—Service.**]—In an action for trespass to plaintiff's mine, an order was obtained by him under Order 50, Rule 3, (N.S.) from a Judge in Chambers for an inspection of defendants' mine below the surface, upon complying with certain terms fixed by the judge:—Held, that the order was within the discretion of the judge granting it, and that the court could not interfere with that discretion:—Held also that the case was one in which an order for inspection should be made if it appeared that it was essential for the purpose of enabling plaintiff to prove his case:—Held, further, that the fact that defendant's partner, the other owner of the mine, of which inspection was ordered, had not been served with the writ at the time the order was made, would not avail defendant. *Gray* v. *Hardman*, 28 N.S.R. 235.

—**Consent Order.**]—An order made on consent cannot be varied or set aside, except by consent, without showing some ground of surprise, mistake or fraud, or other ground which would invalidate an agreement between the parties: *Harvey* v. *Croyden Sanitary Authority*, 26 Ch. D. 249; *Australasian Automatic Co.* v. *Walter*, W.N. [1891], 170; *Huddersfield Banking Co.* v. *Lister* [1895], 2 Ch. 273, followed. *Grant* v. *McKee*, 11 Man. R. 145.

—**Omission in—Amendment—C.S.B.C. c. 31—Rule 266 of S. C. Rules, 1890.**]—By C.S.B.C. c. 31, the name of the judge who makes an order must be inserted in the caption;—Held, that if not inserted it is an "accidental slip or omission" within Rule 266 of S. C. Rules [1890], which may be amended. One Judge of the Supreme Court may sign an order for another. *Gordon* v. *Cotton*, 3 B.C.R. 499.

—**Action—Order for revivor after Judgment—Motion to set aside—Ontario Rule 622.**]—*Chambers* v. *Kitchen*, 17 Ont. P.R. 3, affirming order of Street, J., in 16 Ont. P.R. 219.

—**Receiver—Ex parte Order—Costs—Review.**]
See COSTS, V.

XVI. PARTICULARS.

—**Particulars—Demand—Compliance—Restriction.**]—Where the plaintiff in an action for damages complies with the defendants' demand for particulars, he is restricted to such particulars unless the trial judge gives him leave to amend or considers it a case not requiring particulars. *Young* v. *Erie and Huron Railway Co.*, 17 Ont. P. R. 4.

—**Slander—Particulars.**]—In an action for slander the defendant is entitled to the fullest particulars the plaintiff can furnish as to the place where, the time when, and the person to whom the words alleged were uttered. He is also entitled to particulars of the names of the persons who have ceased to have business dealings with the plaintiff an account of the alleged slander. The plaintiff's particulars must not be uncertain, meaningless or evasive. He must give definite information so far as he can, and if he becomes possessed of further information later on, he may, as a rule, obtain leave to amend his particulars in this behalf. Where the plaintiff in his statement of claim alleges certain other slanders upon which he relies as evidence of express malice or in aggravation of damages, without giving the language, or the names of the persons to whom such slanders were uttered, or the places where, or the times when they were uttered, the defendant is entitled to particulars in respect to these also. *Mulier* v. *Gerth*, 17 Ont. P.R. 129.

—**Estoppel—Particulars—Discovery.**]—The statement of defence to an action for trespass in erecting a building on plaintiff's land alleged that such building was on defendant's side of the boundary fixed by agreement of the parties, and that plaintiff was estopped by his conduct and representations from denying that the boundaries were as so claimed:—Held, that the specific acts and representations constituting the alleged estoppel should have been pleaded, and that an order for particulars was properly made.—If a party is entitled to particulars it is no ground of objection to an order therefor that the names of witnesses will necessarily be disclosed by furnishing them. *Guichon* v. *The Fishermen's Cannery Co.*, 4 B.C.R. 516.

XVII. PROCEDURE GENERALLY.

(a) *Province of Manitoba.*

—**Procedure—Pending Business—Manitoba Queen's Bench Act, [1895].**]—The Manitoba Queen's Bench Act [1895], Rule 983 (*a*) provides with respect to pending business that "in all cases the action or suit shall be continued up to the trial or hearing, according to the previous practice of the said Court, and afterwards according to the provisions of this Act":—Held, that under this rule the trial and hearing should be conducted according to the provisions of the Act, and not according to the previous practice of the Court. *Robertson* v. *Brandes*, 11 Man. R. 264.

(b) *Province of Quebec.*

—**Tender—Condition—Subsequent Costs.**]—The tender of a sum of money in settlement of a claim only discharges the debtor when he is dispossessed of the money tendered, and it is placed at the absolute disposition of the creditor. Therefore, where a sum was tendered and consigned by the defendant to an action upon condition that, as the plaintiff was insolvent, the amount should remain in Court until the termination of the proceedings and then applied in payment of any costs the plaintiff might be ordered to pay to the defendant, such tender

was insufficient and could not be regarded as a payment which would make the plaintiff bear all costs subsequently incurred. *Malenfant* v. *Barrette*, Q.R. 5 Q B. 529.

—**Défense en droit — Réponse Spéciale.**]—A special answer to a défense en droit is irregular and will be struck out on motion. *Beaubien* v. *Fitzallen*, Q.R. 9 S.C. 72.

—**Contrainte par Corps.**]—Where a judgment against a surety orders that he shall be held to satisfy it, even by his body, the judgment creditor is not obliged to wait four months before exercising his right of imprisonment. It is not necessary that the goods of the debtor should be proceeded against before taking the body. *Rutherford* v. *Humphries*, Q.R. 9 S.C. 101.

—**Summary Action—Bank Directors—Art. 887, C.C.P.**]—By art. 887 C.C.P. an action on a cheque is among the class of actions which shall be considered summary. By the charter of the Banque du Peuple the directors are jointly and severally responsible for all its debts and obligations :—Held, that a summary action might be taken against the directors on a cheque accepted by the bank.—The description of the plaintiff in a writ as "gentleman" is sufficient in the absence of proof that he had an occupation or profession. *Lafleur* v. *La Banque du Peuple*, Q.R. 9 S.C. 109.

—**Venue—Art. 34 C.C.P.**]—A contract was made at Montreal for the sale of goods and materials to be used on works in another district, and the goods were delivered at Montreal :—Held, that the cause of action arose in Montreal and the venue was properly laid there. *Roy* v. *Kennedy*, Q.R. 9 S.C 111.

—**Jurisdiction — Election of Domicile.**]— In an action to recover the amount of a cheque indorsed by the defendants, the latter objected to the jurisdiction of the Court (*exception declinatoire*). It appeared that the defendants had directed their agent, who was brought into the action as *mis-en cause*, to receive the amount of the cheque and place it to his own credit at the Hochelaga Bank at Montreal until the difficulty with the plaintiff was settled ; that defendants and their agent all resided in the District of Terrebonne, and the agent sent the cheque by mail to the bank at Montreal, which placed the amount to his credit in its books ; and that the cheque was drawn on the Bank of Montreal in Montreal :—Held, that the cause of action arose in Montreal and the direction to the agent was equivalent to an election of domicile in that place. The action was therefore properly brought in the District of Montreal and the *exception declinatoire* should be dismissed. *Lamarche* v. *Bonnafous*, Q.R. 9 S.C. 154.

—**Form—Summary Matter—Delays.**]—Where a writ of summons was irregularly stamped "*Procedure sommaire*," but the defendant had been allowed a delay of ten days between the service and return of the writ as required in ordinary cases, the action was not dismissed, but the Court ordered that the words "*procedure sommaire*" be struck out and the action proceed as an ordinary cause with the ordinary delays. *Riopelle* v. *Moylan*, Q.R. 9 S.C. 182.

—**Enquête—Delays—Production of Depositions.**]—Where a plaintiff's *enquête* has extended over several years, during which it was proceeded with at different dates, the defendant is entitled to have the depositions taken in the course thereof produced before being foreclosed from proceeding with his *enquête*. *Dunbar* v. *Truteau*, Q.R. 9 S.C. 217.

—**Inscription in Review—Notice—Delays.**]—A party to an action who inscribes in review has eight clear days to deposit security for costs, and as he cannot give notice until after the deposit a notice on the ninth day is in time. *Parks* v. *Day*, Q.R. 9 S.C. 221.

—**Municipal Election — Contestation — Form of Petition.**]—A petition in contestation of a municipal election should be addressed to the Circuit Court ; it is not necessary to address it to the judges. But where a petition presented to the Circuit Court was headed "to the Honorable Judges of the Superior Court," it was held no ground of nullity. *Giroux* v. *Lemay*, Q.R. 9 S.C. 237.

—**Hearing on Merits—Production of Depositions.**]—A cause may be inscribed for hearing on the merits before the depositions are produced. *Filion* v. *Roger*, Q.R 9 S.C. 239.

—**Substitute of Attorney-General—Fees.**]—The fees of the substitute of the Attorney-General cannot be attached. *Robinson* v. *Quinn*, Q R. 9 S.C. 240.

—**Sheriff's Sale—Order for Deposit—Art. 679, C.C.P.**]—It is no cause of nullity of a sheriff's sale under writ of fi-fa that a judge's order for a deposit from bidders under Art. 679 C.C.P., was granted without notice to the defendant in the cause. *Gauthier* v. *Melançon*, Q.R. 9 S.C. 245.

—**Tutor ad hoc—Nomination—Application to Annul.**]—An application to annul the nomination of a tutor *ad hoc* may be made by petition. *Hebert* v. *Roy*, Q.R. 9 S.C. 251.

—**Inscription in Review — Amount — Date of Judgment—Delay.**]—Where the opposant has a right of appeal to the Court of Review from a decision of the Superior Court dismissing his opposition such right is not affected by the fact that the movable property claimed by him is valued at less than $100. Where the minute of judgment bears the date written by the judge, such date, and not that mentioned on the slip, will be taken to be the true date of the judgment in determining whether or not an inscription was filed in time. *Brophy* v. *Fitch*, Q.R. 9 S.C. 257.

—**Declaration — Allegation in — Irrelevancy — Motion to Strike Out.**]—In an action against an employer for damages in consequence of an accident to plaintiff in the course of his employment, the declaration, after stating the circumstances of the accident and plaintiff's position, proceeded to say "that the defendant at the time of the accident was insured against all risks and responsibility that might result from any such accident." On motion to strike this allegation out of the declaration as being irrelevant :—Held, that such objection was not matter for preliminary plea or motion to strike out, but should have been urged by demurrer. *Lee* v. *Burland*, Q.R. 9 S.C. 294.

—**Dilatory Exceptions—Motion—Art. 135, C.C.P.**]—By the practice of the Superior Court (Art. 135 C.C.P.) grounds of dilatory exception to proceedings may be urged by motion in certain cases, but such grounds must rest upon matter appearing on the face of the record. Where they put in issue matter of fact not appearing upon the record, and necessitating an *enquête*, a motion is not the proper proceeding. *Langhoff* v. *Boyer*, Q.R. 9 S.C. 295.

—**Tiers-Saisie — Default — Declaration.**]—On June 22nd, 1895, judgment by default was given against the *tiers-saisie*, and signified to him on July 3rd. On July 4th he gave notice to the plaintiff that he would make his declaration on the 10th, and offered to pay the costs incurred by his default. He made his declaration on July 10th, swearing that he owed nothing to defendant, and it was signified to the plaintiff with notice for Sept. 16th, the first day of the term, of motion to set aside the judgment against him. On Sept 14th the plaintiff moved for rejection of the declaration, which was refused, and the same day he issued execution against the *tiers-saisie*. On opposition of the latter *afin d'annuler*:—Held, that the rules relating to judgments rendered between parties to a cause do not apply to *tiers-saisis*; that the *tiers-saisie* would be allowed to make his declaration at any time even after judgment against him; and that the sole condition imposed upon him was the payment of costs incurred by the default. *Guay* v. *Senneville*, Q.R. 9 S.C. 324.

—**Admission by Party to Action—Divisibility—Art. 231 C.C.P.**]—In an action for the price of a mare to which defendant pleaded conventional warranty and contended on the trial that there was no proof of sale except the defendant's own admission, which could not be divided:—Held, that under Art. 231 of the Civil Code of Procedure the admission could be divided as containing facts foreign to the issues and being in part improbable and invalidated by contrary evidence. *Eglinton* v. *Ashmead*, Q.R. 9 S.C. 427.

—**Municipal Election—Action to annul—Preliminary Exceptions—Security for Costs.**]—In an action to set aside the election of an alderman the defendant is not obliged to file his preliminary exceptions until security for costs has been given. In such action the proceedings will not be stayed on the mere allegation that the petitioner has an interest in the decision on proceedings by mandamus pending at the instance of another party. *Thérien* v. *Wilson*, Q.R. 9 S.C. 466.

—**Rule of Court—Presentation—Indication of Hour—Taxation of Costs—Contrainte par Corps—Art. 2,272 C.C. — Art. 793 C.C.P.**]—Failure to indicate the hour of presentation of a rule is not a cause of nullity. It is not necessary that taxation by the prothonotary of costs incurred on the execution of a judgment and evidenced by the record, should be opposed by the condemned party. There may be an arrest, on demand of attorneys *distraits* for costs of a judgment for personal injuries when the damages have been paid. *Cordeau* v. *De Laval*, Q.R. 9 S.C. 482.

—**Writ of Execution—Opposition—Expiry of a Day—Substituted opposition—Payment of Costs—Arts. 453, 578, C.C.P.**]—If there is an opposition pending to a seizure thereunder, a writ of execution is not exhausted by the expiration, without sale, of the time fixed for its return, Art. 578 C.C.P.—After the presentation of a motion to reject an opposition for irregularity the opposant cannot without permission of the Court, abandon such opposition and substitute another containing the same grounds but omitting the irregularities complained of.—It is an imperative rule (Art. 453, C.C.P.) that a party who has abandoned a proceeding cannot recommence without first paying the costs incurred by his adversary in such proceeding. Non-payment is not merely a cause for suspension of the new proceeding, but for its dismissal as a nullity.—An irregular proceeding may be attacked by motion as well as by exception to the form. *Leboutillier* v. *Carpenter*, Q.R. 9 S.C. 530.

—**Attorney-General — Substitute for—Security for Costs—Deposit of Money.**]
See ATTORNEY-GENERAL.

—**Bureau de Délégués—Writ of Appeal—Notice—Arts. 1066, 1067 M.C.**]
See APPEAL, III (*f*).

—**Capias—Affidavit for—Costs.**]—See CAPIAS.

—**Criminal Law—Impanelling of Jury—Directions to Stand by.**]—See CRIMINAL LAW, II

—**Criminal Procedure—Preferring Indictment—Order of Court—Direction of Attorney-General—Criminal Code, s. 641.**]—See CRIMINAL LAW, II.

—**Execution—Opposition to Seizure—Unnecessary Proceeding—Interest of Opposant.**]
See EXECUTION, VII.

—**Future Rights.**]—See EVOCATION.

—**Husband and Wife — Wife Separated as to Property—Action against—Authorization—Service of Declaration.**]
See HUSBAND AND WIFE, IV.

—**Judge in Chambers — Tutor — Dismissal — Family Council.**]—See TUTOR.

—**Notice of Action—Municipal Corporation—Non-repair of Streets—Art. 793 M.C.**]
See ACTION, II.

—**Universal Legatee—Continuance of Suit—Vacation—Art. 451, C.C.P.**]—See ACTION, II.

—**Unpaid Vendor—Deeds prior to Code—Registration—Resolution of Sale—Demand made.**]
See SALE, III (*b*).

XVIII. PRODUCTION OF DOCUMENTS.

—**Discovery—Documents required for Evidence—53 V., c. 4, ss. 59 and 61.**]—The Court in Equity of New Brunswick on summons under sec. 59 of the Equity Act (53 Vict, c. 4), refused to order the production of documents to enable the defendant to answer the bill. Production will not be ordered until the documents are required for evidence. If the defendant cannot answer fully without them, and the plaintiff on request refuses to produce them, the Court will not treat his answer as insufficient. *Hegan* v. *Montgomery*, 1 N.B. Eq. 247.

—**Examination of Judgment-debtor—Production—Notice—Subpœna.**]—Under Rule 732, and following Rules, of the Manitoba Queen's Bench Act, 1895, on an examination of a judgment-debtor it is sufficient, in order to compel him to produce any books and documents required, to serve him with a notice to produce. It is not necessary that he should be served under Rule 736 with a *subpœna duces tecum* as in the case of a witness at a trial: *Russell* v. *Macdonald*, 12 Ont. P.R. 458; and *Lavery* v. *Wolfe*, 10 Ont P.R. 488, followed. *Whitla* v. *Agnew*, 11 Man. R. 66.

—**Production of Documents—Receiver of Railway Company.**]—An order appointing a Receiver of a Railway Company does not vest the property in the assets of the Company in him, and is no ground for the Company to refuse discovery of the contents of their books to a party in another proceeding; but where there was plausible ground for the claim by the company that the receiver could take possession of their books and papers, and as the parties to the proceedings for the appointment of a receiver, except the Company itself, were not now before the Court, an order for production of books and documents was varied by directing only that such books and documents should be produced to the plaintiffs or their solicitors in demand on twenty-four hours notice at the Company's general offices, and that the plaintiffs or their solicitors should be allowed to take copies of or extracts from such portions of the contents thereof as related to the matters in question. *Maxwell* v. *Manitoba and Northwestern Railway Co.*, 11 Man. R. 149.

—**Affidavit—Requirements of.**]—In his affidavit on production, the defendants' manager stated that the defendants had in their possession "the books of the said bank, consisting of deposit ledgers and liability ledgers, manager's register of collateral securities, letter books," and also letters that had passed between the managers at Brantford and Winnipeg, which he objected to produce on the ground that they were privileged communications relating solely to the defendants' case and defence, and did not concern the plaintiff's case:—Held, that the description of the books was too indefinite, and that the defendants should file a further affidavit showing how many, and which of the books referred to, contained any entry relating to the matters in question in this cause; the rule being that, when objections against production are made, the affidavit must describe the documents with sufficient distinctness to enable the Court to order production, if the objections should be overruled: *Taylor* v. *Batten*, 4 Q.B.D. 85, followed:—Held, also, following *Morris* v. *Edwards*, 15 App. Cas. 309, that sufficient had been stated to excuse production of the letters between the managers. *Hector* v. *The Canadian Bank of Commerce*, 11 Man. R. 320.

XIX. Reference.

—**Report—Payment of Fees.**]—An action was referred to a local Master for trial under sec. 102 of the Ontario Judicature Act, and the referee apportioned the amount of his fees between the plaintiffs and defendants, according to the time occupied by each upon the reference. The plaintiffs paid their share of the fees, but the defendants refused to pay theirs:—Held, that the referee should deliver his report to the plaintiffs upon payment of the fees, for which they alone were liable. He had his remedy against the defendants, and the plaintiffs should not be made to suffer for their neglect:—Semble, that the defendants' solicitors were liable for the defendants' share of the referee's fees. *Brooks* v. *Georgian Bay Saw-Log Salvage Co.*, 17 Ont. P.R. 34.

—**Vacation.**]—An official referee may proceed with a reference during vacation. *Marples* v. *Rosebrugh*, 17 Ont. P.R. 104.

—**Supreme Court Reference Act, 1891 (B.C.)**]—A reference cannot be made by the Lieutenant-Governor-in-Council under the Supreme Court Reference Act, 1891, sec. 1, to a judge. It must be to the Court. *In re Horsefly Mining Co.*, 4 B.C.R. 165.

And see Reference.

XX. Solicitor.

—**Change of Solicitor — Waiver — Subpœna.**]—If the solicitor of a party to an action is removed the proper method of bringing the party before the Court is by subpœna to name a new solicitor. If the party is out of the jurisdiction the Court may order substitutional service of the subpœna. The solicitor of a defendant having been appointed to the bench, a summons for judgment was served on his former partner, who refused to accept it. A judge in chambers, on return of the summons, treated this as good service and made an order giving leave to plaintiff to sign judgment. The defendant appointed a solicitor *ad hoc* and appealed from this order. The plaintiff wrote to this solicitor asking for his grounds of appeal:—Held, that the proper proceeding not having been taken to bring the defendant before the Court, the order was a nullity; if it had been an irregularity merely it would have been waived by the service of the summons and demand for grounds of appeal. *Denny* v. *Sayward*, 4 B.C.R. 212.

—**Costs—Reference—R.S.O. c. 147, s. 32—Unsuccessful Application—Counsel Fees—Discretion.**]
See Costs, IV (*c*).

—**Costs—Liability to Solicitor—Taxation against Opposite Party.**]—See Costs, II (*a*).

—**Costs—Security for—Rule 1243 Consol. Rules Ont.—Costs of former Action unpaid—Solicitor's Want of Authority.**]—See Costs, III.

—**Costs—Taxation—Defendants appearing by same Solicitor—Appeal—Extension of Time—Rules 1230, 1231 Consol. Rules Ont.**]
See Costs, IV (*a*)

XXI. Stay of Proceedings.

—**Settlement of Action — Summary Trial — Costs.**]—The court has jurisdiction, under the Ontario Judicature Act, sec. 52 (9) and (12), to stay proceedings in any action which has been compromised, when the terms of

the compromise do not go beyond what is in controversy in the action. Where in an action of slander, the plaintiff alleged as a reason for not prosecuting the action that he had made an agreement with the defendant whereby the action was to be dropped and $10 costs paid to him by the defendant, which agreement the defendant denied, an order was made directing a summary trial, or the trial by an issue upon oral evidence, of the question of the validity of the settlement; if the result should maintain the validity of the settlement, proceedings were to be stayed perpetually and costs paid by defendant; if the settlement were found to be invalid, action to be dismissed with costs to defendant: *Eden* v. *Najsh*, 7 Ch. D. 781; *Scully* v. *Dundonald*, 8 Ch. D. 658; and *McAlpine* v. *Carling*, 8 Ont. P.R. 171, referred to. *Rees* v. *Carruthers*, 17 Ont. A.R. 51.

—**Application for Security for Costs—Stay of Proceedings pending determination—Judgment by Default.**]—Before filing and delivering his defence, the defendant obtained a summons, returnable at a date subsequent to the expiry of the time for pleading, for the hearing of an application for security for costs, and for a stay of proceedings. Judgment for default of plea was entered by plaintiff before the return day of the summons:—Held, that the summons did not operate as a stay until the time of its return, and that the judgment entered was regular. Defendant, however, was permitted to move on affidavit of merits for leave to defend. *Creelman* v. *Ronnan*, 28 N.S.R. 50.

—**Entry of Cause Nunc pro tunc — Pendency of Former Suit—Stay of Proceedings.**]—A summons was issued by a judge calling upon the plaintiffs in an action to show cause why the proceedings should not be stayed, and the action was not proceeded with. No writ or entry docket was filed in the action as required by rule of Court. Another action having been commenced the defendants pleaded the pendency of the former, to which plaintiffs replied that there was no record in Court of the action stated in the plea. The Court, on application of the defendants, ordered that the writ and entry docket in the first action be filed *nunc pro tunc* and the order for stay of proceedings therein varied to permit the cause to be entered; and also ordered that proceedings in the second action be stayed until the writ and entry docket in the first were filed. *Pictou Bank* v. *Pugsley*, 33 N.B.R. 435.

XXII. Summons.

—**Practice—County Courts—Interlocutory Matters—Summons.**]—Though the County Courts Act does not provide in terms for proceeding in Chambers upon summons in interlocutory matters, there is jurisdiction to deal with such matters and a summons is a proper proceeding. *Wilkerson* v. *City of Victoria*, 3 B.C.R. 366.

—**Action against Trustees—Account—Originating Summons.**]—If in an action against trustees an account is not asked for, and consequently not directed by the decree, an originating summons may properly issue under Rule 591, s.s. (*c*) and (*d*), calling upon the trustees for an account. If the trustees oppose the summons on technical grounds a decision against them may order them personally to pay the costs. *Boscowitz* v. *Belyea*, 4 B.C.R. 527.

—**Operation of—Stay of Proceedings.**

See Practice and Procedure, XXI.

XXIII. Trial.

—**Negligence—Verdict—New Trial.**]—Where the jury find negligence, and then define negligence to consist in doing certain acts, the Court, if there is some evidence of negligence in other respects, may in their discretion order a new trial, although there is no evidence to support the specific findings *Cobban* v. *The Canadian Pacific Railway Co.*, 23 Ont. A.R. 115.

—**Re-opening Case after Judgment—New Trial.**]—An application after judgment in an action "for an order to release the action, or for a new trial" upon the ground of newly discovered material evidence, is provided for by Rule 782 (Ontario). It should be made in Court to the judge who tried the action, and is a proceeding in the cause: *Waterhouse* v. *Lee*, 10 Gr. p. 193, referred to. *Armour* v. *Merchants Bank of Canada*, 17 Ont. P.R. 108.

—**Notice of Trial served before close of Pleadings—Irregularity—Rule 654, Consol. Rules Ont.**]—Rule 654 provides that "after the close of the pleadings either party may give notice of trial for the next sitting of the Court, which shall not be less than ten days thereafter, for the place so named or ordered":—Held that a notice of trial served after three o'clock of the day on which the time allowed the defendant for filing and delivering his last pleading expired, was irregular and should be set aside. *Piper* v. *Benjamin*, 17 Ont. P.R. 267.

—**New Trial—Objections.**]—On motion for a new trial for misdirection the objections must be specified. *Croasdale* v. *Hall*, 3 B.C.R. 384.

—**Notice of Trial—Countermand—Adjournment.**]—If the trial of a cause is adjourned by consent of counsel it is equivalent to a countermand of the notice of trial, and the position is the same as if no notice had been given. The defendant may himself proceed or move to dismiss for want of prosecution. *Harvey* v. *City of New Westminster*, 3 B.C.R. 398.

XXIV. Vacation.

—**Delay—Suspension of.**]—The delay of 60 days for appealing to the Supreme Court prescribed by s. 40 of the Act is not suspended during the vacation of the Court established by its rules. *The News Printing Co.* v. *Macrae*, 26 S.C.R. 695.

— **Vacation — Reference — Official Referee.**]—As a general rule every legal proceeding which may properly be taken out of vacation may with equal propriety be taken during vacation, unless something to the contrary can be found in some Statute or Rule of Court. An official referee may proceed with a reference during vacation. *Marples* v. *Rosebrugh*, 17 Ont. P.R. 104.

XXV. Venue.

—Change of—Preponderance of Convenience.]—In an action charging fraud against the defendant in the adjustment of partnership accounts, and asking for an account between the plaintiff and defendant, the defendant appealed to the Divisional Court from an order of the Judge affirming the order of a Master refusing to change the venue from T. to S. The Divisional Court was divided in opinion. Per Armour, C. J.—The venue should be changed, because the action could more fitly and conveniently be tried at S. Per Street, J., That the affidavits upon which the motion for change of venue was based did not show so great a preponderance of convenience in favour of the change as to justify the court in entertaining the motion, especially in view of the previous refusals by the Master and Judge: *Peer* v. *North-West Transportation Co.*, 14 Ont. P.R, referred to, *Madigan* v. *Ferland*, 17 Ont. P.R. 124.

—Promissory Note—Place of Payment—Election of Domicile—Art. 85 C.C.—Where a promissory note dated at Montreal was in fact signed in the District of Beauharnois, where it was made payable, an action on it should be taken in the latter district.—An erroneous indication in a note of the place of its execution is not equivalent to an election of domicile, which, by the terms of Art. 83 of the Civil Code, results from the indication of the place of payment. *Wilson* v. *Cameron*, Q.R. 9 S.C. 487.

XXVI. Waiver.

—Jurisdiction—Waiver of Objection — Entry of Appearance.]—In proceedings in Admiralty the entry of appearance by defendant is not a waiver of objection to the jurisdiction of the Court. *Rithet* v. *Ship Barbara Boscowitz*, 3 B.C.R. 445.

—Waiver of Irregularity in extending Time for making an Award under a Submission to Arbitration.]

See Arbitration and Award, II.

XXVII. Writ.

— Service out of Jurisdiction — Rule 271 (e) — Contract by Correspondence—Place of Performance—Breach.]—It will not be implied in a contract for the sale of goods that the vendor is to send or carry the goods to the vendee, and where the defendant, living and doing business in Quebec, entered into a contract, by correspondence, with the plaintiffs, doing business in Ontario, to sell and ship certain goods, it was held that this was a contract made and to be performed in the Province of Quebec, and that an action for the breach thereof was not cognizable in Ontario under Rule 271 (1309) which provides that "service out of the jurisdiction of a writ of summons * * * may be allowed * * * whenever * * * (*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which is to be performed within the jurisdiction:" *Gildersleeve* v. *McDougall*, 6 Ont. A.R. 553, referred to. *Empire Oil Co.* v. *Vallerand*, 17 Ont. P.R. 27.

—Writ—Special Indorsement—Action on Bill of Exchange—Initials.] In an action on a bill of exchange a special indorsement on the writ, stating that the defendant accepted the bill, but not that he did so under the initials and name by which it was accepted, is sufficient. *Harrison* v. *McLean*, 33 N.B.R. 427.

—Affidavit—Substitutional Service.]—An affidavit to obtain an order for substitutional service of a writ allowed to be served out of the jurisdiction must show that the defendant is evading service. On motion to set aside an *ex parte* order for such defect the Court will not allow a supplemental affidavit to be filed. *Mellor* v. *Carter*, 3 B.C.R. 301.

— Writ of Execution — Filing of Præcipe.]—Though a præcipe must be filed before a writ of execution is issued, if it is tendered to the proper officer, who states that it is not necessary, and it is not filed, the execution will not be set aside for want of it. *Kimpton* v. *McKay*, 4 B.C.R. 196.

—Specially Indorsed Writ—Interest.—Interest cannot be claimed on a specially indorsed writ unless the indorsement shows that it is due under a statute or by contract. An indorsement claiming a sum named for principal and interest due upon a covenant in a mortgage, and interest on such sum until judgment, is not an endorsement entitling the plaintiff to judgment under Order XIV. *British Columbia Land and Investment Co.* v. *Thain*, 4 B.C.R. 321.

—Writ—Seal of Court—Copy served.]—Service of a writ will not be set aside because the copy served did not indicate that the original was under the seal of the court. The seal is no part of the writ; it only authenticates it. *Canada Settlers' Loan Co.* v. *Steinburger*, 4 B.C.R. 353.

—Execution—Loss of Writ.]

See Execution, VI.

—Alimony—Subsequent Judgment for Arrears in County Court—Effect of.]

See Alimony.

—Alimony—Service out of Jurisdiction—Contract—Law Courts Act, [1895], s. 28.]

See Alimony.

—Garnishee Process.]

See Attachment of Debts.
" Debtor and Creditor, III.

— Canada Temperance Act — Discharge under Habeas Corpus—Costs.]

See Canada Temperance Act.

—Reforming Agreement on Ground of Mistake—Strictness of Evidence Required—Error by Judge—New Trial.]—See Contract, III (*b*).

—Costs—Two Actions in Respect of same Subject Matter — Staying Proceedings until Costs of former Action Paid.]—See Costs, V.

—Costs where Defendant succeeds upon one Ground.]—See Costs, IV (*a*).

—Amendment of Defence at Trial—Costs.]
See COSTS, V.

—Criminal Prosecution—Evidence—Foreign Commission—Order for—Time for Issue—Criminal Code, s. 683.]—See CRIMINAL LAW, I (*b*).

—Criminal Code—Summary Trial—Appeal from Magistrate's Conviction.]
See CRIMINAL LAW, II.

—Dower—Ontario Devolution of Estates Act—Widow—Election—Money in Court.]
See DOWER.

—Dower—Allowance to Widow in lieu of—Devolution of Estates Act (Ont.)—Creditors.]
See DOWER.

—Distress Warrant—Justice of the Peace—Prohibition.]
See JUSTICE OF THE PEACE.

—Justices of the Peace—Trial by—Civil Action—Failure of Jury to Agree—Res Judicata.]
See JUSTICE OF THE PEACE.

—County Court—Prohibition—Jurisdiction.]
See PROHIBITION.

—Adding Parties—Orders 46 and 48 Ontario Judicature Act.]—See PARTIES, I.

PRINCIPAL AND AGENT.

I. LIABILITY OF AGENT TO PRINCIPAL.

—Negligence of Agent—Lending Money for Principal—Financial Brokers—Liability for Loss—Measure of Damages.]—Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him, and in his interest, though their remuneration may come from the borrower.—An agent who invests money for his principal without taking proper precautions as to the sufficiency of the security, is guilty of negligence, and if the value of the security proves less than the amount invested he is liable to his principal for the loss occasioned thereby. The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land. *Lowenburg, Harris & Co.* v. *Wolley*, 25 S.C.R. 51.

—Trust—Principal and Agent—Advances to Agent to buy Goods—Trust Goods mixed with those of Agent—Replevin—Equitable Title.]—If an agent is entrusted by his principal with money to buy goods the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the funds producing them. If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance. *Carter* v. *Long & Bisby*, 26 S.C.R. 430.

—Illegal profit to Agent—Liability for.]—An agent employed to negotiate an exchange of properties deceived his principal as to the amount he would have to pay for the difference in price between his property and that for which it was to be exchanged and, by collusion with the owner of the latter, received for himself the excess:—Held, that the principal could recover from his agent the amount so received as an unlawful profit in respect to his employment. *Martel* v. *Pageau*, Q.R. 9 S.C. 175.

—Attorney for Sale of Lands—Lien—Personal Obligation.]
See EQUITABLE ASSIGNMENT.

II. LIABILITY OF PRINCIPAL TO THIRD PERSONS.

—Trustees and Administrators—Fraudulent Conversion—Past due Bonds, Transfer of—Debentures Transferable by Delivery—Equities—Art. 2287 C.C.—Estoppel—Brokers and Factors—Pledge—Implied Notice—Duty of Pledgee—Innocent Holder—Arts. 1487, 1490, 2202 C.C.]—The Quebec Turnpike Trusts bonds issued under special Acts and Ordinances (Rev. Stats. Que., 1888, Sup., p. 505) are payable to bearer and transferable by delivery. Certain of these bonds belonging to the estate of the late D. D. Young, had been used as exhibits and marked as such in a case of *Young* v. *Rattray*, and having been afterwards lost were advertised in a newspaper in Quebec in the year 1882. About ten years afterwards W., who was the agent and administrator of the estate, and had the bonds in his possession as such, pledged them to a broker for advances on his own account, the bonds then being long past due but payment being provided for under the above cited statutes:—Held, affirming the judgment of the Court of Queen's Bench, that neither the advertisement, nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to pledgee of defects in the pledgor's title; and that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a *bona fide* holder. *Young* v. *MacNider*, 25 S.C.R. 272.

—Agent's Authority—Representation by Agent—Principal affected by—Advantage to other than Principal—Knowledge of Agent—Constructive Notice.]—Where an agent does an Act outside of the apparent scope of his authority, and makes a representation to the person with whom he acts to advance the private ends of himself or some one other than his principal, such representation cannot be called that of the principal. In such a case it is immaterial whether or not

the person to whom the representation was made believed the agent had authority to make it.—The local manager of a bank having received a draft to be accepted induced the drawer to accept by representing that certain goods of his own were held by the bank as security for the drafts. In an action on the drafts against the acceptor:—Held, affirming the decision of the Supreme Court of New Brunswick, that the bank was not bound by such representation; that by taking the benefit of the acceptance it could not be said to adopt what the manager said in procuring it which would burden it with responsibility instead of conferring a benefit; and that the knowledge of the manager with which the bank would be affected should be confined to knowledge of what was material to the transaction and the duty of the manager to make known to the bank. *Richards* v. *Bank of Nova Scotia*, 26 S.C.R. 381.

—Debtor and Creditor—Composition and Discharge — Acquiescence — New Arrangement —Waiver of Time Clause—Notice of Withdrawal —Fraudulent Preferences.]

See COMPOSITION AND DISCHARGE.

— Money paid to Agent — Recovery—Purchase Money—Rescission.]

See ACTION, I.

III. POWER AND AUTHORITY OF AGENT.

—Fire Insurance—Conditions in Policy—Breach —Waiver—Recognition of existing Risk after Breach—Authority of Agent.]—A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed or the interest of the parties therein changed:—Held, affirming the decision of the Supreme Court of New Brunswick, that by a chattel mortgage given by the assured on said property his interest therein was changed, and the policy forfeited under said condition.—Held, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach. *Torrop* v. *The Imperial Fire Insurance Co.*, 26 S.C.R. 585.

—Insurance Agent—Taking Note for Premium.]

See INSURANCE, IV.

IV. UNDISCLOSED PRINCIPAL.

—Sale of Goods—Undisclosed Principal.]—Defendants employed B. as an agent to sell goods for them in his own name, but for their benefit. Until the goods were sold at prices named by the defendants the property in them remained in the defendants. B. purchased goods from the plaintiffs, on his own credit, and without disclosing his relations with the defendants. The plaintiffs' goods having been sold and not paid for, when plaintiffs became aware of the relations between B. and defendants, they took action against the latter, alleging that they had given credit to B., believing the business to be his:—Held, that as B. was a factor or agent of the defendants for the purpose of selling their goods only, he had no power to pledge the defendants' credit for goods unconnected with such employment: *Watteau* v. *Fenwick*, (1893) 1 Q.B. 346, considered. *Becherer* v. *Asher*, 23 Ont. A.R. 202.

PREFERENCE.

Payments by Debtor—Appropriation—R.S.O. [1887] c. 124.]

See APPROPRIATION OF PAYMENTS.

PRELIMINARY EXCEPTION.

Action to Annul Municipal Election—Security for Costs.]—See MUNICIPAL CORPORATIONS, VI.

PRELIMINARY PLEA.

See PLEADING

PREROGATIVE.

See CROWN, II.

PRESBYTERIAN CHURCH.

See TEMPORALITIES FUND.

PRESUMPTION.

See EJECTMENT.
" EVIDENCE, V.
" MARRIAGE LAW.

PREUVE.

See EVIDENCE.

PRINCIPAL AND SURETY.

I. DISCHARGE AND RELEASE OF SURETY.

—Suretyship—Continuing Security—Appropriation of Payments—Imputation of Payment—Reference to take Accounts.]—J. H. S. was a local agent for an insurance company and collected premiums on policies secured through his agency, remitting moneys thus received to the branch office at Toronto from time to time. On 1st January, 1890, he was behind in his remittances to the amount of $1,250, and afterwards became further in arrears until on the 15th of October, 1890, one W. S. joined him in a note for the $1,250 for immediate discount by the company, and executed a mortgage on his lands as collateral to the note and renewals that might be given, in which it was declared that payment of the note or renewals or any part thereof was

to be considered as a payment upon the mortgage. The company charged J. H. S. with the balance then in arrears, which included the sum secured by the note and mortgage, and continued the account as before in their ledger, charging J. H. S. with premiums, etc., and the notes which they retired from time to time as they became due, and credited moneys received from J. H. S. in the ordinary course of their business, the note and its various renewals being also credited in this general account for cash. W. S. died on 5th December, 1891, and afterwards the company accepted notes signed by J. H. S. alone for the full amount of his indebtedness, which had increased in the meantime, making debit and credit entries as previously in the same account. On the 31st July, 1893, J. H. S. owed on this account a balance of $1,926, which included $1,098 accrued since 1st January, 1890, and after he had been credited with general payments there remained due at the time of trial $1,009. The note W. S. signed on 5th October, 1890, was payable four months after date with interest at 7 per cent., and the mortgage was expressed to be payable in four equal instalments of $312.50 each, with interest on unpaid principal:—Held, that the giving of the accommodation notes without reference to the amount secured had not the effect of releasing the surety as being an extension of time granted without his consent and to his prejudice; that the renewal of notes secured by the collateral mortgage was *primâ facie* an admission that, at the respective dates of renewal, at least the amounts mentioned therein were still due upon the security of the mortgage; that in the absence of evidence of such intention it could not be assumed that the deferred payments in the mortgage were to be expedited so as to be *eo instanti* extinguished by entries of credit in the general account which included the debt secured by the mortgage; and that there being some evidence that the moneys credited in the general account represented premiums of insurance which did not belong to the debtor, but were merely collected by him and remitted for policies issued through his agency, the rule in Clayton's case as to the appropriation of the earlier items of credit towards the extinguishment of the earlier items of debit in the general account would not apply, and there should have been a reference to the master to take the account. *The Agricultural Insurance Co.* v. *Sargeant*, 26 S.C.R. 29.

—Vendor and Purchaser—Agreement for Sale of Lands — Assignment by Vendee — Deviation—Giving Time—Depriving Surety of Rights—Secret Dealings with Principal — Release of Lands—Arrears of Interest — Novation.] —An agreement for the purchase and sale of certain specified lots of land in consideration of a price payable partly in cash and partly by deferred instalments on dates specified was subject to payments being made in advance of those dates under proviso that "the company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The vendee assigned all his interest in the agreement to a third party by a written assignment registered in the vendor's office, and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accepted from the assignee several payments upon interest and upon account of the principal remaining due from time to time as lots and parts of lots were sold by him, and without the knowledge of the vendee arranged a schedule apportioning the amounts of payments to be made for releases of lots sold based on their supposed values, and in fact released lots and parts of lots so sold and conveyed them to sub-purchasers upon payments according to this schedule and not in the ratio of the full number of lots to the unpaid balance of the price, and without payment of all interest owing at the time sales were made. The vendors charged the assignee with and accepted from him compound interest, and also allowed the assignee an extension of time for the payment of certain interest overdue, and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers:—Held, that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement:—Held, also, that though the course of dealing did not change the relation of the parties to that of principal creditor, debtor and surety, notice to the vendors of the assignment and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously or impede him in having recourse to it as a security.—In a suit taken by the vendors against the vendee to recover interest overdue, equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot the full amount that they ought to have got from him on a release for an entire lot and as having received on each transfer all arrears of interest.—In the absence of any sure indication in the agreement the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein. *Wilson* v. *The Land Security Co.*, 26 S.C.R. 149.

—Guarantee Bond—Default of Principal—Non-disclosure by Creditor.] —W. was appointed agent of a company in 1891 to sell its goods on commission, and gave a bond with sureties for the faithful discharge of his duties. His appointment was renewed year after year, a new bond with the same sureties being given to the company on each renewal. His agreement with the company only authorized W. to sell for cash, but at the end of each season he was in arrear in his remittances, which he attributed to slow collections, and which he settled by giving an indorsed note, retiring the same before the bond for the next year was executed. After the season of 1894 the company discovered that W. had collected moneys of which he had made no return, and brought an action to recover the same from the sureties:—Held,

reversing the decision of the Court of Appeal, that each year there was an employment of W. distinct from, and independent of, those of previous years; that the position of the sureties on re-appointment was the same as if other persons had signed the bond of the preceding year; and that the company was under no obligation, on taking a new bond, to inform the sureties that W. had not punctually performed his undertakings in respect of previous employment, nor did the non-disclosure imply a representation to the sureties when they signed a new bond that they had been punctually performed. *Niagara District Fruit Growers' Stock Co.* v. *Walker*, 26 S.C.R. 629.

—Bond—Public Schools—Secretary-Treasurer.]—A secretary-treasurer of a public school board was appointed for a year on giving the necessary security, which he did by bond with sureties, without any limit as to time or any reference to the period of his appointment. He was re-appointed each year for several years in the same way and on the same condition, but without fresh security being taken, and subsequently became a defaulter in respect of moneys received by him during his last year's appointment:—Held, that the sureties were not liable for his defalcation. *Waterford School Trustees* v. *Clarkson*, 23 Ont. A. R., 213.

II. Reservation of Rights.

—Giving time to Principal — Reservation of Rights against Surety.]—Where a creditor gives his debtor an extension of time for payment a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given: *Wyke* v. *Rogers*, 1 DeG. M. & G. 408) followed.—Per Gwynne, J., dissenting. The evidence in this case was not sufficient to show that the remedies were reserved. *Gorman* v. *Dixon*, 26 S.C.R. 87.

—Mortgage—Assignment—New Mortgage—Reservation of Rights.]—A covenant by the assignor of a mortgage with the assignee that the mortgage money shall be duly paid makes the assignor a surety; but he is not discharged merely by the assignee taking a new mortgage for the same debt on the same land from a purchaser thereof from the mortgagor, with an extended time for payment, the assignee refusing at the same time to discharge the old mortgage; the new mortgage containing a re-demise clause, but not being executed by the mortgagee. *Trusts Corporation of Ontario* v. *Hood*, 23 Ont. A.R. 589.

—Advance to Wife—Charge on Her Estate—Covenant of Husband and Wife—"Ordinary Legal Rights."]—A married woman who, under the terms of her father's will was entitled to receive her share of his estate on coming of age, agreed, on obtaining her majority, with the other beneficiaries, to postpone the division. An agreement was afterwards executed between the husband, wife, and the trustee of the estate, whereby, after reciting the above facts, the trustee agreed to advance her certain moneys which she agreed to repay within a specified period, the advance being made a charge on her share of the estate. The agreement also provided that the amount of the advance should be deducted from her share in case of non-payment, or of a division of the estate prior to the date fixed for repayment. The husband was a party to the agreement for the purpose only of joining in the covenant, and it was expressly agreed therein that none of the provisions of the indenture should "in anywise affect or prejudice the ordinary legal rights" of the trustee to enforce payment:—Held, that, notwithstanding the latter clause, the husband was liable as a surety only, and that he was entitled to be exonerated by his wife, and to the benefit of her property in the trustee's hands, and to an account in regard thereto from the date of the covenant sued on. *Lee* v. *Ellis*, 27 Ont. R. 608.

PRIVY COUNCIL.

Appeal to.]—See Appeal, III (*a*).

PROBATE ACT.

Probate Act, R.S.N.S., 5 ser., c. 100, p. 57—"Persons Interested" in Settlement of Estate—Personal Expenses of Administrator—Interest.]—The whole scheme of the Nova Scotia Probate Act (R.S.N.S. c. 100) is to include in the settlement of the estate all persons having any claim whatever. Where a person had been removed from the office of administrator, and had certain claims against the estate for moneys expended and personal services rendered, etc., it was held that he was a "creditor" or "person interested" within the meaning of the statute, and was entitled to have the accounts taken.—An administrator's travelling expenses incurred in connection with the business of the estate, but occasioned by his removal from the Province, do not fall within the meaning of the terms "actual and necessary" and "just and reasonable" expenses, as used in sec. 69 of the Act.—Where the administrator seeks to charge the estate for interest upon moneys advanced by him for its purposes, he must furnish clear and satisfactory proof of the necessity for such advances being made. Where he claims for moneys paid by him for witness fees in suits brought in connection with the estate, he must prove the name of the witnesses, distances travelled, number of days in attendance, and the amount paid each witness. *Re Estate Alexander McRae*, 28 N.S.R. 20.

—Probate Act, R.S. N.S., 5 ser. c. 100—Appointment of Stranger as Administrator.]—Upon opposing applications for letters of administration by two persons interested in the estate of deceased, the Judge of Probate refused administration to either and suggested that they should agree upon an administrator. Finding that it was impossible for them to agree, he appointed a Trust Company as administrator:—Held, that the mere fact that the contending applicants would not agree afforded no ground for the appointment of a stranger, the company

being a stranger within the meaning of the expression. Case remitted to Judge to determine, on proper evidence, whether some person interested in the estate should not be appointed before appointing a stranger. *Re Estate of Mary F. W. Smith*, 28 N.S.R. 221.

And see EXECUTORS AND ADMINISTRATORS.
" WILL.

PROCES VERBAL.

—Public Road—Several Municipalities interested in—Payment of Costs—Demand—Action—Arts. 951, 961, M.C.]—See ACTION, I.

PROHIBITION.

County Court — Jurisdiction.] — Where the want of jurisdiction is not apparent on the face of the proceedings in a County Court, and moreover, where it is not a case of total want of jurisdiction in that court, but only a question as to which particular County Court could entertain the action, the Court may refuse to grant prohibition: *Maxwell* v. *Clark*, 10 Man. R. 406; *Gibbins* v. *Chadwick*, 8 Man. R. 209 followed. *Elliot* v. *May*, 11 Man. R 306.

—Sale of Liquor—Distribution of Legislative Powers.]

See CONSTITUTIONAL LAW, II (*a*).

—Promissory Note—Instalments — Jurisdiction of Division Court.]

See DIVISION COURTS.

—Writ of—Magistrate — Issue of Distress Warrant.]

See JUSTICE OF THE PEACE.

—Writ of—Railway Co.—Taxes—Seizure of part of Line—Stay of Sale.]

See RAILWAYS AND RAILWAY COMPANIES, VII.

PROMISSORY NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROMOTER.

Of Company.]

See COMPANY.

"PROPRIETARY INTEREST."

See HUSBAND AND WIFE, V.

PROPRE.

Of Wife—Donation to Husband—Community—Arts. 1,260 et seq. C.C.]

See HUSBAND AND WIFE, III.

PROVINCIAL GOVERNMENT.

Contract with—Powers of Members of Executive Council—Ratification.]

See CONSTITUTIONAL LAW, I (*b*).

PUBLIC HEALTH.

See MUNICIPAL CORPORATIONS, II (*c*) AND X.

PUBLIC NUISANCE.

Suppression of—Mode.]

See MUNICIPAL CORPORATIONS, X.

PUBLIC LANDS.

Constitutional Law—Navigable Waters—Title to bed of Stream—Crown—Dedication of Public Lands by — Presumption — User—Obstruction—Public Nuisance.]

See CONSTITUTIONAL LAW, III.

PUBLIC PARKS.

See MUNICIPAL CORPORATIONS, IX.

PUBLIC SCHOOLS.

See SCHOOLS.

PUBLIC WORK.

Public Work—Injurious Affection—Destruction of Highway—Measure of Damages—Obstruction to Navigation.] Where lands are taken for a public work, and other lands, held with those so taken, are injuriously affected by the construction of the work, the measure of damages is, in general, the value of the lands taken and the depreciation in value of such other lands. The claimant's lands were situated upon an island connected with the mainland by a highway carried over a structure in waters that were, in law, navigable, but had not been used for the purpose of navigation, being only some five or six feet in depth. The obstruction had been acquiesced in for many years. The Crown had repaid to the land owners on the island money the latter had expended in repairing the highway over this structure, and the municipality had also expended money in repairing the highway where it crossed such waters. By the construction of a public work this highway was flooded and destroyed. The Crown, however, treated it as a public way, and substituted another way for it that mitigated but did not wholly prevent the depreciation in value of the claimant's property:—Held, that even if the legislature had not authorized the obstruction in such navigable waters, the claimant was entitled to compensation for the depreciation caused by the construction of the public work.

inasmuch as such depreciation did not arise from any proceeding taken by the Crown for the removal of such obstruction. *The Queen* v. *Moss*, 5 Ex. C.R. 30, affirmed on appeal. See 26 S.C.R. 322.

—**Contract—Progress Estimate—Action on.**]
See CONTRACT, III (*a*).

—**Contract—Final Certificate of Engineer—Previous Decision—Necessity to follow.**]
See RES JUDICATA.
" CONTRACT, VII.

—**Contract—Public Work—Progress Estimates—Engineer's Certificate — Revision by Succeeding Engineer—Action for Payment on Monthly Certificate.**]—See CONTRACT, VII.

—**Wharf Property injuriously affected—Evidence—Damages.**]—*The Queen* v. *Robinson*, 25 S.C.R. 692 affirming 4 Ex. C.R. 439.

See also RAILWAYS AND RAILWAY COMPANIES.

RAILWAYS AND RAILWAY COMPANIES.

I. CARRIAGE OF GOODS.

Carriage of Goods—Connecting Lines—Special Contract—Loss by Fire in Warehouse—Negligence.]—In an action by S., a merchant of Merlin, Ont., against the Lake Erie and Detroit River Railway Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G.T.R. Co., and the rest to the C.P.R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie, &c., Co. for carriage to Merlin. That on receipt by the Lake Erie Co. of the goods it became their duty to carry them safely to Merlin and deliver them to S. There was also an allegation of a contract by the Lake Erie Co. for storage of the goods and delivery to S. when requested, and the lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co. at Merlin:—Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G.T.R. to be transferred to the Lake Erie Co. as alleged, if the cause of action stated was one arising *ex delicto* it must fail, as the evidence showed that the goods were received from the G.T.R. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G.T.R. to the consignors, and if it was a case of action founded on contract it must also fail, as the contract under which the goods were received by the G.T.R. provided among other things that the company would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier.—Held further, that as to the goods delivered to the companies other than the G.T.R. to be transferred to the Lake Erie Co., the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G.T.R., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie Co., and such finding should not be interfered with.—Held also, that as to goods carried on a bill of lading issued by the Lake Erie Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one, as the company only undertakes to warehouse goods of necessity and for convenience of shippers. *The Lake Erie and Detroit River Railway Co.* v. *Sales*, 26 S.C.R. 663.

—**Negligence—Release—Reduced Rates of Carriage—51 V. (D.), c. 29, s. 246—Findings by Jury—New Trial.**]—A railway company is liable for damages to goods resulting from negligence, even though the shippers of the goods agree in consideration of the allowance of a reduced rate of freight not to hold the company liable: *Vogel* v. *Grand Trunk Ry. Co.*, 11 S.C.R. 612, followed. *Cobban* v. *The Canadian Pacific Railway Company*, 23 Ont. A.R. 115.

II. CARRIERS OF PASSENGERS AND LUGGAGE

—**Railway Ticket—Right to Stop Over.**]—By the sale of a railway ticket the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at any intermediate station: *Craig* v. *Great Western Railway Co.* (24 U.C.Q.B. 509); *Briggs* v. *The Grand Trunk Railway Co.* (24 U.C.Q.B. 516); and *Cunningham* v. *The Grand Trunk Railway Co.* (9 L.C. Jur. 57; 11 L.C. Jur. 107) approved and followed. *Coombs* v. *The Queen*, 26 S.C.R. 13, affirming 4 Ex. C. R. 321.

III. FIRE FROM ENGINES.

—**Railway Company—Negligence—Sparks from Engine or "Hot-box"—Damages by Fire—Evidence—Burden of Proof—Art. 1053 C.C.—Question of Fact.**]—In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was not sufficient proof that the fire occurred through the fault or negligence of the company and it was not shown that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding. *Sénésac* v. *Central Vermont Railway Co.*, 26 S.C.R. 641.

IV. Government Railways.

See hereunder Nos. V. and VI.

V. Injury to Persons.

—Loan of Cars — Reasonable Care — Breach of Duty — Negligence — Risk Voluntarily Incurred—"Volenti non fit injuria."]—A lumber company had railway sidings laid in their yard for convenience in shipping lumber over the line of railway with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway thereupon sending their locomotives and crew to the respective sidings in the lumber yard and bringing away the cars to be despatched from their depot as directed by the bills of lading:—Held, that in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that where the lumber company's employees remained in a car lawfully pursuing their occupation there, the person in charge of the locomotive owed them the duty of using reasonable skill and care in moving the car with them in it, so as to avoid all risk of injury to them.—On the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted, the jury had found that "the deceased voluntarily accepted the risk of shunting," and that the death of the deceased was caused by defendant's negligence in the shunting, in giving the car too strong a push:—Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the maxim "*volenti non fit injuria*" had no application: *Smith* v. *Baker* ([1891] A. C., 325) applied. *The Canada Atlantic Railway Co.* v. *Hurdman*, 25 S.C.R. 205.

—Negligence—Injury to the Person on a Railway—Undue rate of speed of Train at Crossing—Liability of Crown—50 & 51 V., c. 16, s. 16 (c).]—Where a train was approaching a level crossing over a public thoroughfare in a town and the conductor was aware that the watchman or flagman was not at his post at such crossing, it was held that the conductor was guilty of negligence in running his train at so great a rate of speed as to put it out of his control to prevent a collision with a vehicle which had attempted to pass over the crossing before the train was in sight. Where such negligence occurs on a Government railway the Crown is liable therefor under 50 & 51 V., c. 16, s. 16 (c.) *Connell* v. *The Queen*, 5 Ex. C.R. 74.

—Moving Train—Postal Car—Bare Licensee—Accident—Negligence.]—The plaintiff was injured in attempting to post a letter on a train. It appeared that the train, to which was attached a postal car with an opening in the door for posting letters, provided by direction of the Post Office Department for the use of the public, had just commenced to move out of the station, and the plaintiff, while following the car, tripped and fell and was injured, as was alleged, on a stake some inches out of the ground, which had been planted by the defendants for the furtherance of alterations being made in the station:—Held, that the plaintiff was a bare licensee upon the premises of the defendants, who under the circumstances were not liable to him. *Spence* v. *Grand Trunk Railway Co.*, 27 Ont. R. 303.

—Passenger—Ticket—"Station"—Access to—Invitation—Passenger lawfully upon the Railway—Negligence—Passing Train.]—A person purchased a ticket from the defendants entitling him to travel on their railway from a certain station to the station nearest his place of residence. He took a train from the former to the latter station, although notified by the defendants that it would not go beyond a crossing station some miles short of his destination by rail. Leaving the train at the crossing station he proceeded to walk home by the railway track, and, going westward, and while within a short distance of a highway to the east of the crossing station, he was struck and killed by a following train, which, on approaching the highway had omitted to give the statutory warning. The defendants sold tickets to the crossing station from all their regular stations, and received passengers commencing their journey at it, but, although they had the power to expropriate, they had provided no means of access to or from the station and the nearest highways, except their tracks, which they had permitted passengers to use:—Held, that all persons, whether travelling on a highway or not, are entitled to the benefit of the provisions of sec. 256 of the Railway Act, requiring warning by bell or whistle on approaching the highway; and that the deceased had a right to travel on his ticket to the crossing station, which the defendants had recognized as a station, and being lawfully there, had the right of egress from it, and, by necessity, to be upon the track, to which the defendants had impliedly invited him, and that the neglect of the statutory provision was evidence of negligence to go to the jury. *Anderson* v. *Grand Trunk Railway Co.*, 27 Ont. R. 441.

—Jury—Answers to Questions—Negligence—Act of Incorporation—Change of Name.]—*Pudsey* v. *The Dominion Atlantic Railway Co.*, 25 S.C.R. 691.

—Accident on—Medical Aid to Injured—Action de in rem verso for Value of Services.]

See Action, II.

VI. Lands Expropriated.

—Expropriation for Railway purposes—Owner in possession of Building on Expropriated Property—Use and Occupation—Profits—Interest—Compensation.]—Where the Crown had expropriated certain real property for the purposes of a railway, but had for a number of years left the owner in the use and occupation of several buildings thereon, two of which, an hotel and a store, were burned uninsured, before action brought, compensation was allowed him for the value, at the time of the expropriation, of

all the buildings, together with interest on the value of the hotel and store from the time they were so destroyed. *The Queen* v. *Clarke*, 5 Ex. C.R. 64.

—**Expropriation for Railway—Temporary Enhancement in Value of Lands—Compensation—Interest.**]—The temporary enhancement in the value of lands by reason of their being adjacent to the site of a projected railway terminus which had been abandoned, was not taken into consideration by the court in assessing compensation under the 31st section of the Exchequer Court Act (prior to its amendment by 54 & 55 Vict., c. 26, s. 37) for the expropriation of such lands.—Where the Crown has gone into possession of lands sought to be expropriated for the purposes of a public work, interest upon the sum awarded as their value may be computed from the date of entering into possession, notwithstanding the fact that the Crown may not have acquired a good title to the lands until a date subsequent to that of such entry into possession. *The Queen* v. *Murray*, 5 Ex. C.R. 69.

—**Railway Act, [1888] (D) —Taxation of Costs—Revision of—Interest.**]—In proceedings for expropriation under the Railway Act, 1888 (D) the taxation of a bill of costs by a judge of the Superior Court is final and cannot be revised either on appeal or in an action to recover the amount so taxed. As the taxation effects no condemnation except as to the amount of costs to be paid by the losing party, interest on the amount only runs from the institution of the action to recover them or from the date of a legal demand. *Wood* v. *Atlantic & North-West Railway Co.*, Q.R. 9 S.C. 297.

—**Lands Injuriously Affected—Right to Compensation.**]—See *Hendrie* v. *The Toronto, Hamilton and Buffalo Railway Co.*, 27 Ont. R. 46, affirming 26 Ont. R. 667.

VII. Miscellaneous Cases.

—**Imported Steel Rails—Street Railways—Tramways—Law of Canada—Construction—Dominion Act (50 & 51 V., c. 39) s. 1, item 88; s. 2, item 173.**]—Although there may be in various Canadian Acts and for other purposes substantial distinctions between railways or railway tracks, and street railways and tramways, yet, for the purpose of separating free and dutiable articles, such distinction is not maintained in 50 & 51 Vict., c. 39, and its three predecessors. According to the true construction of that Act (see s. 1, item 88, and s. 2, item 173), the question whether imported steel rails are taxed or free depends solely upon their weight, not upon the character of the railway track for which they are intended. *Toronto Railway Co.* v. *The Queen* [1896], A.C. 551, reversing 25 S.C.R. 24.

—**Prescription — Commencement — Continuing Damage—Tortious Act—Public Work—Contractor—Liability of Company for act of.**]—The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act, and could have been foreseen and claimed for at the time. A company building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place and in a manner not authorized by the contract. *Kerr* v. *The Atlantic and Northwest Railway Company*, 25 S.C.R. 197.

—**Arbitration—51 V., c. 29, s. 150 (D.)—"Opposite Party"—Mortgagor and Mortgagee.**]—The word "opposite party" in s. 150 of the Dominion Railway Act, 51 V., c. 29, s. 150, must be read so as to include both mortgagor and mortgagee, and both must concur in the appointment of an arbitrator to determine the compensation to be paid for mortgaged land required for the railway. *Re Toronto, Hamilton and Buffalo Railway Co. and Burke*, 27 Ont. R. 690.

—**Immovable — Sale for Taxes — Prohibition.**]—A railway company whose land, forming an integral part of its line, has been announced by a municipal corporation as about to be sold for taxes, can cause such sale to be restrained by writ of prohibition. An integral and essential part of a railway cannot be seized separately from the whole. *The Montreal, Portland & Boston Railway Co.* v. *The Town of Longueuil*, Q.R. 9 S.C. 3.

—**Railway Company—Immovable acquired by —Hypotheque.**]—Where a portion of an immovable subject to a hypothec is acquired by a railway company by amicable purchase, and the company does not deposit the price, the hypothecary creditor has the ordinary recourse against the company as *détenteur*, but only to the extent of the value of the land so acquired. *Clearihue* v. *The St. Lawrence & Adirondack Railway Co.*, Q.R. 9 S.C. 399.

—**Sale of Railway under Mortgage, where part is outside of Province—Jurisdiction—Priority of Lien for Working Expenses—Receiver.**]—When a portion of a mortgaged railway extends beyond the province, the Court cannot decree a sale of the whole of it because of such portion being without the jurisdiction, nor of such portion as is within the jurisdiction, unless it can be cut off and operated separately by the purchaser. *Redfield* v. *Wickham*, 13 App. Cas. 467, referred to. But in such a case the first mortgagees in trust for bondholders are entitled to have a receiver appointed, an account taken, and an order for payment into Court, also an inquiry as to what personal property was embraced in their security, and to have that sold. —Held, also, that under the statute authorizing the plaintiffs' mortgage, 46 Vict. (D.), c. 68, s. 5, the working expenses of the whole railway were a first lien on the revenues thereof, and should be provided for in priority to the claim of the plaintiffs under their mortgage. *Gray* v. *Manitoba and Northwestern Railway Co.*, 11 Man. R. 42.

—**Receiver — Duties — Working Expenditure — Railway Act, s. 2.**]—A railway was in possession of a receiver and manager, whose duties under the order appointing him were to receive and manage the railway property and assets, to operate, carry on and superintend the said

railway, to receive the revenue, to pass his accounts from time to time, and pay into court whatever balance should be found due from him after paying the expenses of operation and management of said railway. The defendant company applied for payment, by the receiver or out of moneys paid into court by him, of the salary of the secretary of the Company, directors' fees, expenses of an office for the company, and of meetings of directors, etc.:—Held, that these matters had nothing to do with the operation and management of the railway, and that the receiver could not be authorized to pay them: Held, also, that as by another order all proceedings had been stayed except such as might be necessary in connection with the management of the railway by the receiver, no application for payment of such expenses out of the money in court could be entertained pending the stay of proceedings:—Held, also, that the term "expenses of operation and management," in the Court order should not be given the extended meaning of the term "working expenditure" as defined in s. 2, s.s. (*x*) of The Railway Act, 51 V., c. 29. *Charlebois* v. *Great North West Central Railway Co.*, 11 Man. R. 135.

—**Railway Act [1890] s. 38 (B.C.)—Tramway.**]—Held, per Crease, Walkem and Drake, J.J., McCreight, J., contra, that a tramway is not a "railway" within the meaning of the Railway Act of 1890, sec. 38 (B.C.) *Edison General Electric Co.* v. *Edmonds*, 4 B.C.R. 354.

—**Contract for Construction—Control of Works by Company—Responsibility for acts of Contractor.**]—See ACTION, V.

—**Municipal Corporation—By-law—Assessment—Local Improvements—Agreement with Owners of Property—Construction of Subway—Benefit to Lands.**]—See MUNICIPAL CORPORATION, V.

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

See MUNICIPAL CORPORATION, II (*c*).

—**Mandamus — Cattle — Fences — Damages — 53 V., c. 28 (D.) s. 2.**]—See MANDAMUS.

—**Crossings—Railway Act, [1888]—Power of Railway Committee.**]

See CONSTITUTIONAL LAW, II (*a*).

— **Dominion Railways Act, s. 165 — Judge — Persona Designata—Appeal.**]—See APPEAL, I.

—**Practice—Production of Documents by Receiver of Railway Company.**]

See RECEIVER.
" also NEGLIGENCE.

REAL PROPERTY ACT.

Registration—Execution—Unregistered Transfers—Equitable Rights—Sales under Execution R.S.C. c. 51; 51 V. (D.) c. 20.]

See EXECUTIONS, V.

RECEIVER.

Equitable Execution — Pending Action — Unliquidated Damages.]—A receiver will not be appointed by way of equitable execution on behalf of a judgment creditor to receive the amount of a claim for unliquidated damages which his debtor is seeking to recover in a pending action. *The Central Bank* v. *Ellis*, 27 Ont. R. 583.

—**Receiver—Ex parte Order—Costs—Review.**]—After judgment, a receiver may be appointed *ex parte* in case of emergency, or where there is danger apprehended in the disposal of property: *Re Potts* (1893), 1 Q.B. at p. 662, and *Minter* v. *Kent, etc., Land Society*, 11 Times L.R. 197, referred to.—Where costs are given to the applicant on an *ex parte* order in such a case the Court will not review the direction as to costs upon a motion to continue the receiver: *McLean* v. *Allen*, 14 Ont. P.R. 84, distinguished. *Stark* v. *Ross*, 17 Ont. P.R. 237.

— **Railway — Receiver — Production of Documents.**]—The opposite party in a suit is entitled to the production of the books of a railway company, although the company may be in the hands of a receiver, who is entitled to the custody of the books and documents, if he has not actually taken possession of them. The usual order for production was varied in this case by directing only that the books and documents be produced to the plaintiffs or their solicitors, on demand after twenty-four hours' notice at the company's general offices, and that the plaintiffs or their solicitors be allowed to take copies of, or extracts from, such portions of the contents as related to the matters in question. *Maxwell* v. *Manitoba and Northwestern Railway Co.*, 11 Man. R. 149.

—**Of Foreign Corporation—Right to Appear in Judicial Proceeding—Action by Transferee—Contract—Evidence.**]—See ACTION, I.

—**Duties of Receiver—Working Expenditure—The Railway Act, s. 2.**]

See RAILWAYS AND RAILWAY COMPANIES, VII.

RECEL.

Landlord and Tenant—Removal of Goods by Tenant—Seizure before Judgment.]

See LANDLORD AND TENANT, XIII.

RECOGNIZANCE.

Forfeiture of—Cognizors—Joint and Several Liability—Arrest.]—Where a recognizance has been forfeited, and judgment entered in favour of the Crown against the cognizors, who are jointly and severally liable, one of the cognizors is not subject to *contrainte par corps* until it is established that sufficient real and personal property cannot be found belonging to the other to satisfy the judgment. *The Queen* v. *Ferris*, Q.R. 9 S.C. 376.

REDDITION DE COMPTE.

Agreement to Account—Contestation—Procedure.]—Where parties have not agreed to adjust accounts between them in a friendly way formal accounts should be rendered; and the fact that there would have been, between the rendering and auditing of an account, contestation as to the title of an immovable mentioned in a declaration as appertaining in part to the plaintiff, and of the revenues of which the defendant would be required to render an account, does not relieve the defendant of his obligation to render an account of his general administration. *Durocher* v. *Durocher*, Q.R. 9 S.C. 448.

REFERENCE.

Referee—Report—Fees.]—Upon a reference under sec. 102 of the Judicature Act (Ont.), the referee apportioned the amount of his fees between the plaintiffs and defendants according to the time occupied by each upon the reference. The plaintiffs paid their share, but the defendants did not:—Held, that the referee should issue his report to the plaintiffs without further payment by them, and look to the defendants for their share of his fees *Brooks* v. *Georgian Bay Saw-log Salvage Co.*, *Rumley* v. *Georgian Bay Saw-log Salvage Co.*, 17 Ont. P.R. 34.

—Allowance of Interest by Referee—58 V., c. 12, s. 118 (O.)]—See INTEREST.

— Vacation — Proceedings in Official Referee's Office.]—See PRACTICE AND PROCEDURE, XIX.

REGISTRATION.

See BILLS OF SALE.
" MINES AND MINERALS.
" SALE.
" SOULTE.

REGISTRATION OF JUDGMENT.

Authority of Solicitor—Acquiescence.]
See SOLICITOR.

REGISTRY LAWS.

Trespass — Damages — Easement — Equitable Interest—Municipal By-law, Registration of—Notice—Registry Act, R.S.O. c. 114.]—R. S. O. [1887] c. 114, s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests—If the owner of land gives permission to the municipality to construct a drain through it, the municipality, after the work has been done, has an interest in the land to which the registry laws apply, whether the agreement conveys the property, creates an easement, or is a mere license which has become irrevocable, and if there has been no by-law authorizing the land to be taken such interest is, under the said section, invalid as against a registered deed executed by an assignee of the owner, a purchaser for value without notice: *Ross* v. *Hunter* (7 S.C.R. 289) distinguished. *The City of Toronto* v. *Jarvis*, 25 S.C.R. 237.

—Mortgage — Agreement to charge Lands—Statute of Frauds—Registry.]—The owner of an equity of redemption in mortgaged lands, called the Christopher Farm, signed an agreement which his solicitor wrote on one of his letter forms under the printed words "Dear Sir," his own name being at the bottom on the left side, and he made an affidavit, as subscribing witness, to have it registered. In an action arising out of this agreement it was contended that the solicitor was not a subscribing witness but only the person to whom the letter was addressed:—Held, affirming the judgment of the Court of Appeal, that the solicitor signed the agreement as a witness and the registration was, therefore, regular, but if not, as the document was upon the registry, a subsequent purchaser had actual notice by which he was bound notwithstanding the informality in the proof of execution, which did not make the registration a nullity:—Held, per Taschereau, J., that the agreement did not require attestation, and if the solicitor was not a witness it should have been indorsed with a certificate by a county court judge as required by R.S.O. (1887) c. 114, s. 45, and it having been registered the court would presume that such certificate had been obtained. *Rooker* v. *Hoofstetter*, 26 S.C.R. 41.

—Real Property Act—Registration—Execution—Unregistered Transfers—Equitable Rights—Sales under Execution—R.S.C. c. 51; 51 V. (D.) c. 20.]—The provisions of sec. 94 of the Territories Real Property Act (R.S.C. c. 51), as amended by 51 Vict. (D.) c. 20, do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees, but merely protect the lands from intermediate sales and dispositions by the execution debtor. If the sheriff sells the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers. *Jellett* v. *Wilkie*. *Jellett* v. *The Scottish Ontario and Manitoba Land Co*. *Jellett* v. *Powell*. *Jellett* v. *Erratt*, 26 S.C.R. 282.

—Registered Deed—Priority over earlier Grantee—Postponement—Notice.]—To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable. *The New Brunswick Railway Co.* v. *Kelly*, 26 S.C.R. 341.

—Mortgage—Mining Machinery—Registration—Fixtures—Interpretation of Terms—Bill of Sale—Personal Chattels—R.S.N.S. (5 Ser.) c. 92, ss. 1, 4 and 10 (Bills of Sale)—55 V., (N.S.) c. 1, s. 143, (The Mines Act).]—The "fixtures" included in the meaning of the expression "Personal Chattels" by the tenth section of the Nova Scotia Bills of Sale Act, are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act. An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia Bills of Sale Act (R.S.N.S. 5 ser. c. 92), and there is now no distinction, in this respect, between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee. *Warner v. Don*, 26 S.C.R. 388.

—Assignment for Benefit of Creditors—R.S. N.S. (5th Ser.) c. 92—Chattel Mortgage—Statute of Elizabeth.]—See ASSIGNMENT.

—Unpaid Vendor—Hypothecary Creditor—Resolutory Condition—Immovables by Destination—Movables Incorporated with Freehold—C.C. arts. 379, 2017, 2083, 2085, 2089.]
See CONTRACT, III (*a*).

—Mortgage—Building Loan—Subsequent Mortgage—Priority.]—*Piercé* v. *Canada Permanent Loan & Savings Co.*, 23 Ont. A.R. 516, affirming 25 Ont. R. 671.

—Defect in Proofs for Registration—R.S.O. c. 114, s. 80.]—See EQUITABLE ASSIGNMENT.

—Sale of Land—Mortgagee without Notice—Equitable Relation of Vendor and Vendee.]
See LIMITATION OF ACTIONS, I.

—Public Highway—Registered Plan—Dedication—User—Construction of Statute—Retrospective Statutes—Estoppel—46 V. (Ont.) c. 18.]
See MUNICIPAL CORPORATIONS, IV.

—Agreement charging lands—Statute of Frauds—Registration—Proof of Execution.]
See NOTICE.

REGLE.

See PRACTICE AND PROCEDURE, XVII (*b*)

RELIGIOUS ADVISER.

Privilege of.]—See WITNESS.

RELIGIOUS INSTITUTIONS ACT, (ONT.)

Minister's Residence—Necessity for User as—R.S.O. c. 237, ss. 1, 23—38 V., c. 76, s. 10 (O.)
See WILL, IV.

REMAINDERMAN

See TENANT FOR LIFE.

RENOUVELLEMENT D'ENREGISTREMENT.

See SOULTE.

RENT.

Attachment for Rent—Distress.]
See ATTACHMENT OF DEBTS.
" LANDLORD AND TENANT, IV.

—Garnishment of—Apportionment—Suspension of Right of Distress.]
See LANDLORD AND TENANT, IV.

—Statute of Limitations—Payment of Mortgage—R.S.O. c. 111, s. 15.]
See LIMITATION OF ACTIONS, I.

REPARTITION.

—Of Cost of Procés verbal—Action by County Corporation—Demand of Payment—Arts. 951, 961 M.C.]—See ACTION, I.

REPLEVIN.

—Trust Goods—Advances to buy Goods—Equitable Title.]—See ACTION, II.

—Canada Temperance Act—Search Warrant—Magistrate's Jurisdiction—Constable—Justification of Ministerial Officer—Goods in custodiâ legis—Estoppel—Res Judicata—Judgment inter partes.]—See CANADA TEMPERANCE ACT.

—Distress Warrant—Solicitor's Costs.
See CANADA TEMPERANCE ACT.

—Of Confiscated Gambling Instruments, Money, &c.—Criminal Code, s. 575—"The Canada Evidence Act, 1893"—Rules of Evidence—Impeachment of Forfeiture.]—See CRIMINAL LAW, III.

—Debtor and Creditor—Agreement—Conditional License to take Possession of Goods—Creditor's Opinion of Debtor's Incapacity, bonâ fides of—Replevin—Conversion.]
See DEBTOR AND CREDITOR, V.

REPONSE SPECIALE.

To défense en droit—Rejection.]—To reply specially to a *défense en droit* is irregular and the *réponse spéciale* will be rejected on motion. *Beaubien* v. *Fitzallen*, Q.R. 9 S.C. 72.

REPRISE D'INSTANCE.

Universal Legatee—Failure to take up instance—Vacation.]

See ACTION, II.

RESILIATION.

Of Lease—Notice—Mise en demeure.]

See LANDLORD AND TENANT, V.

RES JUDICATA.

Action—Bar to—Foreign Judgment—Estoppel—Judgment obtained after Action begun—R.S. N.S. 5 ser., c. 104, s. 12, s.s. 7; Orders 24 and 70, R. 2; Order 35, R. 38.]—A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada.—Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta* (1 P.D. 393) distinguished. —The combined effect of the orders 24 and 70, rule 2, and s. 12, s.s. 7 of ch. 104 R.S.N.S. (5 ser.), will permit this to be done in Nova Scotia. *Law* v. *Hansen*, 25 S.C.R. 69.

—Title to Land—Action en bornage—Surveyor's Report—Judgment on—Acquiescence in Judgment—Chose Jugée.]—In an action *en bornage* between M. and B. a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the Court of Review, claiming that the report gave B. more land than he claimed, and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review, but that his measurements showed that the line indicated was not in the line of the old fence, and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor, having been homologated by the court, was final as to the location of the fence and that the judgment had been properly executed. The Court of Queen's Bench reversed this judgment, set aside the last report and ordered the surveyor to place the boundaries in the true line of the old fence:—Held, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review in which the parties acquiesced was *chose jugée* between them not only that the division line between the properties must be located on the line of the old fence but that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else than start his line at the said point. *Mercier et vir* v. *Barrette*, 25 S.C.R. 94.

—Contract—Public Work—Final Certificate of Engineer—Previous Decision—Necessity to Follow.] The Intercolonial Railway Act provides that no contractor for construction of any part of the road should be paid except on the certificate of the engineer, approved by the commissioners, that the work was completed to his satisfaction. Before the suppliant's work in this case was completed the engineer resigned, and another was appointed to investigate and report on the unsettled claims. His report recommended that a certain sum should be paid to the contractors:—Held, per Taschereau, Sedgewick and King, JJ., that as the court in *McGreevy* v. *The Queen* (18 S.C.R. 371) had, under precisely the same state of facts, held that the contractor could not recover, that decision should be followed, and the judgment of the Exchequer Court dismissing the petition of right affirmed:—Held, per Gwynne, J., that independently of *McGreevy* v. *The Queen*, the contractor could not recover for want of the final certificate:—Held, per Strong, C.J., that as in *McGreevy* v. *The Queen* a majority of the judges were not in accord on any proposition of law on which the decision depended, it was not an authority binding on the court, and on the merits the contractors were entitled to judgment. *Ross* v. *The Queen*, 25 S.C.R. 564, affirming 4 Ex. C. R. 390.

—Canada Temperance Act—Search Warrant—Magistrate's Jurisdiction—Constable—Justification of Officer—Goods in Custodiâ Legis—Replevin—Estoppel—Judgment Inter Partes.]—A search warrant issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face, it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.—A judgment on certiorari quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceeding to set the warrant aside, and such judgment was a judgment *inter partes* only. *Sleeth* v. *Hulburt*, 25 S.C.R. 620, reversing 27 N.S.R. 375.

—Nova Scotia Probate Act—R.S.N.S., 5 ser., c. 100; 51 V. (N.S.) c. 26—Executors and Administrators—License to sell Lands—Estoppel.]—An executrix obtained from the Probate Court a license to sell real estate of a deceased testator for the payment of his debts. Judgment creditors of

the devisees moved to set aside the license, but failed on their motion and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same, knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser brought an action to have it declared that the judgment was not a charge thereon:—Held, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors and they were precluded thereby from taking collateral proceedings to charge the lands affected, upon grounds invoked or which might have been invoked upon the motion:—Held, further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action. *Clarke* v. *Phinney*, 25 S.C.R. 633, affirming 27 N.S.R. 384.

—**Debtor and Creditor—Security Realized by Creditor—Appropriation of Proceeds—Res judicata.**]—Under the Ontario Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded. *Cooper* v. *Molsons Bank*, 26 S.C.R. 611.

—**Prerogative—Chose Jugée—Effect of when Pleaded against the Crown.**]—The doctrine of *res judicata* may be invoked against the Crown. *The Queen* v. *St. Louis*, 5 Ex. C.R. 330.

—**Insolvency—Appointment of Curator—Objections to—Judgment on—Subsequent Proceedings.**]—Where a creditor of an insolvent applied by petition to set aside an assignment by the latter which the Court refused, he was not allowed, in subsequently opposing an opposition by the curator to the sale of the insolvent's property under execution, to urge the same objections to the assignment which appeared in his petition the judgment on which was *chose jugée*. *Hartman* v. *Babson*, Q.R. 9 S.C. 241.

—**Interlocutory Judgment—Divisional Court.**]—A judgment of the Divisional Court is not *res judicata*, unless an appeal lies therefrom to the full court, and thence as of right to the Supreme Court of Canada. *Edison General Electric Co.* v. *Edmonds*, 4 B.C.R. 354.

—**Justices of the Peace—Trial by—Civil Action—Failure of Jury to agree—Res Judicata.**]

See JUSTICE OF THE PEACE.

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

See PARTNERSHIP, I.

RESOLUTION DE VENTE.

See SALE, III (*b*).

RESPONSABILITE.

See ACTION.
" BENEFIT SOCIETIES.
" COLLECTION AGENCY.
" DAMAGES.
" LIBEL AND SLANDER.
" LIMITATION OF ACTION.
" MUNICIPAL CORPORATIONS.
" NEGLIGENCE.
" NOTARY.

REVENDICATION.

Goods Under Seizure — Revendication.]—Goods seized by officers of the Crown for infraction of the revenue laws cannot be revendicated by the owner pending the proceedings for forfeiture and confiscation. *Poupart* v. *Vincent*, Q.R. 9 S.C. 190.

—**Of Moneys Seized in Gambling House—Rules of Evidence—Impeachment of Judgment Declaring Forfeiture.**]—See CRIMINAL LAW, III.

REVENUE.

Steel Rails—Street Railway—50 & 51 V., c. 39 (D.), s. 1, item 88; s. 2, item 173.]—Steel rails for use on street railway tracks are exempt from duty under 50 & 51 Vict., c. 39, sec. 1, item 88, and sec. 2. item 173, which exempts steel rails of a specified weight "for use on railways." *Toronto Railway Co.* v. *The Queen*, [1896] A.C. 551, reversing 25 S.C.R. 24, and 4 Ex.C.R. 262.

—**Tariff Acts of 1894 and 1895—The Customs Act (R.S.C. c. 32, as amended by 52 V., c. 14, c. 12) s. 150—Importation of Goods—Assessment of Duty.**]—An importation of goods is complete within the meaning of the 150th section of The Customs Act when the ship in which the goods are carried comes within the limits of the first port in Canada at which such goods ought to be reported at the customs. *The Queen* v. *The Canadian Sugar Refining Co. (Ltd.)*, 5 Ex.C.R. 177, reversed by Supreme Court of Canada, 27 S.C.R. 395.

—**Breach—Seizure of Vessel—Controller's Decision—Reference to Court—Petition of Right—Jurisdiction—Damages for Wrongful Seizure and Detention.**]—The Controller of Customs had made his decision in respect of the seizure and detention of a vessel under the provisions of The Customs Act, confirming such seizure. The owner of the vessel within the thirty days mentioned in the 181st and 182nd sections of the said Act gave notice in writing to the Controller that his decision would not be accepted. No reference of the matter was made by the Controller to the court as provided in the said section, but the claimant presented a petition of right and a *fiat* was granted. The Crown objected that the court had no jurisdiction to entertain the petition, and that the only procedure open to the claimant was upon a reference by the Controller to the court:—Held, that the court had jurisdiction.—Damages cannot be recovered against the Crown for the wrongful act of a customs officer in seizing a

vessel for a supposed infraction of the Customs law; but the claimant is entitled to the restitution of the vessel. *Julien* v. *The Queen*, 5 Ex.C.R. 238.

—Succession Duty Act—Present and Future Interests — Duty Payable — Annuity.]—Where a testator divides up his estate so as to create present and future estates or interests, the duty under the Succession Duty Act, 1892, 55 Vict., c. 6 (O.), is to be assessed on the whole estate at the time of his death, including both the present and future estates or interests, but duty is only payable at the death or within eighteen months thereafter on the present estates or interests, the payment of duty on the future estates being deferred until they become estates in possession or enjoyment, and the duty then payable is not the duty fixed at the time of the death, but that assessed upon the value of such estates or interests at the time the right of possession or enjoyment accrues.—In computing the duty on an annuity payable at a testator's death, and of which there is present actual enjoyment, the duty thereon must be assessed on its then cash value; on a deferred annuity, duty is payable when the right to enjoy it commences. Duty is also payable on the capital producing an annuity, when it becomes distributable as legacies or as part of the final distribution of the estate. *Attorney-General* v. *Cameron*, 27 Ont. R. 380.

—Goods Seized—Revendication.]—Goods seized by the officers of the Crown for infraction of the revenue laws cannot be revendicated by the owner pending the proceedings for forfeiture and confiscation. *Poupart* v. *Vincent*, Q.R. 9 S.C. 190.

—R.S.C. c. 34, s. 334—Breach—Penalty—Jurisdiction of Exchequer Court.]

See EXCHEQUER COURT OF CANADA.
See also ASSESSMENT AND TAXES.
" MUNICIPAL CORPORATIONS I AND V

REVIVOR.

Action — Delay — Change of Interests.]— A statute gave certain claimants a right to bring action within a year. Plaintiffs did so within the year, but no proceeding was taken by either party after the delivery of the defence, in June 1890, until one of the plaintiffs having died in January, 1895, the action was revived in February, 1896, by a præcipe order. In the meantime changes had taken place in the interest of the parties:—Held, that the order should not be interfered with, and that, as the defendants had not moved to dismiss they could not complain of the action being revived. *Ardagh* v. *The County of York*, 17 Ont. P.R. 184.

See also PRACTICE AND PROCEDURE, XV.

RIGHT OF WAY.

See EASEMENT.
" WAY, I.

RIPARIAN OWNER.

Canadian Waters—Property in Beds — Public Harbours—Erections in Navigable Waters—Interference with Navigation—Right of Fishing—Power to grant—Great Lakes and Navigable Rivers — Operation of Magna Charta — Provincial Legislation—R.S.O. (1887), c. 24, s. 47—55 V. c. 10, ss. 5 to 13, 19 to 21 (O.)—R.S.Q. arts. 1375 to 1378.]—Riparian proprietors before confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. *Robertson* v. *The Queen*, (6 S.C.R. 52) followed.—The rule that riparian proprietors own *ad medium filum aquae* does not apply to great lakes or navigable rivers. —Per Gwynne, J.—R.S.O. c. 24, s 47 is *ultra vires* so far as it assumes to authorize the sale of land covered with water within public harbours. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. The Act of 1892 and R.S.Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*. *In re Jurisdiction over Provincial Fisheries*, 26 S.C.R. 444.

—Driving Dam—Overflow of River—License—Acquiescence—Prescriptive Rights.—W. for the purpose of driving logs, built a dam on the part of a river above the land of M., and thereby caused the river to overflow and injure the property of M., who had some years before assisted in building a dam in the same place and for the same purpose. The land so injured became vested subsequently in M.'s wife, who jointly with M. brought a suit against W. for an injunction and damages:—Held, that they were not estopped by acquiescence from restraining W. by injunction from further injuring the land, nor from claiming compensation for the injury already done.—A right to use the stream to drive logs so as to injure another's land can never be acquired by prescription. *Mitten* v. *Wright*, 1 N.B.Eq. 171.

See WATERS AND WATER COURSES.

ROAD.

See MUNICIPAL CORPORATIONS, IV.
" WAY.

ROLE DE COTISATION.

See ASSESSMENT AND TAXES.

SAISIE-ARRET.

Before Judgment—Landlord and Tenant—Removal of Goods by Tenant—Secretion.]

See LANDLORD AND TENANT, XIII.

SAISIE-GAGERIE.

Lessor and Lessee—Lessor's Right of Seizure—Removal of Goods.]

See LANDLORD AND TENANT, IV.

—Husband and Wife—Wife Separated as to Property—Matters of Administration.]

See HUSBAND AND WIFE, IV.

SAISISSABILITE.

Honoraries—Substitute of Attorney-General.]

See ATTORNEY-GENERAL.

SALE.

I. SALE OF DEBTS AND GOODS.

(a) *Conditional Sale.*

Sale of Machinery—Retention of Ownership—Incorporation with Realty.]—An agreement for the sale of machinery on condition that, though delivered to the purchaser, the seller shall retain the ownership until the full price is paid, is a valid agreement. In order to regain possession the seller must pay back or tender what has been paid on account of the price unless the agreement provides that the same shall be forfeited as damages for non-performance.—To immobilize movables by destination they must be affixed to the realty by their owner and not by another person. *Waterous Engine Works Co.* v. *Hochelaga Bank*, Q.R. 5 Q.B. 125. Affirmed by Supreme Court of Canada, 27 S.C.R. 406.

—Verbal Sale—Possession—Registry.]—E. purchased furniture in a dwelling-house, and afterwards by memo. in writing hired it to the seller. A creditor of the latter having seized it under execution an interpleader issue was tried to determine the title:—Held, that E. was entitled to the goods; that the Registry Act does not prohibit verbal sales nor require written evidence of the same to be made and registered; and that if the subsequent hiring had been a contract of sale and hire (which it was not) its non-registration would not make it void as against execution creditors who are not mentioned in the Conditional Sales Act. *Esnouf* v. *Gurney*, 4 B.C.R. 144.

—Conditional Sale—Vendor's Lien—Landlord and Tenant.]—See LANDLORD AND TENANT, IV.

(b) *Delivery.*

—Warranty—Latent Defect—Reasonable Delay to Complain—Arts. 1506, 1530, C.C.]—A plea of conventional warranty against lameness and latent defects is no answer to an action for the price of a mare, when it appears that the animal was lame, to purchaser's knowledge, at the time of delivery, that he did not test her for three months, and did not notify the vendor that he would not keep her until five months after such delivery. And the purchaser under these circumstances is not entitled to a reduction of the price.—The object of Art. 1530 of the Civil Code, providing that "the vedlubitory action resulting from latent defects must be brought with reasonable diligence," is to protect a vendor from being prejudiced by the purchaser's delay in complaining. *Eglinton* v. *Ashmead*, Q.R. 9 S.C. 427.

—Commercial Sale—Action on Contract for—Evidence—Art. 1,235, s. 4, C.C.]—An action was brought for damages for non-delivery of goods which plaintiff alleged that defendant had agreed to sell and deliver to him at a fixed rate, the damages claimed being the difference between the selling price and the market price on the day of delivery:—Held, that the alleged contract was in a commercial transaction and fell under Art. 1,235, s. 4, C.C., and there having been no part payment, the plaintiff, not producing proof in writing, could not give evidence by witnesses of the contract. *Masterman* v. *Denesha*, Q.R. 9 S.C. 522.

—Conditional Sale—Resumption of Possession—Fraud of Agent.]—Defendant, at the solicitation of plaintiff's agent, gave the latter an order for a certain article, and signed a printed agreement by which he undertook, in consideration of the delivery of the article to him, freight prepaid, at a certain express office, to pay the sum of $35, ten dollars on delivery at the express office, and the balance in monthly payments of five dollars each. It was further agreed, in case of failure to pay any one of said instalments, after maturity thereof, that plaintiff might re-take possession of the article, without recourse against him for any money paid on account thereof. A package addressed to defendant was forwarded to the express office named in the agreement, and defendant was notified of its arrival, but declined to accept it. Subsequently the package was returned to plaintiff by the express agent at his direction. The express agent had no knowledge of the contents of the package apart from that derived from the bill of lading, which was not produced, and no other evidence was given:—Held, that there was no delivery.—On the trial evidence was given by defendant, without any contradiction on the part of plaintiff, that the agreement was fraudulently filled up by plaintiff's agent, and that the order was given on the understanding that it was to be optional with defendant to accept or reject

the article when sent:—Held, that the sale was a conditional one; that plaintiff, having availed himself of the condition as to the retaking, had thereby rescinded the sale, and that the contract having been thus put an end to, all rights and liabilities thereunder ceased. *White* v. *Smith*, 28 N.S.R. 5.

—**Interpleader Issue—Vendee's Right against Execution Creditor.**]—Interpleader issue respecting the ownership of certain horses seized in execution against the defendant and claimed by his mother. On the 2nd October, 1894, a verbal sale of the horses in question was made to the claimant, and part of the purchase money was then paid, and the claimant stated in her evidence that the horses were "hers from the 2nd October." For the convenience of the claimant, however, and at her request, the defendant continued in actual possession of the horses until the 12th of November following, when he called upon the claimant and told her that he was going away, but had left everything all right, and that a boy who had been in his employment could take care of everything; and thereafter the claimant, by her servants, remained in actual possession of the horses. The trial judge found that the sale was *bonâ fide*. The execution was not issued until January, 1895:—Held, that the sale was good as against the plaintiffs, notwithstanding the Bills of Sale Act, R.S.M., c. 10, s. 2, and that this case might be distinguished from *Jackson* v. *Bank of Nova Scotia*, 9 Man. R. 75, on the ground that here there was a delivery by the vendor on the 12th of November, and that what then took place brought the case within the rule laid down by Patterson, J., in *Whiting* v. *Hovey*, 13 Ont. A. R. 14, that, although a grantee could not by any act of his own in seizing the goods give himself a better title than he had under his deed, yet the grantor might by making a delivery which would operate as a conveyance of goods capable of passing at law by delivery, effectually cure a prior defective conveyance. *Trust & Loan Co.* v. *Wright*, 11 Man. R. 314.

—**Trustees and Administrators—Fraudulent Conversion—Past Due Bonds—Negotiable Security—Estoppel—Innocent Holder for Value—Principal and Agent.**]—See PLEDGE.

(c) *Rescission.*

—**Fraud—Rescission of Contract.**]—In an action to rescind a contract of sale of goods on the ground of fraud, it appeared that the vendee when he purchased the goods was solvent, but that he had been reckless in his personal expenditures, and that he had increased the usual amount of his purchases within a month prior to his making an assignment, in trust, for his creditors. He explained the increase in the amount of his purchases by the statement that he bought lower than usual and had contemplated opening another shop. He further accounted for his failure by the small amount of his sales, the unexpected demands of his creditors, and his inability to procure a loan to tide over his difficulties:—Held, that the facts did not entitle the unpaid vendor to have the contract of sale rescinded on the ground that the vendee, at the time he purchased, had a preconceived intention of fraudulently obtaining the goods without paying for them. *Small* v. *Glasel*, 28 N.S.R 245.

(d) *Reservation of Property.*

See sub-division (a) hereunder.

(e) *Statute of Frauds.*

—**Memorandum in Writing—Repudiating Contract by.**]—A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memorandum under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale. *Martin* v. *Haubner*, 26 S.C.R. 142.

—**Sale of Land—Quantum Meruit.**]—The plaintiff's claim was for the balance of the purchase money of a piece of land which had been sold by the plaintiff to the defendant, and the plaintiff had procured a conveyance of the land to the defendant, who had accepted the same as made in performance of the plaintiff's agreement, but there was no agreement of sale to satisfy the Statute of Frauds:—Held (following *Giles* v. *McEwan*, 11 Man. R. 150), that notwithstanding the absence of an agreement in writing the plaintiff was entitled to recover the value of the land conveyed, which *primâ facie* was worth the amount the defendant had agreed to pay. *McMillan* v. *Williams*, 9 Man R. 627, distinguished, on the ground that plaintiff there had sued on the agreement. *Holmwood* v. *Gillespie*, 11 Man. R. 186.

(f) *Warranty.*

—**Warranty—Latent Defects—Reasonable Delay to Complain—Art. 1530 C.C.**]—An action for the price of a mare cannot be defeated by a plea of conventional warranty against lameness and latent defects, where it appears that at the time the mare was delivered to the purchaser he knew that she was lame, that he did not test her for three months, and did not notify the vendor that he would not keep her until five months after such delivery; under these circumstances, the purchaser is not entitled to a reduction of the price.—The object of Art. 1530 C.C., which provides that "the redhibitory action resulting from latent defects must be brought with reasonable diligence," is to protect the vendor from being put in any worse position by the purchaser's delay in complaining. *Elington* v. *Ashmead*, Q.R. 9 S.C. 427.

—**Sale of Debts—Guarantee—Arts. 1,509, 1,511, 1,576 C.C.**]—Where debts are sold by the curator of an insolvent, without guarantee even of their existence, the purchaser can recover back from the curator, notwithstanding the clause of non-guarantee, the amount paid for those debts which, to the knowledge of the curator, had no existence at the time of the sale. Such clause must be understood to refer to the possibility of collecting the debts, the purchaser not being supposed to have desired to purchase nothing, but it cannot relieve the seller from his obligation to return the price when he knew that the debts sold had no existence. *Ostigny* v. *Fulton*, Q.R. 9 S.C. 436.

(g) *Other Cases.*

—**Sale Under Powers—Chattel Mortgage—Mortgage in Possession—Negligence—Wilful Default—"Slaughter Sale"—Practice—Assignment for Benefit of Creditors—Revocation.**]—A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account, not only for what he actually receives, but for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor. *Rennie* v. *Block*, 26 S.C.R. 356.

—**Goods—Undisclosed Principal.**]—Where undisclosed principals, carrying on a wholesale business, employ an agent to carry on a retail business in his own name, but for their benefit, to sell their goods at invoice prices, they are not liable for the prices of goods of the same kind purchased by the agent for himself from other persons without the knowledge or authority of his employers. *Watteau* v. *Fenwick* [1893] 1 Q.B. 346, considered. *Becherer* v. *Asher*, 23 Ont. A.R. 202.

—**Contract by Correspondence—Breach—Service of Writ out of Jurisdiction.**]

See PRACTICE AND PROCEDURE, XXVII.

—**Sale of Railway.**]

See RAILWAYS AND RAILWAY COMPANIES, VII.

II. PAYMENT.

—**Of Goods by Sample—Invoice, Delay in Objecting.**]—A job lot of tea was sold without memorandum in writing or broker's note. Samples of the tea were given to the buyer on which different prices were marked. After delivery of part the seller sent to the buyer an invoice for the lot, charging the tea at one price per lb. for the whole. The buyer had accepted drafts for a part of the price, and refused to accept a draft for the balance claimed, alleging for the first time that the price was fixed by the sample:—Held, that as five months from the receipt of the invoice had elapsed when the last draft was presented, the buyer could not contend that the invoice price was not that agreed upon.—Part of the price of the tea was to be paid in wine, and seven weeks after the delivery was held to be an unreasonable delay by the seller, to complain that the wine was not according to sample. *Kearney* v. *Letellier*, Q.R. 9 S.C. 128. Affirmed by Supreme Court, 27 S.C.R. 1.

—**Sale of Horses—Agreement Signed under Threat—Waiver.**]—See WAIVER.

III. SALE OF LAND.

(a) *Contract of Sale.*

—**Sale—Guarantee—Damages.**]—A sale of land with warranty against *faits et promesses* of the vendor is virtually a sale without warranty, and where the vendee is evicted from possession by a third party, he can recover back the price paid with interest, but not damages and costs incurred, nor money spent on the land. *Lovejoy* v. *Phillips*, Q.R. 9 S.C. 114.

—**Crops—Agreement by Vendee as to Property—Execution.**]—In an agreement for the sale of land on credit, it was provided that the crops grown upon it should be and remain the property of the vendor, and should not be removed therefrom until the then current year's payment of principal money and interest should have been made, without the authority of the vendor:—Held, that under this agreement, when the crop came into existence the legal title to it was in the vendee, and no property in it passed to the vendor; but at most, he had an equitable right to enter and take the crop when it came into existence, or to call for the execution of a formal and legal mortgage upon it; and that he had no title to the crop in question as against an execution creditor of the vendee, whose writ was placed in the sheriff's hands before the crop was sown. *Clifford* v. *Logan*, 9 Man. R. 423 followed. *Smith* v. *Union Bank*, 11 Man. R. 182.

(b) *Vendor and Purchaser.*

—**Agreement for Sale of Land—Objection to Title—Waiver—Lapse of Time—Will—Devise—Defeasible Title—Rescission.**]—An agreement for the sale and purchase of land contained the provision that the vendee should examine the title at his own expense and have ten days from the date of the agreement for that purpose, and should be "deemed to have waived all objections to title not raised within that time." Upon the investigation of the title by the purchaser, it appeared that the vendors derived title through one P., a purchaser from one B.S., a devisee under a will by which the land in question was devised by the testatrix to her daughter the said B.S., and certain other land to another daughter; the will contained the direction that "if either daughter should die without lawful issue the part and portion of the deceased shall revert to the surviving daughter," and a gift over in case both daughters should die without issue. At the time of the agreement B.S. was alive and had children. An objection was taken to the title, but not within the ten days from the date of the agreement. The purchasers brought a suit for specific performance of the contract:—Held, reversing the judgment of the Court below, and although B.S. took an estate in fee simple subject to the executory devise over in case she should die without issue living at her death, inasmuch as the purchaser would get a present holding title accompanied by possession, the objection taken did not go to the root of the title and was one to which effect could not be given, not having been taken within the time limited by the agreement. *Armstrong* v. *Nason*; *Armstrong* v. *Wright*, *Armstrong* v. *McClelland*, 25 S.C.R. 263.

—**Special Tax—Ex post facto Legislation—Warranty.**]—Assessment rolls were made by the city of Montreal under 27 & 28 V. c. 60 and 29 & 30 V. c. 56, apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside as null and the other was lost. The corporation obtained power from the legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and con-

veyed by a deed with warranty containing a declaration that all taxes both special and general had been paid. New rolls were subsequently made assessing the lands for the same improvements, and the purchaser paid the taxes and brought action against the vendor to recover the amounts so paid:—Held, affirming the judgments in the courts below, that as two taxes could not exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the warranty and declaration by the vendor did not oblige her to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale. *La Banque Ville Marie* v. *Morrison*, 25 S.C.R. 289.

—**Offer to Purchase—Withdrawal.**]—A parcel of land having been placed by the plaintiff in a land-agent's hand for sale, the defendant offered to purchase it, and signed a form of agreement for sale and purchase, which was taken by the agent to the plaintiff and was signed by him, but before the defendant was notified thereof he gave notice to the agent withdrawing his offer:—Held, that the instrument, though in form an agreement, was in substance a mere offer, and as defendant had withdrawn before he was notified of its acceptance, there was no completed agreement. *Larkin* v. *Gardiner*, 27 Ont. R. 125.

—**Unpaid Vendor—Resolution de Vente.**]—The unpaid vendor of an immovable, whose rights are derived from a deed of sale anterior to the enactment of the Civil Code, has the right of resolution of sales of said immovable, and to resume his possession and ownership thereof unaffected by the hypothecs and registrations subsequent to his deed. The demolition by a subsequent purchaser of a house on said immovable and reconstruction thereof, cannot defeat the said right of resolution. *Credit Foncier* v. *Guay*, Q.R. 9 S.C. 280.

—**Title to Lands — Specific Performance.**]—Where in a contract for sale of lands the purchase money was payable by instalments and the conveyance given on payment of the whole, the vendees could not call for a title until all instalments were paid.—Specific performance may be decreed against a vendee notwithstanding the vendor does not hold the title, if he is in a position to procure it. *Foot* v. *Mason*, 3 B.C.R. 377.

—**Trustee—Possession by Cestui que Trust—Right of Entry—Mortgage by Trustee—Registry Act—Priority.**]—See LIMITATION OF ACTIONS, I.

—**Agreement for Sale—Assignment—Release.**]
See PRINCIPAL AND SURETY, I.

(c) Other Cases.

—**Sale by Plan—Lane—Abandonment.**]—(Per Maclennan, J.A.)—A conveyance made in pursuance of the Short Forms Act (Ontario), of a lot according to a registered plan upon which a lane is laid out, does not pass any interest in the lane when it has not in fact been opened on the land, and has not been used or enjoyed with the lot in question. *Bell* v. *Golding*, 23 Ont. A. R. 485.

IV. SHERIFF'S SALE.

—**Sheriff's Sale—Identity of Property—Error of Bidders.**]—That the bidders at a sheriff's sale were in error as to the identity of an immovable offered, of which the *adjudicataire* was aware, but did not inform the others, is no ground for setting the sale aside in the absence of fraud or artifice. *Molleur* v. *St. James*, Q.R. 9 S.C. 184.

—**Order for Deposit—Art. 679 C.C.P.**]—It is no cause of nullity of a sheriff's sale under writ of fi. fa. that a judge's order for a deposit from bidders under Art. 679 C.C.P. was granted without notice to the defendant in the cause. *Gauthier* v. *Melançon*, Q.R. 9 S.C. 245.

—**Delivery—Change of Possession.**]
See SALE, I (*b*).

—**Resolutory Condition—Immovables by Destination—Movables Incorporated with the Freehold—Severance—Hypothecary Creditor—Unpaid Vendor.**]
See CONTRACT, III. (*a*).

—**Attorney for Sale of Lands — Lien — Personal Obligation.**]—See EQUITABLE ASSIGNMENT.

—**Free Grant of Lands in Ontario—Fi. fa. upon a Judgment recovered against Locatee prior to Location—Devisee—Sale.**]
See EXECUTION, VI.

—**Of Land in Lots — Right of Passage — Expropriation.**]—See TITLE TO LAND.
And see TAX SALE.

SALVAGE.

See SHIPPING, VII.

SCHOOLS.

Union School Section—Alteration—Petition of Ratepayers—Award.]—The "joint-petition" of five ratepayers from each of the municipalities concerned, required under 54 Vict., c. 55, sec. 87, sub-sec. 1 (Ont.), for the formation, alteration or dissolution of a Union School Section, means that each set of five ratepayers shall join in a petition to the municipal council of the municipality, of which they are ratepayers, and not that five ratepayers from each municipality concerned must join in each petition to each municipality. [Judgment of Meredith, C.J., 26 Ont. R. 662, following *Trustees of School Section No. 6 York* v. *Corporation of York*, noted 26 Ont. R. at p. 664, reversed.

Where the award in such case was that no action should be taken on the petition, the prohibition in sub-sec. 11 of sec. 87 against any new proceedings for a further period of five years, was held not to apply. Judgment of Meredith, C.J., affirmed on this point. *Union School Section of East and West Wawanosh, and Hullett* v. *Lockhart*, 27 Ont. R. 345.

—**Creation of School District—Protestant Minority—Declaration de Dissidence—School Taxes—Arts. 1973, 1985, 1986, R.S.Q.**—Art. 1973 of the Revised Statutes of Quebec permits the limits of existing municipalities to be altered for school purposes, to be divided and new school districts to be erected, and under that article, the town and parish of Longueuil was, by Order-in-Council, created a distinct school district for Protestants alone, and school commissioners were elected for such district. No declaration that they were a dissentient body (*déclaration de dissidence*) was produced on the part of the Protestants, and no board of trustees (*bureau de syndics*) for the schools of the Protestant minority was constituted:—Held, that the above article permits the creation of a distinct and separate school district for a religious minority residing within the limits of a school municipality already existing without the production of a *déclaration de dissidence*, or the establishment of a *bureau de syndics* for the dissentient schools:—Held further, that the effect of the Order-in-Council was to abolish the dissentient body (*dissidence*), and to constitute the Protestants of the town and village of Longueuil, a distinct school municipality, and that a Protestant who had, after the new district was created, paid his school taxes to the former board representing the majority of taxpayers, could maintain an action to recover back the taxes so paid (*en répétition de l'indû.*) *Stephens* v. *The School Commissioners of the Parish of Longueuil*, Q.R. 9 S.C. 408.

—**Common Schools Act of New Brunswick—Sectarian Education—Employment of members of Religious Order as Teachers — Religious instruction outside of School Hours.**]—The Common Schools Act of New Brunswick makes the public schools non-sectarian, but is not violated by the employment as teachers of sisters of a religious order of the Roman Catholic Church, and permitting them to wear the garb of their order while teaching.—The fact that the sisters forward all their earnings beyond what is necessary for their support to the treasury of their order, does not affect their right to be employed in the public schools.—A public school is not made sectarian by reason of these sisters, before and after the prescribed school hours, holding religious exercises in one of the school rooms for the benefit of Roman Catholic scholars. *Rogers* v. *The School Trustees of School District No. 2 of Bathurst*, 1 N.B. Eq. 266.

— **Municipal Corporations — Debentures Issued by School District—Change of Name—Liability.**]—In the year 1881 the "Protestant School District of Donore" issued certain debentures payable in 8, 9, and 10 years respectively. Its boundaries had been changed several times after the issue of such debentures, leaving only a small fraction of its original territory, and its name had also been changed to the "School District of Donore, number 118," under the Manitoba Public Schools Act of 1890:—Held, that to allow such territorial changes to effect the dissolution of the school corporation, or the shifting of its liabilities to another corporation by reference to the uncertain criterion of the extent of the changes, would contravene the evident purpose of the Legislature in creating such corporations: and that the change of name under the Act of 1890 was no defence, because that statute expressly declared that no change of name of a school district should effect obligations incurred prior to such change. *Canada Permanent Loan & Savings Co.* v. *School District of Donore*, 11 Man. R. 120.

—**Bond of Secretary-Treasurer of Public Schools—Defalcation—Liability of Sureties.**]

See PRINCIPAL AND SURETY, I.

SCIRE FACIAS.

Company — Winding-up Act — R.S.C, c. 129—Contributory—Action against.

See COMPANY, VII (*a*).

SEAL FISHERY.

See BEHRING SEA AWARD ACT, 1894.

SEAMEN'S WAGES.

See SHIPPING, V (*b*).

SEARCH WARRANT.

Canada Temperance Act—Magistrate's Jurisdiction—Constable — Justification of Officer — Goods in Custodiâ legis—Replevin—Estoppel—Res judicata.]—A search warrant issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face, it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside.—The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.—A judgment on certiorari quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes* only. *Sleeth* v. *Hurlburt*, 25 S.C.R. 620.

SECRETION.

Of Goods by Tenant—Right of Landlord to Seize.]—See LANDLORD AND TENANT, XIII.

SECURITY FOR COSTS.

See APPEAL, VIII.
" COSTS, III.

SEPARATE ESTATE.

See HUSBAND AND WIFE, V.
" MARRIED WOMAN.

SEQUESTRE.

See APPEAL, V.

SERVANT.

Domestic Servant—Indenture by Charitable Institution.]—Under the powers conferred by 26 Vict., c. 63 (C.) and 50 Vict., c. 91 (Ont.) an infant placed, on the application of her mother, and without any dissent by her father, in "The Girls' Home," may be validly indentured as a domestic servant by that institution.
Re Robinson, 27 Ont. R. 585.

See also MASTER AND SERVANT.

SERVITUDE.

Right of Way—Co-proprietors.]—Where parties agreed to establish a passage between their respective properties, each furnishing four feet of land for the purpose, and one of them had windows put in a wall immediately adjoining the passage, which the other wished to have removed:—Held, that the agreement created not a right of co-proprietorship but a servitude of passage—each party remaining proprietor of the strip of land furnished by him. The windows, therefore, being on the property of the complaining party, were ordered to be removed. *Hotte* v. *Fauteux*, Q.R. 5 Q.B. 38, reversing 7 S.C. 514.

—Party Wall—Repair of.]—Under the civil law and the code, one of two adjoining owners of land cannot demolish and re-construct a wall between the properties without notice to the other, or, if he will not consent, on judicial order. If he does he cannot compel his co-proprietor to pay any portion of the cost. If the appointment, in Montreal, of an inspector of buildings has altered the civil law, it is only in case of a structure that is a menace to public safety, which fact must be established by experts before action taken. *Tate* v. *Lamothe*, Q.R. 5 Q.B. 265.

—Party Wall—Use of—Acquiescence—Evidence.]—M. commenced to build a house on his lot, using the wall of a house on the adjoining lot on which to rest his own wall without previously acquiring the right to do so. V., owner of the adjoining lot, brought an action to compel him to abandon his work and demolish what he had done, or if he failed to do so, that she, V., be authorized to demolish it, and maintained in peaceable possession of her land and of her said wall. It appeared that the work was done with the knowledge, and within sight of V., who, a month after it was begun, presented an account to M. for the amount of half the value of the wall and demanded immediate payment. M. refused to pay, and the action was then brought against him. On the trial, he endeavored to prove by witnesses that he had been granted a delay for payment:—Held, that the agreement for delay could not be proved by witnesses, and that V. had not, by her silence, and by demand of payment for half the wall, renounced her claim for demolition of the work. M. was ordered to demolish it within four months, or such other delay as the court might grant, unless he preferred to pay the amount claimed, or to establish, during the delay, by *expertise*, the value of half the wall and pay the amount established. *Viger* v. *Maurice*, Q.R. 5 Q.B. 428.

—Right of Way—Action négatoire.]—In an *action négatoire* it was proved that in 1831 the predecessors in title of both parties, proprietors of adjoining lands, and three neighbouring proprietors, bought from one of their number a right of passage around a hill, agreeing to allow each a right of way over their respective lands in going and coming by said road "in the culture of their fields," and to maintain such road at the common cost, "*entre eux ainsi que leurs hoirs et ayant cause à perpétuité*. In 1850 a new road was opened, and the parties were enabled to dispense with the right of passage, but the defendant to the action continued to use it "for the cultivation of his land":—Held, that it was on the defendant, who invoked the existence of the servitude, to show that it had been established in the manner required by law, which he had failed to do; that a servitude can only be established by destination of the *père de famille* so far as its nature and extent are specified by the written instrument, and that the right of passing over land by permission of the owner, no matter how long it continues, can never create a right of servitude *de passage*. *Riou* v. *Riou*, Q.R. 5 Q.B. 572, reversing 9 S.C. 144.

And see EASEMENT.
" " WAY, I.

SET-OFF.

See CHOSE IN ACTION.
See BANKRUPTCY AND INSOLVENCY, II.

SHERIFF.

See EXECUTION MINES AND MINERALS.
" SALE, IV.
" TENANT IN COMMON.

SHIPPING.

I. BILL OF LADING.

—Contract—Correspondence—Carriage of Goods—Transportation Co.—Carriage over Connecting Lines.]—A shipping agent cannot bind his principal by receipt of a bill of lading after the

vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped. Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it; but that conclusion does not follow where the document is given out of the usual course of business, and seeks to vary terms of a prior mutual assent. *The North-West Transportation Co.* v. *McKenzie*, 25 S.C.R. 38.

II. Charter Party.

—Chartered Ship—Perishable Goods—Excepted Perils—Obligation to Tranship—Repairs—Reasonable Time.]—If a chartered ship be disabled by excepted perils from completing the voyage, the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination and earn the freight. The option to tranship must be exercised within a reasonable time, and if repairs are decided upon they must be effected with reasonable despatch, or otherwise the owner of the cargo becomes entitled to his goods. *Quære:* Is the shipowner obliged to tranship?—If the goods are such as would perish before repairs could be made the ship owner should either tranship, deliver them up or sell if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable. And if in such a case the goods are sold without the consent of the owner the latter is entitled to recover from the ship owner the amount they would have been worth to him if he had received them at the port of shipment, or at their destination at the time of the breach of duty. *Owen* v. *Outerbridge*, 26 S.C.R. 272.

III. Collision.

—Rules of the Road—Narrow Channel—Navigation, Rules of—R.S.C. c. 79, s. 2, arts. 15, 16, 18, 19, 21, 22 and 23—"Passing" Ships—Breach of Rules — Presumption — Contributory Negligence — Moiety of Damages—36 & 37 V. (Imp.), c. 85, s. 17—Manœuvres in "Agony of Collision."]—If two vessels approach each other in the position of "passing" ships (with a side light of one dead ahead of the other), where unless the course of one or both is changed they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good navigation.—If one of two "passing" ships acts consistently with good seamanship and the other persists, without good reason, in keeping on the wrong side of the channel; in starboarding the helm when it was seen that the helm of the other was hard to port and the vessels are rapidly approaching; and, after signalling that she was going to port, in turning her bow to starboard, she is to blame for a collision which follows.—The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop, or reverse, if necessary, when approaching another ship, so as to involve a collision, is not to be considered as a fact contributing to a collision, provided the collision could have been avoided by the impinging vessel by reasonable care exerted up to the time of the collision.—Excusable manœuvres executed in "agony of collision" brought about by another vessel, although in contravention of statutory rules, cannot be imputed as contributory negligence on the part of the vessel collided with.—The rule that in narrow channels steamships shall, when safe and practicable, keep to the starboard (art. 21), does not override the general rules of navigation which would also apply to appropriate cases: *The Leverington* (11 P.D. 117) followed. *The "Cuba"* v. *McMillan*, 26 S.C.R. 551, affirming 5 Ex. C. R. 135.

—Burden of Proof—Mutual Negligence—Action by Mortgagee.]—Where a collision occurs between a moving vessel and one at anchor the former is bound to show that it was not caused by her negligence: *The Annot Lyle* (11 P.D. 114), referred to. If both the vessels are negligent, even though not in the same degree, the damages must be equally apportioned between them.—A mortgagee in possession can maintain an action for damages arising out of a collision. *Ward and Pemberton* v. *The Ship Yosemite*, 3 B.C.R. 311.

IV. Jurisdiction.

—Revenue Law—R.S.C. c. 34, s. 113—Infringement—Penalty—Jurisdiction of Exchequer Court —The Colonial Courts of Admiralty Act, [1890] (Imp.)]—The jurisdiction conferred upon the Vice-Admiralty Courts in Canada by sec. 113 of the Inland Revenue Act (R.S.C. c. 34) in respect of actions for penalties prescribed by such Act, is not disturbed by The Colonial Courts of Admiralty Act, 1890, (Imp.) The latter Act (s. 2, s.s. 3) vests the jurisdiction of the Vice-Admiralty Courts in any colonial court of Admiralty, and by The Admiralty Act, 1891, the Parliament of Canada made the Exchequer Court the Court of Admiralty for the Dominion, and by sec. 9 thereof conferred upon the Local Judges in Admiralty all the powers of the Judge of the Exchequer Court with respect to the Admiralty jurisdiction thereof *The Queen* v. *Annie Allen*, 5 Ex.C.R. 144.

—Admiralty Law—Jurisdiction of Court—Breach of Contract—Practice—Waiver.]—A court of Admiralty has no jurisdiction to try an action against the owner of a ship for damages caused by negligence, or breach of duty, or of contract, if such owner resides within the jurisdiction. Entry of appearance does not waive an objection to the jurisdiction. *Rithet* v. *The Barbara Boscowitz*, 3 B.C.R. 445.

V. Maritime Lien.

(a) *Damages.*

—Crown's Rights in enforcing Maritime Lien—Priority of Master's Lien—Writ of Extent — Costs.]—Where the Crown invokes the aid of a Court of Admiralty to enforce a maritime lien, it is in no higher position than an ordinary suitor, and its rights must be determined in such court by the rules and principles applica-

ble to all claims and suitors alike.—Where the Crown had sued the owners of a steamship for damages to a Government canal occasioned by the ship colliding with the gates, but had obtained judgment subsequent in date to one obtained by the master of the ship upon a claim for wages and disbursements accrued and made after the time of such collision, the latter judgment was accorded priority over that held by the Crown.—Where a party in an action *in rem* has incurred costs which have benefited not only himself but parties in other actions against the *res*, the costs so incurred by him will, if the proceeds of the property are insufficient to satisfy all claims in the various actions, be paid to him out of the fund in court before any other payment is made thereout:—Semble, where the Crown pursues its remedy by Writ of Extent against the owners of a ship, it can only take under the Writ of Extent the property of the debtor at the time of the issue of the Writ. If the debtor has assigned his property before that, the Crown can realize nothing under the writ in respect to the *res*. *The Queen* v. "*The City of Windsor*"; *Symes* v. "*The City of Windsor*," 5 Ex. C.R. 223.

(*b*) *Master's Disbursements and Wages.*

—Account between Co-owners—Proportion of Costs to be Paid by Co-owners—Mortgagee—Priority of Lien-holder.]—In actions for account between co-owners the rule as to the incidence of costs followed by the courts of law in partnership actions may be adopted in a Court of Admiralty. In an action of account where there is a deficiency of assets the court may order the costs of the proceedings to be borne equally by the co-owners. Where the *res* is not of sufficient value to pay the claims of a lien-holder (in respect of Master's wages) and a mortgagee in full, the lien-holder is entitled to apply all the proceeds in payment of his claim. *Sidley* v. *the Ship* "*Dominion*"; *Sidley* v. *the ship* "*Arctic*," 5 Ex.C.R. 190.

VI. Mortgage.

—Maritime Law—Action by Owner of Unregistered Mortgage against Freight and Cargo.]—A mortgagee under an unregistered mortgage of a ship has no right of action in the Exchequer Court of Canada against freight and cargo; and unless proceedings so taken by him involve some matter in respect of which the court has jurisdiction, they will be set aside.—*Strong* v. *Smith* (the *Atalanta*), 5 Ex. C.R. 57.

VII. Salvage.

—Maritime Law—Salvage Agreement—Validity of—Undue Influence—Quantum Meruit—Evidence.]—Where an agreement for salvage services has been entered into between the master of a stranded ship and the master of a tug, unless it appears that the latter has taken advantage of the distressed condition of the stranded ship to make an extortionate demand, the Court will enforce such agreement and not decree a *quantum meruit*. In such a case the agreement is valid *primâ facie*, and the *onus* is upon the defendant to show that the price stipulated for was unjust and exorbitant, and the promise to pay it extorted under unfair circumstances. *Connolly* v. *The* "*Dracona*," 5 Ex. C.R. 146. Affirmed on appeal, 5 Ex. C.R. 207.

—Maritime Law—Salvage—Expenses.]—The salvors of a ship may, under special circumstances, be entitled to the expenses of navigating her to port in addition to the moiety of her auction value. *Jacobson* v. *the Ship* "*Archer*," 3 B.C.R. 374.

VIII. Towage.

—Maritime Law—Injury to Tow—Negligence of Pilot—Liability—Costs.]—In an ordinary contract of towage the vessel in tow has control over the tug, and if the pilot of the tow negligently allows the tug to steer a dangerous course whereby the tow is injured, the tug is not responsible in damages therefor. Where a very great part of the blame is to be attributed to the tug, the costs of the latter in defending the action may not be allowed. *The* "*Prince Arthur*" *v. Jewell* ("*The Florence*"), 5 Ex.C.R. 151. Affirmed on appeal, 5 Ex.C.R 218.

SIDEWALK.

See Municipal Corporations, IV.
" Way, II.

SIMULATION.

Advantage from Husband to Wife—Interposition of Third Person—Art. 774 C.C.]—In 1886 S. sold to his father-in-law a lot of land, but was not paid the purchase money, and remained in possession, paying all the charges on the lot. The father-in-law afterwards placed a hypothec on the lot to secure repayment of a loan, the amount of which S. received, and in 1894 he bought a lot adjoining that mentioned, paying for it with money supplied by S., and some weeks later donated both lots to his daughter, the wife of S., subject to payment of the hypothecs:—Held, on a claim made by the creditors of S., that these transactions were simulated (*simules*), being intended to effect an advantage from S. to his wife by interposition of a third person, and that they should be annulled and S. declared to be the true owner of the lots, but without prejudice to the rights of the vendor of the second lot nor to the hypothec created by the father-in-law. *Samson* v. *Samson*, Q.R. 9 S.C. 386.

SOCIETE.

See Company.
" Partnership.

SOCIETE DE BIENFAISANCE.

See Benefit Society.

SOLICITOR.

Acquiescence in Judgment—Act of Attorney—Registration of Judgment.]—By a judgment of the Superior Court a married woman was granted separation from her husband with an alimentary allowance. The husband afterwards brought action to recover real property which he had transferred to his wife during the coverture, and obtained a judgment in the court of first instance. After this judgment the attorneys for the wife applied for a sum of money deposited in court by the husband as being due to the wife on surrender of the real estate, and they also registered the previous judgment against said property. The wife inscribed in review from the judgment for the return of the real estate:—Held, that the authority of the wife's attorney terminated with the judgment rendered, and as she had given no directions therefor the application to withdraw the money from court was unauthorized, and no acquiescence by her in the judgment:—Held further, that the registration of the judgment was a mere conservatory act which would not have shown acquiescence even if done by the wife herself. *Tabb* v. *Beckett*, Q.R. 9 S.C. 159.

—Solicitor's Costs—Taxation.]

See COSTS I, II, and IV.
" also ATTORNEY.

SOULTE.

Soulte—Registration.]—The privilege of *soulte* does not exist as against a third person acquiring title without notice by renewal of the registration as required by arts. 2172, 2173 C.C. The holder of a right *à la soulte* cannot follow the price of the immovable sold to a third party by good registered title. The privilege can only be exercised upon the price in case of judicial sale, expropriation or other cases provided by law. *Morin* v. *Guertin*, Q.R. 9 S.C. 65.

SPECIFIC PERFORMANCE.

See SALE, III (*b*).

STATUTE.

I. APPLICATION.

—Imperial Act, 21 Jac. 1 c. 14.]—The Imperial statute, 21 Jac. 1 c. 14, is in force in the Province of New Brunswick. *Murray* v. *Duff*, 33 N.B.R. 351.

—The Imperial Act, 13 Geo. II. c. 8, s. 5.]—The Imperial statute, 13 Geo. II. c. 8, sec. 5, requiring six days previous notice to convicting justices, is in force in British Columbia. *In re Plunkett*, 3 B.C.R. 484.

II. CONSTRUCTION.

—By-law — Petition to Quash — Appeal — 40 V. (P.Q.) c. 29—53 V. (P.Q.) c. 70—Judgment Quashing—Appeal to Supreme Court from—R.S.C. c. 135, s. 24 (*g*).]—Sec. 439 of the Town Corporations Act (40 V. (P.Q.) ch. 29) not having been excluded from the charter of the City of Ste. Cunégonde (53 V. c. 70) is to be read as forming a part of it and prohibits an appeal to the Court of Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under sec. 310 of said charter.—Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction no appeal lies to the Supreme Court of Canada from its decision. *City of Ste. Cunégonde* v. *Gougeon*, 25 S.C.R 78.

— By-law—Exclusive Right Granted by—Statute Confirming—Extension of Privilege—45 V. c. 79, s. 5 (P.Q.)—C.S.C. c. 65.]—In 1881 a municipal by-law of St. Hyacinthe granted to a company incorporated under a general Act (C.S.C. c. 65) the exclusive privilege for twenty-five years of manufacturing and selling gas in said city, and in 1882 said company obtained a special Act of incorporation (45 V. c. 79, P.Q.), sec. 5 of which provided that "all the powers and privileges conferred upon the said company, as organized under the said general Act, either by the terms of the Act itself or by resolution, by-law or agreement of the said city of St. Hyacinthe, are hereby reaffirmed and confirmed to the company as incorporated under the present Act, including their right to break up, &c., the streets * * * and in addition it shall be lawful for the company, in substitution for gas or in connection therewith, or in addition thereto, to manufacture, use and sell electric, galvanic or other artificial light, and to manufacture, store and sell heat and motive power derived either from gas or otherwise * * * with the same privileges, and subject to the same liabilities, as are applicable to the manufacture, use and disposal of illuminating gas under the provisions of this Act:"—Held, affirming the decision of the Court of Queen's Bench, that the above section did not give the company the exclusive right for twenty-five years to manufacture and sell electric light; that the right to make and sell electric light with the same privilege as was applicable to gas did not confer such monopoly, but gave a new privilege as to electricity entirely unconnected with the former purposes of the company; and that the word "privilege" there used could be referred to the right to break up streets and should not, therefore, be construed to mean the exclusive privilege claimed:—Held, also, that it was a private Act notwithstanding it contained a clause declaring it to be a public Act, and the city was not a party nor in any way assented to it; and that in construing it the court would treat it as a contract between the promoters and the legislature, and apply the maxim *verba fortius accipiuntur contra proferentem*, especially where exorbitant powers are conferred. *La Compagnie pour l'éclairage au gaz de St. Hyacinthe* v. *La Compagnie des pouvoirs Hydrauliques de St. Hyacinthe*, 25 S.C.R. 168.

—Registry Act, R.S.O. c. 114—Municipal By-law, Registration of—Notice.] — R.S.O. (1877), c. 114, s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests. *City of Toronto* v. *Jarvis*, 25 S.C.R. 237.

— Master and Servant — Negligence — Quebec Factories Act—R.S.Q. Arts. 3019-3053—Art. 1053 C. C.—Accident, cause of—Evidence—Onus of Proof—Statutable Duty—Police Regulations.]— The provisions of the Quebec Factories Act (R.S.Q. arts. 3019 to 3053 inclusive), are intended to operate only as police regulations, and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the Civil Code. *The Montreal Roller Mills Company* v. *Corcoran*, 26 S.C.R. 595.

—Mortgage—Mining Machinery — Registration —Fixtures—Interpretation of Terms — Bill of Sale—Personal Chattels—R.S.N.S. (5 ser.) c. 92, ss. 1, 4 and 10 (Bills of Sale)—55 V. (N.S.) c. 1, s. 143 (The Mines Act).]—The "fixtures" included in the meaning of the expression "Personal chattels" by the tenth section of the Nova Scotia Bills of Sale Act, are only such articles as are not made a permanent portion of the land, and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.—An instrument conveying an interest in lands and also fixtures thereon does not need to be registered under the Nova Scotia Bills of Sale Act (R.S.N.S. 5 ser. c. 92), and there is now no distinction, in this respect, between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee. *Warner* v. *Don*, 26 S.C.R. 388, affirming 28 N.S.R. 202.

—Constitutional Law—Married Woman—Separate Estate—Jurisdiction of North-west Territorial Legislature—Interpretation—40 V., c. 7, s. 3, and Amendments—R.S.C. c. 40—N. W. Ter. Ord. No. 16 of 1889.]—The provisions of ordinance No. 16 of 1889, respecting the personal property of married women, are *intra vires* of the legislature of the North-west Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the order of the Governor-General in Council passed under the provisions of "The North-west Territories Act."—The provisions of said ordinance No. 16 are not inconsistent with secs. 36 to 40 inclusive of "The North-west Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.—The words "her personal property" used in the said ordinance No. 16 are unconfined by any context, and must be interpreted not as having reference only to the "personal earnings" mentioned in sec. 36, but to all the personal property belonging to a woman, married subsequently to the ordinance, as well as to all the personal property acquired since then by women married before it was enacted: *Brittlebank* v. *Gray-Jones* (5 Man. L. R. 33) distinguished. *Conger* v. *Kennedy*, 26 S.C.R. 397.

—Seal Fishing — Statutes in Pari Materiâ.] — The Seal Fishery (North Pacific) Act, 1893, and the Behring Sea Award Act, 1894, being statutes *in pari materiâ*, are to be read as one Act: *McWilliams* v. *Adams*, 1 Macq. H.L.C. 120, referred to. *The Queen* v. *The Ship "Shelby,"* 5 Ex. C.R. 1.

—1. Mechanics' Lien—Repairs by Lessee — Interest of Lessor—"Owner" — Scenic Artist.]— The lessor in a lease which provides that certain repairs shall be done by the lessee, and the cost deducted from the rent is not, as regards persons employed to do such repairs, an "owner" within the meaning of sub-sec. 3 of sec. 2 of R.S.O., ch. 126, the Mechanics' Lien Act:—Semble, a scenic artist is not a "mechanic, labourer, or other person, who performs labour, etc.," under section 6 (1) of the Act. *Garing* v. *Hunt and Claris*, 27 Ont.R. 149.

— Interpretation — Powers of Legislature.] — Where the terms of a statute express the intention of the legislature with sufficient clearness the Court will not consider the reason of the law, nor interfere with its execution on the ground of inconvenience and danger to the public which may result therefrom. An Act of the legislature of Quebec authorizing a light and power company to lay wires underground in the streets of Montreal, and to open the streets for the purpose without first obtaining the consent of the municipal authorities, is within the competence of the legislature. *City of Montreal* v. *The Standard Light & Power Co.*, Q.R. 5 Q.B. 558. Affirmed by Privy Council, July, 1897.

—Criminal Code—Section 808.]—The first clause of sec. 808 of the Criminal Code, 1892, should be read as if it were framed thus: "The provisions of this Act relating to preliminary inquiries before justices, except as mentioned in secs. 804 and 805, and the provisions of Part LVIII., shall not apply to any proceedings under this part," and so construed, it prevents an appeal from the decision of a police magistrate on a summary trial under part LV. of the code. *The Queen* v. *Egan*, 11 Man. R. 134.

—Municipal Acts—City Charter—Repugnancy or Inconsistency — Municipal Act (1892), s. 113 (B.C.)—Vancouver Incorporation Act (1886), s. 128, (1892) s. 5.]—By sec. 4 of the Municipal Act (1892) the provisions of said Act apply to the city of Vancouver, except where repugnant to or inconsistent with the Act of incorporation. Sec. 113 of the Act enacts that money by-laws of a municipality shall recite "the total amount required by this Act to be raised annually by special rate for paying the new debt and interest," and "the annual special rate in the dollar for paying the interest and creating an equal yearly sinking fund for paying the principal of the new debt." By sec. 128 of the Vancouver Incorporation Act, ch. 32, Acts of 1886 as amended by ch. 62, sec. 5, Acts

of 1892, a money by-law shall state *inter alia* the amount of the debt which such new by-law is intended to create, and in some brief and general terms, the object for which it is to be created:—Held, that said provisions of the Municipal Act are not repugnant to nor inconsistent with the charter of Vancouver, and a money by-law is invalid which does not recite the annual special rate on the dollar required by sec. 113. *In re Bell-Irving and the City of Vancouver*, 4 B.C.R. 300.

—Customs Duties — 50 & 51 V. c. 39, Items 88 and 173—Exemption—Steel Rails for use on Railways—Application to Street Railways.]

See RAILWAY COMPANY, VII.

—"Bills of Exchange Act, 1890"—"The Bank Act," R.S.C. c. 120—Constitutional Law—Provincial Legislatures—Government Expenditures—"Letter of Credit"—Powers of Executive Councillors.]—See CONSTITUTIONAL LAW, I (*b*).

—Ex Post Facto Legislation—Special Tax.]

See MUNICIPAL CORPORATIONS, V.

—Repair of Streets—Pavements—Assessment of Owners—Double Taxation—24 V. c. 39 (N.S.)—53 V. c. 60, s. 14 (N.S.)]

See MUNICIPAL CORPORATION, IV.

—Canadian Waters—Public Harbours—Interference with Navigation—Right of Fishing—Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta—Provincial Legislation—R.S.O. [1887] c. 24, s. 47—55 V. (O.) c. 10, ss. 5 to 13, 19 to 21—R.S.Q. Arts. 1375 to 1378.]—See CONSTITUTIONAL LAW, II (*a*).

—Landlord and Tenant—R.S.O. [1887] c. 143, s. 28—Distress—Goods of Person Holding "Under" Tenant.—See LANDLORD AND TENANT, IV.

—Appeal—Time Limit—Commencement of, pronouncing or Entry of Judgment—Security—Extension of Time—Vacation—R.S.C. c. 135, ss. 40, 42, 46.]—See APPEAL, VIII.

—Penalties—Prior and Subsequent Enactments as to same Offence—Repugnancy.]

See MUNICIPAL CORPORATIONS, VI.

—Municipal Law—Debentures issued by School District—Change of Name—Liability.]

See SCHOOLS.

—Manitoba—Foreign Corporations Act—Retrospective Effect.]—See CONTRACT, V (*a*).

III. REPEAL.

—Construction of Statute—Special Act—Repeal of by General Act—Repeal by Implication.]—A general later statute (and *a fortiori*, a statute passed at the same time) does not abrogate an earlier special Act by mere implication.—The law does not allow an interpretation that would have the effect of revoking or altering a special enactment by the construction of general words, where the terms of the special enactment may have their proper operation without such interpretation. *City of Vancouver* v. *Bailey*, 25 S.C.R. 62.

—Municipal Elections—55 V. (Ont.) c. 42, ss. 167 and 210—Personation—Repugnant Penalties.]—Where a clause in a statute prohibits a particular act and imposes a penalty for doing it, and a subsequent clause in the same statute imposes a different penalty for the same offence, which cannot be reconciled either as cumulative or alternative punishment, the former clause is repealed by the latter. This principle being applied to sections 167 and 210 of the Consolidated Municipal Act (Ont.), 1892, a person convicted of personation under the former clause was discharged as illegally convicted on a return to a *habeas corpus*: *Robinson* v. *Emerson*, 4 H. & C. 352; and *Mitchell* v. *Brown*, 1 El. & El. at p. 275, followed. *The Queen* v. *Rose*, 27 Ont. R. 195.

—Repeal of Act—Exception—Interpretation Act—Con. Mun. Act, 1892, 55 V. c. 42, s. 533a (O.)—57 V. c. 50, s. 14 (O.)]—Sec. 14 of the Municipal Amendment Act, 1894, 57 Vict. c. 50 (O.) must be read with sec. 8, sub-secs. 43 and 48 of the Interpretation Act, R.S.O. c. 1, and so read, rights of action accrued at the passing of the former Act are not affected thereby. On the 29th April, 1893, a township corporation obtained an award against a county corporation under sec. 533a of the Consolidated Municipal Act, 1892, for part of the cost and maintenance of certain bridges expended by them, and while an appeal against the award was before the Court of Appeal, the Act 57 Vict. c. 50 (O.), repealing sec. 533a, was passed:—Held, that there was no "arbitration pending" by reason of the appeal at the time of the passing of the repealing Act. The plaintiffs were held entitled, notwithstanding the repeal of sec. 533a (O.), to recover the proportionate amount paid, or agreed to be paid by them, from the commencement of 1893 to the date of the passing of the repealing Act. *The Corporation of the Township of Morris* v. *The Corporation of the County of Huron*, 27 Ont. R. 341.

STATUTE OF ELIZABETH.

Assignment for Benefit of Creditors—Preferences—Chattel Mortgage—R.S.N.S. (5 ser.), c 92, ss. 4, 5, 10.]—An assignment is void under the statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member and provides for allowance of interest on claim of said firm until paid, and the assignee is permitted to continue in the same possession and control of business as he previously had, though no one of these provisions taken by itself would have such effect.—A provision that "the assignee shall only be liable for such moneys as shall come into his hand as such assignee, unless there be gross negligence or fraud on his part," will also void the assignment under the statute of Elizabeth.—Authority to the assignee not only to prefer parties to accommodation paper but also to pay all "costs, charges and expenses to arise in consequence" of such paper, is a badge of fraud. *Kirk* v. *Chisholm*, 26 S.C.R. 111. Affirming 28 N.S.R. 111.

STATUTE OF FRAUDS.

Memorandum in Writing—Repudiating Contract by—29 Car. II., c. 3.]—A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memorandum under the 17th sec. of the Statute of Frauds, may be used for that purpose though it repudiates the sale. *Martin* v. *Haubner*, 26 S.C.R. 142.

See SALE, I (*e*).

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STAY OF PROCEEDINGS.

See PRACTICE AND PROCEDURE, XXI.

STOCK.

See COMPANY, VI.

STREET RAILWAY.

—Sale of Tickets—Payment of Fare—City By-law.]—A by-law of the City of Montreal provides that the Street Railway Co. shall sell six tickets, each good for a trip on the company's cars, for twenty-five cents, and the company shall incur a penalty for violation of any of the obligations imposed by said by-law, including the above:—Held, that a passenger who tenders twenty-five cents to the employee of the company who collects the fares, and demands six tickets therefor, which such employee refuses, on the ground that he has none, can maintain an action for damages against the company on being expelled from the car for non-payment of the usual single fare, five cents:—Held further, that the fact that the company was liable to a penalty, did not deprive the passenger of his right to sue for damages. *St. Julien* v. *Montreal Street Ry. Co.*, Q.R. 9 S.C. 243, reversing 7 S.C. 463.

—Negligent operation of Electric Street Cars—Damages.]—It is the duty of the motorman of a street car, when he sees a horse in the street before him greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse, and it is also his duty to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. If he fails to do this the company is liable in damages when an accident happens; *Ellis* v. *Lynn & Boston Railroad Co.*, 160 Mass. 341, referred to. *Lines* v. *Winnipeg Street Railway Co.*, 11 Man. R. 77.

—Customs Duties—Exemption—Steel Rails for Street Railways.]—See RAILWAY COMPANY, VII.

—Running Cars too Fast—Action for Damages—Allegation of Habitual Negligence—Demurrer.]

See PLEADING, III.

—Lord's Day Act—R.S.O. c. 203, s. 1—Travellers.]

See SUNDAY.

SUBSTITUTION.

Curator to—Failure to bring into Cause—Sale of Goods—Renewal of Registry—Arts. 951, 953, 958, 2172, 2,193 C.C.—Art. 710 C.C.P.]—An immovable in Montreal was devised by will charged with a substitution in favour of the devisee's children, and the revenues were bequeathed to the *grevé* for maintenance (*à titre d'aliments*). The buildings on the immovable were destroyed by a fire which ravaged a considerable portion of Montreal, and an Act was passed by the legislature authorizing the city to guarantee loans to sufferers by the fire. The devisee took advantage of the guarantee to borrow money and rebuild. Not having repaid the loan, proceedings to recover it were taken by the lender, and the property was sold under decree of the Court, the City of Montreal becoming the purchaser to protect itself against its guarantee. In the action to recover the loan the curator to the substitution was not brought in as a party (*mis en cause*):—Held, that the money having been borrowed in a case of necessity and in the interests of the *appelés à la substitution*, the latter were bound by it, and though the curator had not been made a party to the action the hypothec which led to the action and sale having been given for valuable consideration, under the authority of justice and in the interest of the *appelés*, and there being apparent in the cause a debt having priority over the substitution under Art. 710 C.C.P., the substitution had been purged and the *appelés* could not attack the judicial sale because the curator to the substitution was not *mis en cause*:—Held, further, that the registration of the substitution, being the registration of a title to property, did not require to be renewed under Art. 2,172 C.C.: *La Banque du Peuple* v. *Laporte*, 19 L.C.Jur. 66, and *Wells* v. *Gilmour*. Q.R. 3 Q.B. 250, approved. *City of Montreal* v. *Vadeboncœur*, Q.R. 5 Q.B. 452. Reversing 8 S.C. 38; and restoring 5 S.C. 486.

— Immovable charged with — Revendication — Prescription—Opening of Substitution.]

See LIMITATION OF ACTIONS, IV.

— Testamentary Executor — Preservation of Goods—Legacy to Children—Issue of Different Marriages—Per Capita or per Stirpes.]

See WILL, II.

—Created by Will before the Code—Opening of — Prescription — Suspension of Prescription — Arts. 2207, 2270 C.C.]—See WILL, II.

SUCCESSION.

—Of Father—Acceptance by Children—Garants —Renunciation.]—See WILL, V.

SUCCESSION DUTY.

See REVENUE.

SUMMARY ACTION.

—Action against Bank Directors—Joint and Several Liability.]

See PRACTICE AND PROCEDURE, XVII (*b*).

SUMMARY CONVICTION.

—Appeal from—Municipal Corporation—Neglect to Repair—Dominion Parliament—Legislative Authority.]—See CRIMINAL LAW, II.

—Certiorari—Duty of Court as to Reviewing Evidence.]—See PRACTICE AND PROCEDURE, VII.

SUMMARY TRIAL.

—Theft—Criminal Code, s. 783—Appeal.]

See CRIMINAL LAW, II.

—Criminal Code, s. 808.]

See STATUTES, II.

SUMMONS.

See PRACTICE AND PROCEDURE, XXII.

SUNDAY.

Street Railways—Lord's Day Act, R.S.O. c. 203, s. 1—Construction—Exemption.]—The words "or other person whatsoever" in sec. 1 of the Lord's Day Act, R.S.O. ch. 203, are to be construed as referring to persons *ejusdem generis* as the persons named, "merchant, tradesman," etc., and an incorporated company of persons operating street cars on Sunday is not within the prohibition of the enactment: *Sandiman* v. *Breach*, 7 B. & C. 96; *Reg.* v. *Budway*, 8 C.L.T. Occ. N. 269; and *Reg.* v. *Somers*, 24 Ont.R. 244, followed. *Semble*, also, that the defendants, if the enactment applied were within the exception as to "conveying travellers." *Reg.* v. *Daggett*, 1 Ont.R. 537, followed. *Attorney General for Ontario* v. *The Hamilton Street Railway Co.*, 27 Ont.R. 49.

TARIFF AND CUSTOMS DUTIES.

See REVENUE.

TAXATION OF COSTS.

See COSTS.

TAXES.

Municipal Electors—Disqualification—Exemption—56 V. c. 35, s. 4 (O.).

See MUNICIPAL CORPORATIONS, VI.

" also ASSESSMENT AND TAXES.

" " REVENUE.

TAXES MUNICIPALES.

Municipal Council—Election of Councillor—Qualification—Payment of Taxes.]

See MUNICIPAL CORPORATIONS, VI.

TAX SALES.

Sale of Land for Taxes—Damages against Municipality—R. S. Man., c. 101, s. 192—Right of Action—Demurrer.]—Where the owner of land which has been sold for arrears of taxes, when no taxes were due thereon, cannot recover it back by reason of its having been brought under the operation of the Real Property Act, his right of action against the municipality under section 192 of the Assessment Act, Rev. Stats. Man., c. 101, for the loss or damage sustained by him on account of such sale, is not complete until the amount of the indemnity to be paid is first settled in the manner pointed out by that section, namely, either by agreement or arbitration; and where the plaintiff, in his declarations claiming damages under that section for the wrongful sale of his lands by the defendant municipality for alleged arrears of taxes, showed that the lands had been bought under the Real Property Act by the tax purchaser, but did not show any agreement with defendants as to the amount of indemnity, nor that any arbitration had been held to ascertain such amount, a demurrer was allowed. *Clemons* v. *St. Andrews*, 11 Man. R. 111.

—Place of Sale—Fairness—Man. Real Property Act.—On the trial of an issue under the Manitoba Real Property Act, to determine the validity of a sale of lands for taxes, it appeared that the council did not appoint any place for the holding of the sale, and that the treasurer appointed the sale to take place at a small hall in the municipality, but not at the assize town or city of the Judicial District. The sale began at eleven o'clock in the morning, was continued for about an hour, and then, the auctioneer, officials and audience all went away to dinner, and were absent for about an hour, during which time no one was left in charge of the hall which was locked up, nor was any notice put up at the door with reference to the sale, and the land in question was sold after the sale was resumed in the afternoon, and for just the amount of taxes:—Held, the sale had not been conducted in a fair and open manner within the provisions of sec. 154 of the Manitoba Assessment Act, and that, under section 190 of the Act, the sale should be set aside. *Scott* v. *Imperial Loan Company*, 11 Man.R. 190.

—Trespasser—Possession—Tax Title—R.S.O. c. 111, s. 5, s.s. 4—Construction.

See LIMITATION OF ACTIONS, I.

—Railway—Seizure of part—Writ of Prohibition.

See PRACTICE AND PROCEDURE, XVII. (*b*).

TAXES-SCOLAIRES.

School District—Erection of New District—Board of Trustees—Payment to former Board.]
See SCHOOLS.

TELEGRAPH OFFICE.

—Common Betting-house—Ss. 197 and 198 of Criminal Code.]—See CRIMINAL LAW, III.

TEMPORALITIES FUND.

Presbyterian Church—Rights of Ministers.]—By a resolution of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, passed in 1855, ministers of the Church were to be entitled to certain annuities and benefits, but it was provided that they should cease to have any claim thereto whenever they should cease to be ministers in connection with the Church. At the time of the union of the Presbyterian bodies in Canada it was enacted by 45 Vict. c. 124 (D), that the vested rights of ministers should continue on the same principle. The plaintiff, in 1886, being then a minister of the Presbyterian Church of Canada, and receiving an annuity from the Temporalities Fund left Canada and was installed as pastor of a church in the United States. In 1889 he returned to Canada and was re-admitted into the Presbyterian Church of Canada:—Held, that he had forfeited his right to the annuity previously enjoyed, and was only entitled to be put on the roll as a new comer. *Smith* v. *The Board for the Management of the Temporalities Fund of the Presbyterian Church of Canada*, Q.R. 9 S.C 314.

TENANT FOR LIFE.

Rent—Apportionment.]—A tenant for life who had leased the premises of which she was life-tenant, died a few days after a half-year's rent, which was payable in advance, became due. On the day of her death part of the rent was remitted to her, and was received by her executor, to whom the balance was paid on the representation that he was entitled to it:—Held, that the rent was received by the executor for the use of those entitled to it, and was therefore apportionable between the executor and the remainderman, who had confirmed the possession of the tenant, and that the executor was entitled to an order for repayment by persons, third parties, claiming under the will, to whom he had paid it. *Dennis* v. *Hoover*, 27 Ont. R. 376.

—Marriage Settlement—Mortgage Investment—Loss on Realization—Apportionment between Life-tenant and Remainderman.]
See TRUSTS AND TRUSTEES, VII.

TENANT IN COMMON.

Property Seized under Execution against Co-tenant—Conversion by Purchaser at Sheriff's Sale.]—Plaintiffs were owners, as tenants in common, with M., of certain hay, grain and straw, which was taken and sold by the sheriff under an execution against M., and was purchased by defendant, who re-sold part and used the balance:—Held, that there was a conversion of the plaintiff's property by the defendant: *Brady* v. *Arnold*, 19 U.C.C.P. 48, and *Rathwell* v. *Rathwell*, 26 U.C.Q.B. 179, referred to. *McLellan* v. *McDougall*, 28 N.S.R. 237.

TENDER.

Conditional—Withdrawal of Deposit—Balance of Claim.]
See PRACTICE AND PROCEDURE, XVII (*b*).

TESTAMENT.

See WILL.

THIRD PARTY.

See PARTIES, II.

TIERS-ACQUEREUR.

Soulte—Knowledge of Tiers—Registry—Renewal.]—See SOULTE.

—Sale to in Good Faith—Tutor—False Statement to Family Council.]—See TUTOR.

TIERCE-OPPOSITION.

Procedure—Intervention before Court of Review—Arts. 154, 510 C.C.P.]—See PARTIES, II.

TITLE TO LAND.

Action en bornage—Surveyor's Report—Judgment on—Acquiescence in Judgment—Chose Jugée.]—In an action *en bornage* between M. and B. a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the Court of Review, claiming that the report gave B. more land than he claimed and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention, and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review, but that his measurements showed that the line indicated was not the line of the old fence, and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor, having been homologated by the Court, was

final as to the location of the fence, and that the judgment had been properly executed. The Court of Queen's Bench reversed the judgment, set aside the last report, and ordered the surveyor to place the boundaries in the true line of the old fence:—Held, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review in which the parties acquiesced was *chose jugée* between them, not only that the division line between the properties must be located on the line of the old fence, but that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else than start his line at the said point. *Mercier et vir* v. *Barrette*, 25 S.C.R. 94.

—**Letters Patent—Evidence—Trespasser—Compensation for Improvements.**]—H. being in possession of Crown land on which he had made improvements, applied for a patent, which was issued in favour of him, his heirs and assigns after his death, and recited the facts of his possession and improvements. H.'s heir and successor continued in possession of the land for 60 years:—Held, that if the patent did not pass a perfect title, the length of possession and recognition of title by the Crown for the time, payment of taxes and other acts of ownership were sufficient to support a petitory action against a trespasser:—Held, further, that the trespasser was entitled to 'compensation for improvements and chargeable for profits, though the latter only arose from the improvements. *Handley* v. *Foran*, Q.R. 5 Q.B. 44.

—**Pre-emption—Unoccupied Land—Cancellation of Record—Misrepresentation—C.S.B.C. [1888] c. 66.**]—C., in 1884, applied to the Assistant Commissioner of Crown Lands for a grant of a lot adjoining his holding and believing that his title was complete, he fenced in said lot and made improvements to the value of $600. In 1893 H. applied to pre-empt the same lot, untruly stating to the Commissioner that the land was not improved, and making the statutory declaration that it was "unoccupied and unreserved Crown land within the meaning of The Land Act." A record of the land was issued in the name of H., who entered and sought to dispossess C., and the latter appealed to the Assistant Commissioner, who cancelled the record. On appeal to the Chief Justice:—Held, that the lands were not "unoccupied" when H. applied for pre-emption; that the *bonâ fide* continuous residence of a pre-emptor mentioned in sec. 14 of the Act as the occupation required relates only to the cancellation of a record under sec. 13, where the settler ceases to occupy and does not govern the occupation referred to in sec. 5; and that the Commissioner had power to cancel the record to H., which was obtained by a false declaration. *Hereron* v. *Christian*, 4 B.C.R. 246.

See also DEED.
" " LANDLORD AND TENANT.
" " MORTGAGE.
" " REGISTRY LAWS.

—**Sale of Land—Delay—Waiver.**]
See SALE, III (*b*).

—**Constitutional Law—Title to Beds of Waters.**]
See CONSTITUTIONAL LAW, II. AND III.

TORT.

Creditor—Preference—13 Eliz. c. 5—R.S.O. c. 96, s. 1.]—A plaintiff suing for a tort is not a "creditor" within the meaning of the Ontario Statute as to preferences: *Ashley* v. *Brown*, 17 Ont. A.R. 500, followed. *Gurofski* v. *Harris*, 27 Ont. R. 201.

—**Continuing Damage—Prescription.**]
See LIMITATION OF ACTION, II.

—**Conversion by Purchaser at Sheriff's Sale.**]
See NEGLIGENCE.
" also RAILWAYS AND RAILWAY COMPANIES.
" " TENANTS IN COMMON.
" " TRESPASS.

TOWNSHIP.

By-laws Transferring and Assuming Road.
See WAY.

TRADE-MARK.

Trade-name—Geographical Designation—Injunction.]—As a rule a man cannot have monopoly or property in a geographical name. The plaintiff having published for a number of years a journal devoted to the interest of booksellers in Canada called *The Canadian Bookseller*, sought to enjoin the defendants from adopting as the name of a journal published and sold by them, *The Canada Bookseller and Stationer*, which for many years had been published by them under another name. There was no evidence of fraudulent intention on defendant's part:—Held, that plaintiff was not entitled to the injunction sought for. *Rose* v. *McLean Publishing Co.*, 27 Ont. R. 325.

TRAPS.

Fishing with Traps and Wears.]
See FISHERIES.

TRESPASS.

Crown Land—Finding of Jury as to doubtful Boundary Line.]—Plaintiff, in an action of trespass, claimed land as against the grantee from the Crown, on the ground that, at the time the grant was made, plaintiff was in the actual, open and exclusive possession of the land. The land in question was a small piece of woodland, which was covered by plaintiff's deed, but was neither fenced nor under cultivation, and the only evidence of occupation by plaintiff was of going on the land and removing stones, and cutting wood and poles "at many times." At the time the gran

was made there was no one in actual occupation, and no visible evidence of occupation:—Held, that the acts shown were not of such an exclusive, continuous, and notorious character as to require the Crown, before granting the land, to take steps to restore its rights:—Held, also, that the Crown was not affected with notice, under the Registry Act, of the recording of the deed of the land by a stranger to the title:—Held, also, that acts of ownership exercised by a party upon land to which he has a good title will not be extended to adjoining land included in his deed, but to which he has no title, in the absence of actual occupation of a part of the land claimed. The doctrine of *Smyth* v *McDonald*, 1 Old. 274, is not to be extended. The finding of a jury as to the location of a line, the exact position of which it is difficult to determine, will not be disturbed. *McKay* v. *McDonald*, 28 N.S.R. 99.

—Trespass to Mine — Order for Inspection of Defendants' Mine—View—Discretion—Order 50 (Nova Scotia) Rule 3—Failure to serve Co-Owner.]—In an action for trespass to plaintiff's mine, an order was obtained by him under Order 50, Rule 3, from a Judge in Chambers for an inspection of defendants' mine below the surface, upon complying with certain terms fixed by the Judge:—Held, that the order was within the discretion of the Judge granting it, and that the court could not interfere with that discretion:—Held, also, that the case was one in which an order for inspection should be made if it appeared that it was essential for the purpose of enabling plaintiff to prove his case:—Held, also, that the fact that defendant's partner, the other owner of the mine, of which inspection was ordered, had not been served with the writ at the time the order was made, would not avail defendant. *Gray* v. *Hardman*, 28 N.S.R. 235.

—Hay Cut by Trespasser on Crown Lands—Destruction of same by Fire—Negligence—Right of Action.]—In an action to recover the value of certain hay alleged to have been destroyed by fire through the negligence of the defendants, it appeared that the hay had been cut by the plaintiff, without license or authority therefor, on certain lands belonging to the Crown and stacked there, and was neither in his actual nor *de facto* possession at the time it was burnt:—Held, that the action would not lie. *Gaudry* v. *The Canadian Pacific Railway Co.*, 11 Man. R. 69.

Fire—Negligence.]—Where a person uses fire in his field in a customary way for the purposes of agriculture, or other industrial purposes, he is not liable for damages arising from the escape of the fire to other lands unless the escape is due to his negligence. *Owens* v. *Burgess*, 11 Man. R. 75. And see *Booth* v. *Moffatt*, 11 Man. R. 25.

See also NEGLIGENCE, VI.

—Petitory Action against Trespasser—Compensation—Value of Improvements.

See TITLE TO LAND.

TRUSTS AND TRUSTEES.

I. ACCOUNTS.

Account — Limitation of Actions — Ontario Trustee Act, 1891, s. 13—Estoppel.]—The defendant, as surviving trustee under a will, by deed dated 2nd March, 1887, conveyed the lands retained by him as the share of the plaintiff's deceased husband under the will, to the brothers and sisters of the husband as his heirs and heiresses at law under the directions of the will. In an action begun on the 8th July, 1893, the plaintiff sought an account of the defendant's dealings with the estate of the testator, and a transfer and conveyance to her of her deceased husband's share, which she claimed under a marriage settlement. The defendant pleaded the Ontario Trustee Act, 1891, sec. 13, sub-sec. 1 (*a*) and (*b*), in bar of the action:—Held, notwithstanding that a small balance of $6.35, ascertained as early as 3rd February, 1887, remained in the defendant's hands until the 21st July, 1887 that the statute began to run in his favour on the 2nd March, 1887, assuming a breach of trust on that day, and the plaintiff's action was barred before it was begun. On the 27th September, 1892, the defendant wrote a letter to the plaintiff's solicitors in which he stated that all the affairs of the estate between himself, as trustee, and the heirs were wound up "as long ago as July, 1887":—Held, that this was not an acknowledgement which had the effect of taking the case out of the operation of the statute; and the defendant was not estopped by the letter from saying that the conveyance was as early as the 2nd March, 1887. *Stephens* v. *Beatty*, 27 Ont. R. 75.

—Advance to Wife—Charge on Her Estate—Covenant of Husband and Wife—"Ordinary Legal Rights."]—A married woman who, under the terms of her father's will, was entitled to receive her share of his estate on coming of age, agreed, on obtaining her majority, with the other beneficiaries, to postpone the division. An agreement was afterwards executed between the husband, wife, and the trustee of the estate, whereby, after reciting the above facts, the trustee agreed to advance her certain moneys, which she agreed to repay within a specified period, the advance being made a charge on her share of the estate. The agreement also provided that the amount of the advance should be deducted from her share in case of non-payment, or of a division of the estate prior to the date fixed for repayment. The husband was a party to the agreement for the purpose only of joining in the covenant, and it was expressly agreed therein that none of the provisions of the indenture should "in anywise affect or prejudice the ordinary legal rights" of the trustee to enforce payment:—Held, that notwithstanding the

latter clause, the husband was liable as a surety only, and that he was entitled to be exonerated by his wife, and to the benefit of her property in the trustee's hands, and to an account in regard thereto from the date of the covenant sued on. *Lee* v. *Ellis*, 27 Ont. R. 608.

II. Advice of Court.

—Proceedings in Equity—Application to Trustees for Advice—Right to Fund in hands of Trustees—53 V. c. 4, s. 212 (N.B.)]—Under sec. 212 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), the court will not, as a rule, determine the rights of competing parties to a fund in the hands of the trustees. The object of that section is to enable the court to advise executors and trustees in matters of discretion vested in them. *In re Foxwell's Estate*, 1 N.B. Eq. 195.

III. Appointment of Trustees.

—Trustee Act, 13 & 14 V. c. 60 (Imp.)—Appointment by Court.]—Where in case of a trust created by will it is not expedient to replace deceased trustees by appointment in the mode the will directs, the court will make the appointment by authority of the Trustee Act (13 & 14 V. c. 60, Imp.), as amended by 15 & 16 V. c. 55 (Imp.) *In re Bossi*, 4 B.C.R. 584.

IV. Creation of Trust.

—Sale of Land—Trustee and cestui que trust—Possession—Limitation—Registry Act.]—The parties to an agreement for the sale of land in payment of the purchase money, until the taking of possession by the purchaser, stand in the relation of trustee and *cestui que trust*; and as the former has no effective right of entry, the Statute of Limitations does not apply in favor of the possession of the *cestui que trust*: *Warren* v. *Murray* [1894], 2 Q.B. 648, applied. A mortgagee from the trustee under the above circumstances, who takes and registers his mortgage in ignorance that any one other than the mortgagor is in occupation of the land, and without notice, actual or constructive, of any equitable right of the *cestui que trust*, is entitled to set up the provision of sec. 83 of the Registry Act, which is retrospective, and to plead it if it is necessary to do so: *Bell* v. *Walker*, 20 Gr. 558; *Grey* v. *Ball*, 23 Gr. 390, followed. *The Building and Loan Association* v. *Poaps*, 27 Ont. R. 470.

—Constructive Notice—Priority—Equity.]—C. had a contract with a municipal corporation, for supply of rock for making roads, and assigned the same to K. for $11,000, of which $5,000 was to be paid in cash, and the balance at the rate of twenty cents for every cubic yard of rock delivered, part of the monies due and accruing due, under the contract, being assigned to K. as security. The corporation was released from all obligation to C. under the contract. Subsequently, K. entered into a new contract with the city which recited the said assignment from C., and having received advances from an aunt to pay C. he assigned to her all money due and to become due under such new contract. In an action between C. and the aunt:—Held, that by the deed of assignment to K., the latter became a trustee for C. of the portion of the earnings to be received from the city which had been assigned to C. as security, and C. had, therefore, an equity which over rode the subsequent assignment to the aunt of K., and priority of notice to the city of the latter assignment was immaterial:—Held, per McCreight, J., that the aunt having had notice of the existence of the deed of assignment had constructive notice of its terms; and the fact that the solicitor employed by her to draw the second assignment had prepared the deed of assignment for C. affected the aunt with constructive notice, though the solicitor acquired his knowledge in a former and different transaction. *Clark* v. *Kendall*, 4 B.C.R. 503.

Indian Lands—Charge—Surrender.]
See Constitutional Law, III.

V. Proceedings by Trustees.

—Suit by Trustees—Refusal of one to join—Costs.]—A trustee refused to join with his co-trustee in a suit for the recovery of trust property and was made a defendant:—Held, that as the costs of the suit were not large, and it appeared that the trustee had good grounds for his refusal and had not asked for costs, the court would not order costs against him. *Belyea* v. *Conroy*, 1 N. B. Eq. 227.

VI. Removal of Trustees.

—Summary Application to Remove.]—The Court will not upon a summary petition, or otherwise than in an action, remove a trustee or executor *in invitum*. *Re Davis's Trust*, 17 Ont. P.R. 187.

—Refusal to take Proceedings—Removal—Receiver.]—Where trustees, without sufficient reason, refuse to bring an action for the benefit of the estate at the request of beneficiaries, they may be removed from the trusteeship. If the period of the trust has almost expired, and the estate is to be wound up at its close, a receiver may be appointed instead of new trustees. *Garesche* v. *Garesche*, 4 B.C.R. 310.

VII. Trust Funds.

—Marriage Settlement—Mortgage Investment—Loss on Realization—Apportionment between Life-tenant and Remainderman.]—Where a loss occurs under a mortgage of trust bonds, the income of which is payable to a life-tenant, the loss should be apportioned between the tenant for life and the remainderman, by adding the amount actually realized from the security to the amount of interest theretofore received by the tenant for life, and dividing the whole sum between the latter and the remainderman in the proportion in which they would have been entitled to share if the security had been paid in full, the tenant for life giving credit for the amounts already received: In *re Foster, Lloyd* v. *Carr*, 45 Ch. D. 629, followed. *In re Plumb*, 27 Ont. R. 601.

—Advances to Agent to Buy Goods—Interest of Principal in Goods.]
See Principal and Agent, I.

See also EXECUTORS AND ADMINISTRATORS
See MORTGAGE, VIII.
" WILL.

TUTOR.

Family Council.]—The functions of a tutor appointed to represent a minor *à un inventaire* are at an end when the inventory is closed, and his nomination is no obstacle to that of a *tuteur-general* to the same minor.—The fact that all relations of a minor were not present at the family council when the tutor is nominated does not make the nomination void, nor nullify the subsequent acts of the tutor. Nor will a sale by a tutor to a stranger in good faith be avoided by the submission to a family council of a false statement of the state of the minor's affairs. *Donahue* v. *Faucher*, Q.R. 9 S.C. 69.

— Dismissal — Family Council.] — A judge in chambers cannot dismiss a tutor, even with his own consent, except on advice of the family council. *Kinsela* v. *Baynes*, Q.R. 9 S.C. 218.

—Ad Hoc—Petition to annul Nomination—Account of Tutor.]—An application to annul the nomination of a tutor *ad hoc* may be made by petition.—The account (*compte*) of a tutor can only be rendered to him who has the administration of the minor's property; if the tutelage ceases after the majority of the infant it is rendered to the latter; if before, to the infant, assisted by a curator (Art 318 C.C.); if on the minor's death to his heirs; and if it becomes vacant to the new tutor.—A tutor *ad hoc* has not the administration of the minor's property, and his appointment to receive the tutor's account is illegal. *Hebert* v. *Roy*, Q.R. 9 S.C. 251.

ULTRA VIRES.

See CONSTITUTIONAL LAW.
" CONTRACT.
" MUNICIPAL CORPORATIONS.

UNDUE INFLUENCE.

See WILL, IV

USUFRUCTUARY.

—Action for title—Judgment—Continuance of Usufruct.]—See ACTION, IX.

VACATION.

Appeal — Time Limit — Commencement of — Pronouncing or Entry of Judgment—Security—Extension of Time—Order of Judge—R.S.C. c. 135, ss. 40, 42, 46.]—The delay of sixty days for appealing to the Supreme Court of Canada, prescribed by sec. 40 of the Supreme and Exchequer Courts Act, is not suspended during the vacation of the court established by the rules. *The News Printing Co.* v. *Macrae*, 26 S.C.R. 695.

—Proceedings before—Official Referee.]—As a general rule every legal proceeding which may properly be taken out of vacation may with equal propriety be taken during vacation, unless something to the contrary can be found in some statute or Rule of Court.—An official referee may proceed with a reference during vacation. *Marples* v. *Rosebrugh*, 17 Ont P.R. 104.

—Proceedings in—Universal Legatee—Reprise d'Instance.]—When a succession is accepted after the beginning of the long vacation on the first of July, the person accepting it is bound to take up the *instance* during the vacation. *Hancock* v. *Cassils*, Q.R. 9 S.C. 152.

VENDOR AND PURCHASER.

See SALE, III (*b*).

VENDOR'S LIEN.

—Lien—Conditional Sale of Goods—Landlord and Tenant—Distress.]

See LANDLORD AND TENANT, IV.
See also SALE, I.

VENTE.

See SALE.

VENUE.

See PRACTICE AND PROCEDURE, XXV.

VERDICT.

Railway Company—Loan of Cars—Breach of Duty—Reasonable Care—Negligence—Risk Voluntarily Incurred—"Volenti non fit Injuria."]

See ACTION, IX.

VICE-ADMIRALTY COURT.

See EXCHEQUER COURT OF CANADA.
" SHIPPING.

VOISINAGE.

—Nuisance—Demolition of Stable.]

See NUISANCE.

VOLUNTARY CONVEYANCE.

See BILLS OF SALE.

VOLUNTARY SETTLEMENT.

—Life Insurance — Mutual Benefit Society — Benefit Certificate — Voluntary Settlement — R.S.O. c. 136.]—See INSURANCE, IV.

WAGES.

See MASTER AND SERVANT, I.
See SHIPPING, V (*b*).

WAIVER.

Extension of Time for Making Award—Irregularity of Extension — Waiver.] — An arbitrator was required to make and publish his award on or before a day fixed by the submission, "or on such further day as the said arbitrator may from time to time enlarge the time for making his said award, by writing under his hand, indorsed on the agreement at any time." Two extensions of time for making the award were written upon another paper, which was at the time among the papers connected with the arbitration, and "either inside or outside the agreement of submission": Held, that this was not a sufficient compliance with the agreement to render the extension of time effective, as the mode for extending the time indicated by the agreement should have been strictly followed; that the irregularity was not waived by the writing of a letter to the arbitrator objecting to the award on other grounds, it not being shown that at the time the letter was written either the plaintiff or his solicitor had knowledge that the extension of time had not been properly made. *MacKay* v. *Nicol*, 28 N.S.R. 43.

—Expropriation Proceedings—Demurrer—Estoppel—Waiver—Pleading.]—In a notice given under sec. 699 of the Manitoba Municipal Act, of proceedings for the expropriation by arbitration of the plaintiff's land, the defendants stated that a petition would be presented to fix the compensation to be "paid to the plaintiff" for the land required, instead of that to be "allowed for the land." The notice also differed from the form directed by that section in referring to the Judge of the County Court of the "Eastern Judicial District" instead of the "Judicial Division" within which the land lay. The defendants proceeded with the arbitration proceedings and procured the award of commissioners under that and following sections of the Act, although they declined afterwards to submit it to the County Court Judge for confirmation. In an action by the plaintiff for a mandamus to compel the defendants to complete the arbitration proceedings and pay the amount of the award:—Held, that the irregularities in the notice were not material; and that such irregularities were waived by the defendants in taking subsequent steps in the proceedings:—Held, also, that the defendants were estopped from denying that there was a proper notice given by them, and could not withdraw from the position taken by them therein. *Scott* v. *The City of Winnipeg*, 11 Man. R. 84.

—Agreement Signed under Threat of Criminal Proceedings—Acquiescence in acts done thereunder.]—The plaintiff having bought two horses from the defendant and given a chattel mortgage upon them which was to be paid by delivering hay, a dispute arose as to whether the horses had been paid for or not. Defendant then seized the horses, claiming a right to do so under the chattel mortgage, when plaintiff prosecuted him for stealing. The defendant then threatened to prosecute the plaintiff for perjury in swearing to the information. The parties then agreed to refer their disputes to arbitration, the plaintiff having been induced by the threats to do so. The proceedings of the arbitrators were admittedly irregular, but an award was made giving the horses to defendant, who was to pay the feed bill due against them, and $15 for previous expenses. The defendant then paid the feed bill and the $15 and took away the horses. More than four months afterwards the plaintiff replevied the horses in the County Court, when the judge found that the horses had been paid for by the delivery of hay, and that the arbitration proceedings were irregular, but was of opinion that plaintiff had by his conduct and acquiescence waived all objections to the award. On appeal to a judge of the Queen's Bench:—Held, that the agreement of arbitration was wholly void: (*Williams* v. *Bayley*, 4 Giff. 638, L.R.I.H.L. 200, and *Windhill Local Board* v. *Vint*, 45 Ch. D. 351, followed. *Flower* v. *Sadler*, 10 Q.B.D. 572, distinguished); and that the plaintiff had not waived his right of objecting to the agreement and award by allowing the defendant to take the horses and pay the money according to the award, or, by allowing the defendant to keep the horses for so long. *Hayward* v. *Phillips*, 6 A. & E. 119; *Bartle* v. *Musgrave*, 1 Dowl. N.S. 325, followed. *Laferriere* v. *Cadieux*, 11 Man. R. 175.

—Notice to Quit—Waiver.]

See LANDLORD AND TENANT, IX.

—Fire Insurance—Mutual Co.—Termination of Contract—Notice—Statutory Condition.]

See INSURANCE, II.

—Debtor and Creditor—Composition and Discharge — Acquiescence — New Arrangement — Principal and Agent — Notice of Withdrawal from Agreement—Fraudulent Preferences.]

See DEBTOR AND CREDITOR, V.

—Fire Insurance—Conditions of Policy—Breach—Recognition of Existing Risk after Breach—Agent's Authority.]

See INSURANCE, II.

—Insurance Policy—Non-payment of Premium—Waiver of Nullity—Agent.]

See INSURANCE, IV.

—Lease—Infectious Disease on Premises—Refusal to Occupy or Pay Rent—Attempt to Sublet.]

See LANDLORD AND TENANT, V.

—Practice—Right to Jury—Rule 333 (B.C.)]

See PRACTICE, XIV.
And see ESTOPPEL.

WAREHOUSEMAN.

Loss of Goods—Liability for.]—A warehouseman is not liable for a loss resulting from a cause, the danger and risk of which was made known to the owner of the goods at the time they were warehoused. *Fry* v. *Quebec Harbour Commissioners*, Q.R. 5 Q.B. 340, affirming 9 S.C. 14.

See also RAILWAYS AND RAILWAY COMPANIES, I.

WARRANT.

Criminal Code, s. 573—Persona Designata—Officers de Facto and de Jure—"Chief Constable"—Confiscation of Gaming Instruments, Moneys, etc.—Ministerial Officer.]—A warrant issued under sec. 575 of the Criminal Code to seize gaming instruments would be good if issued on the report of a person who filled *de facto* the office of "deputy high constable," though he was not such *de jure*. *O'Neil* v. *The Attorney-General of Canada*, 26 S.C.R. 122.

—Form in Statute—Canada Temperance Act—Search Warrant—Magistrate's Jurisdiction—Constable—Justification of Ministerial Officer—Judgment Inter Partes.]

See CANADA TEMPERANCE ACT.
" also DIVISION COURTS.
" " JUSTICE OF THE PEACE.

WARRANTY.

Action in Warranty—Proceeding taken by Warrantee before Judgment on principal demand.]—It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby. But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences. *Archbald* v. *deLisle*, *Baker* v. *deLisle*, *Mowat* v. *deLisle*, 25 S.C.R. 1.

—Action of—Proceedings en Guarantie—Assessment of Damages—Questions of fact.]—The Supreme Court will not interfere with the amount of damages assessed by a judgment appealed from if there is evidence to support it. In cases of *delit* or *quasi-delit* a warrantee may before condemnation take proceedings *en garantie*, and before the warrantor can object to being called into the principal action as a defendant *en garantie*. *Archbald* v. *DeLisle* (25 S.C.R. 1) followed. *The Montreal Gas Co.* v. *St. Laurent*; *The City of St. Henri* v. *St. Laurent*, 26 S.C.R. 176.

—Special Tax—Local Improvements—Ex post facto Legislation—Warranty.]

See MUNICIPAL CORPORATIONS, V.

—Builder—Faulty Construction—Recourse against Architect.]—See ACTION, VIII.
" also SALE, I (*f*).

WATER LOTS.

Crown Grants—Title to Bed of Navigable Waters—Dedication—User—Obstruction to Navigation—Nuisance.]

See CONSTITUTIONAL LAW, III.

—Filling in—"Buildings and Erections"—"Improvements"—Lessor and Lessee.]

See LANDLORD AND TENANT, III.

WATERS AND WATER-COURSES.

Rivers and Streams—Tolls.]—A mill-dam erected in a stream by the owners of a saw-mill for their business is not an improvement made for the purpose of facilitating the floating of saw-logs, lumber and timber down such stream so as to entitle the owners to charge tolls for the transmission of such saw-logs, etc., over it under the provisions of the Rivers and Streams Act (R.S.O. c. 118); and under R.S.O. c. 120 lumbermen are entitled to the free transmission of their logs, etc., over such dam. *In re Dam and Slide on Little Bob River*, 23 Ont. A.R. 177.

WAY.

I. PRIVATE WAYS.

Public Highway—Registered Plan—Dedication—User—Retrospective Statute—46 V. c. 18 (O.)]—The right vested in a municipal corporation by 46 V. c. 18 (O.) to convert into a public highway a road laid out by a private person on his property, can only be exercised in respect to private roads, to the use of which the owners of property abutting thereon were entitled. *Gooderham* v. *The City of Toronto*, 25 S.C.R. 246.

—Conveyance of "Road"—Effect of.]—M. by deed conveyed to W., amongst other lands, "a road forty feet wide," (describing it) "not included in the above quantity of land":—Held, that this was merely a grant of an easement of the right of way over the land so described, and that the fee in the freehold therein did not pass to the grantee. *Fisher* v. *Webster*, 27 Ont. R. 35.

—Private Approach—Non-repair—Liability.]—Defendant had constructed, with the knowledge of, and without objection by, the municipal corporation, an approach across a ditch between the sidewalk and the highway for the purpose of enabling vehicles to pass to and from his property. Plaintiff was passing on foot along the sidewalk in front of the defendant's property, and wishing to cross to the opposite side of the street she entered upon the defendant's approach, which at the time had become dilapidated and out of repair. It being in the night time, the plaintiff's foot passed through a hole in the approach which

she did not see, and, in consequence, her leg was broken;—Held that the defendant was liable. *Hopkins* v. *The Town of Owen Sound*, 27 Ont. R. 43.

—**Townships Transferring and Assuming Roads —By-laws.**]—A township corporation on which has devolved a portion of a public road situated within its territorial limits, relinquished by the Minister of Public Works under sec. 52 of 31 Vict., c. 12 (D.), cannot authorize another township to assume control of and keep in repair such portion of the road, nor can the latter township assume the road and lawfully collect tolls thereon, and by-laws passed for such purpose are invalid: *Corporation of Ancaster* v. *Durrand*, 32 U.C.C.P. 563 distinguished. *Smith* v. *The Township of Ancaster*, 27 Ont. R. 276. Affirmed on Appeal: 23 Ont. A.R. 596.

—**Easement—Unity of Possession and Seizin—Lost grant—Tenancy—Estoppel.**]—A testator dying in 1874 devised adjoining lots of land 4 and 5 to his two sons respectively. House No. 9 stood mainly on lot No. 4, but also partly on lot 5, and house No. 13 stood on the remainder of lot 5, there being a passage way between the two houses, used in common by the occupants of both for the purpose of getting in wood and coal, etc. The appellant, the owner of lot No. 4, had, as was admitted, by virtue of a conveyance from the devisee of lot 4 and by the statute of limitations, acquired title to the portion of lot 5 on which house No. 9 stood:—Held, that a right of way over the passage between the two houses did not pass by implication of law to the devisee of lot No. 4.—The passage in question was used by the occupants of house No. 9 from the time of the death of the testator until 1895, but during the period from March to June, 1894, the owner of No. 13 was also the tenant of No. 9:—Held, per Meredith, C.J., that the unity of possession during that period interrupted the running of the statute, and the appellant had not acquired a right of way as an easement by prescription under R.S.O. c. 111, sec. 35: Dictum of Hatherly, L.C., in *Ladyman* v. *Grave*, 6 Ch. App. 763, not followed. But, *per curiam*, that at all events the locus in question could not be treated as a way to lot 4; it was rather a way to that portion of lot 5 on which house No. 9 stood; and there being no unity of seizin of the alleged dominant and servient tenants in the devisee of lot 5, no easement could exist while that unity continued; and therefore the enjoyment of the way as an easement began only when the title of the devisee of lot 5 to that portion of it in which house No. 9 stood became extinguished by the statute, which was less than twenty years before this litigation:—*Semble*, per Meredith, C.J., that but for this latter circumstance, the claim of the appellant might have been sustained by the application of the doctrine of "lost grant." And also, that the respondent, by reason of his tenancy of house No. 9, was estopped from asserting that his possession of the land of which he was tenant, and his use of the way which was enjoyed in connection with it, were other than a possession and user by him as tenant. *Re Cockburn*, 27 Ont. R. 450.

—**Opening—Invitation—Accident—Land adjoining Highway.**]—Where the plaintiff, instead of taking the way provided for access to and from his premises, left it and proceeded to his destination upon a track belonging to the defendants, which, to his knowledge, was not a street or way completed for use or opened for public travel, no invitation or inducement being held out by the defendants to the public to travel it, and on which he, owing to irregularities on its surface, fell and was injured:—Held, that he could not recover damages for his injury:—Held, also, that he could not recover upon the alternative allegation that he was obliged to leave the highway, because it was in a dangerous state from snow and ice, and sustained the injury upon the adjoining land. *Noverre* v. *City of Toronto*, 27 Ont. R. 651.

—**Sale by Plan—Lane—Abandonment.**]
See EASEMENT.

II. PUBLIC WAYS.

(*a*) *Accidents Arising from Negligence.*

—**Repair of Streets—Liability for Non-feasance.**]—In the absence of a statute imposing liability for negligence or non-feasance a municipal corporation is not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way, or having been allowed to get out of repair: *Municipality of Pictou* v. *Geldert* ([1893] A.C. 524), and *The Town of Sydney* v. *Bourke* ([1895] A.C. 433), followed. *The City of Saint John* v. *Campbell*, 26 S.C.R. 1.

—**Highways—Ice on Sidewalk—57 V., c. 50, s. 13 (O.)**]—A street crossing in the line of and adjoining parts of a sidewalk on opposite sides of the street, is not a sidewalk within the meaning of 57 Vict., c. 50, s. 13 (O.).—On the street crossing in question snow had accumulated, partly from being shovelled there from the sidewalk and partly from the action of passing sleighs, so that there was a descent of some inches from the crossing to the sidewalk, and the plaintiff slipped on this descent and was injured:—Held, per Hagarty, C.J.O., and Maclennan, J.A., that the municipality was not liable. Per Burton and Osler, JJ.A., that there was evidence of negligence to go to the jury. In the result the judgment of the Common Pleas Division for the plaintiff was affirmed. *Drennan* v. *City of Kingston*, 23 Ont. A.R. 406. Affirmed on appeal to the Supreme Court of Canada, 27 S.C.R. 46.

—**Highway—Want of Repair.**]—Anything which exists or is allowed to remain above a highway interfering with its ordinary and reasonable use constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway.—A branch of a tree growing by the side of a highway, to the knowledge of defendants, extended over the line of travel at a height of about eleven feet. The plaintiff in endeavouring to pass under the branch, on the top of a load of hay, was brushed off by it and injured:—Held, that the jury having found that the highway was out of repair, the defendants were liable: *Embler* v. *Town of Wallkill*, 57 Hun 384, referred to.—

The question whether a highway is out of repair is a question for the jury: *Derochie* v. *Town of Cor wall*, 21 Ont. A.R. 279, followed.—It was shown that the plaintiff had hauled hay upon this road and past this particular place not long before; that he and another man who was on the load with him, when approaching the branch observed the situation, but concluded they could pass in safety; that the other man did pass safely under the branch, and the plaintiff, instead of lying close to the hay, put up his feet to raise the limb, which he failed to do:—Held, that the plaintiff was not called upon to do the very best and wisest thing; and that upon this evidence the Court could not interfere with the finding of the jury that the accident could not have been avoided by the exercise of reasonable care on the part of the plaintiff: *Connell* v. *The Town of Prescott*, 22 S.C.R. at pp. 162-3, referred to:—Held, also, upon the evidence, that the sum assessed as damages, $1,200, was not so excessive as to warrant the Court in interfering with the verdict. *Ferguson* v. *Township of Southwold*, 27 Ont. R. 66. And see *McCullough* v. *Anderson*, 27 Ont. R. 73 *n*.

—**Defective Sidewalk—Notice of Action.**]—The notice required by 57 Vict., c. 50, s. 13 (Ont.) in cases of injury from defective sidewalks is to inform the corporation before action of the nature of the accident. Having regard to Ontario Consol. Rule 402, that a defendant is to raise all such grounds of defence, as if not raised at the pleadings would be likely to take the opposite party by surprise, it is proper for the defendant to set up in his defence want of notice in case the statement of claim is silent on the point, so that the judge can inquire into the circums ances (if any) which excuse the want or insufficiency of this notice. Where the objection, in such a case, to the want of notice was not raised until after the evidence was closed, a motion for a non-suit was refused. *Longbottom* v. *The City of Toronto*, 27 Ont. R. 198.

—**Hydrant on Street—Misdirection—Evidence.**]—A hydrant was placed on a narrow, irregular street in the town of Woodstock, in which there was no line of demarcation between the street and sidewalks, with two posts placed around it to protect it from damage, and mark its position in winter when the snow accumulated so as at times to cover it up. There was no light on the street, and a woman in passing through it after nine o'clock on a night in August struck against the hydrant and posts and was injured. In an action against the town for damages: Held, that the jury were rightly asked at the trial to say whether or not the posts were a proper or necessary means of protection, or whether any protection at all was required, and that it was not misdirection to leave to them for consideration whether a line between the sidewalk and street should not have been made by the town:—Held, also, that evidence of other accidents from the same cause was properly admitted. *Glidden* v. *The Town of Woodstock*, 33 N.B.R. 388.

—**Highway—Repair—Municipal Act [1892] s. 104, s.s. 90 (B.C.)**]—A duty may be cast by statute upon a municipal corporation to repair highways, and if that is clearly done it will be liable for damages caused by negligence in not repairing. The Municipal Act, 1892, sec. 104, s.s. 30, which empowers a corporation to raise money by way of road tax and to pass by-laws respecting roads, streets and bridges, does not cast on a corporation the duty of keeping streets in repair. *Lindell* v. *City of Victoria*, 3 B.C.R. 400.

(b) Other Cases.

—**Repair of Streets—Pavements—Assessment of Owners—Double Taxation—24 V., c. 39 (N.S.)—53 V., c. 60, s. 14 (N.S.)**]—By s. 14 of the Nova Scotia statute, 53 V., c. 60, the City Council of Halifax was authorized to borrow money for paving the sidewalks of the city with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done, and to be a first lien on such properties. A concrete sidewalk was laid, under authority of this statute, in front of L.'s property, and he refused to pay half the costs on the ground that his predecessor in title had in 1867, under the Act 24 V., c. 39, furnished the material to construct a brick sidewalk in front of the same property, and that it would be imposing a double tax on the property, if he had to pay for the concrete sidewalk as well:—Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing, because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891 had become worn out, useless and dangerous. *The City of Halifax* v. *Lithgow*, 26 S.C.R. 336.

—**By-law—Assessment—Agreement with Owners—Construction of Subway—Benefit to Lands.**]—An agreement was entered into by the Corporation of Toronto with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made, running east on King Street to the limit of the subway, the street being lowered in front of the company's lands, which were, to some extent, cut off from abutting as before on certain streets; a retaining wall was also found necessary. By the agreement, the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property so assessed being on the approach to the subway:—Held, that to the extent to which the lands of the company were cut off from abutting on the street as before the work was an injury, and not a benefit to such lands, and therefore not within the clauses of the Municipal Act as to local improvements;

that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement:—Held further, that as the by-law had to be quashed as to three-fourths of the work effected, it could not be maintained as to the residue, which might have been assessable as a local improvement if it had not been coupled with work not so assessable.—Notice to a property owner of assessment for local improvements under sec. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act. In the result the judgment of the Court of Appeal, 23 Ont. A.R. 250, was affirmed *City of Toronto* v. *Canadian Pacific Railway Co.*, 26 S.C.R. 682.

—**Local Improvements—55 V. (O.) c. 42, s. 623b.**]—An assessment charging lands is a judicial act, of which the party affected must have notice, and be allowed to be heard. Under the provisions of sec. 623b of the Consolidated Municipal Act, 55 Vict. c. 42, publication in a local newspaper of a notice that the corporation intend to construct sidewalks in certain districts named therein, is not sufficient notice to a property owner affected by the proposed work. *In re Hodgins and the City of Toronto*, 23 Ont. A.R. 80, affirming 26 Ont. R. 480.

—**Street Level—Injury by Raising—Damages.**]—The purchaser of a lot of land has an absolute right, as against his vendor, to have the adjoining ground maintained at its natural level if a change of such level would be injurious to him, and the corporation of the city in which such lot is situated has no greater right to change the level than such vendor would have had except for reason of public utility, and then subject to the obligation of indemnifying the owner of the lot for any loss accruing to him therefrom. The owner in such case is entitled to damages, even though he knew when he purchased the lot that proceedings involving a change of level were contemplated, and when building made some provisions, though inadequate, against the anticipated change. *Audet* v. *The City of Quebec*, Q.R. 9 S.C. 340.

—**Widening of Street—Statutory Authority—Care of Turnpike Road.**]—In proceedings to annul a by-law for the widening of a main thoroughfare within the municipality:—Held, that an arrangement between the municipality and the turnpike road trustees by which the latter handed over to the municipality the care of turnpike roads within its limits in consideration of the municipality assuming certain obligations of the trustees, was duly authorized by 42 & 43 V., c. 43 (P.Q.), and that the municipality in passing the by-law for the widening of the street, merely exercised the right given to it by its Act of incorporation and other statutes regulating the rights and duties appertaining to it as a municipal corporation. *Murray* v. *The Town of Westmount*, Q.R. 9 S.C. 366. Affirmed by Court of Queen's Bench on Dec. 17th, 1896, and by the Supreme Court of Canada on June 7th, 1897.

—**By-Law—Ultra Vires—Highways.**]—Sec. 593 of Manitoba Municipal Act, as amended by 58 V., c. 32, s. 14, enacts that rural municipalities may pass by-laws "for regulating or prohibiting the passage of traction engines, threshing machines, or other heavy vehicles over highways or bridges upon highways, and for providing the penalty in case of the violation of the provisions of such by-law." The defendants passed a by-law providing that no traction engine, steam engine, threshing machine, or watertank, should pass or be transported over any of the highways within the defendants' municipality, except at the sole risk of the owner of such engine, machine, etc. Held, that this was not a *bonâ fide* exercise of the power conferred by the Act, as it neither regulated nor prohibited the passage of such engines, etc., and that such by-law was *ultra vires*. *McMillan* v. *Portage la Prairie*, 11 Man. R. 216.

WEARS.

Fishing by Traps and Wears.]

See FISHERIES.

WIFE.

See HUSBAND AND WIFE.

WILL.

I. CONSTRUCTION.

—**Vendor and Purchaser—Waiver of Objections—Lapse of Time—Executory Devise over—Defeasible Title—Rescission of Contract.**]—An agreement for the sale and purchase of land contained the provision that the vendee should examine the title at his own expense and have ten days from the date of the agreement for that purpose, and should be "deemed to have waived all objections to title not raised within that time." Upon the investigation of the title by the purchaser it appeared that the vendors derived title through one P., a purchaser through one B S., a devisee under a will by which the land in question was devised by the testatrix to her daughter the said B.S., and certain other land to another daughter; the will contained the direction that "if either daughter should die without lawful issue the part and portion of the deceased shall revert to the surviving daughter," and a gift over in case both daughters should die without issue. At the time of the agreement B.S. was alive and had children. An ob-

jection was taken to the title, but not within the ten days from the date of the agreement. The purchasers brought a suit for specific performance or rescission of the contract:—Held, reversing the judgment of the Court below, that although B.S. took an estate in fee simple subject to the executory devise over in case she should die without issue living at her death, inasmuch as the purchaser would get a present holding title accompanied by possession, the objection taken did not go to the root of the title and was one to which effect could not be given, not having been taken within the time limited by the agreement. *Armstrong* v. *Nason*, *Armstrong* v. *Wright*, *Armstrong* v. *McClelland*, 25 S.C.R. 263.

—**Will, Construction of—Death without Issue—Executory Devise Over—Conditional Fee—Life Estate—Estate Tail.**]—A testator died in 1856, having previously made his last will, divided into numbered paragraphs by which he devised his property amongst certain of his children. By the third clause he devised lands to his son F. on attaining the age of 21 years—"giving the executors power to lift the rent, and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of 21 years," and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors." F. attained the age of 21 years and died in 1893, unmarried and without issue:—Held, that neither the form nor the language used in the will would authorize a departure from the general rule as to construction according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to the property devised to the testator's sons and daughters by all the preceding clauses of the will. Held, further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee who thus took an estate in fee subject to the executory devise over. *Crawford* v. *Broddy*, 26 S.C.R. 345.

—**Devise—Construction—"My Lawful Heirs."**]—A testator, after making a devise to his wife and only child for their joint lives and to the survivor for life, 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":—Held, that the testator's language must be taken to refer to those who were his heirs at his death, and not to those who may have happened to answer that description at the determination of the preceding particular interest, even though the person taking as heir was the person, or one of the persons, entitled to the particular interest. *Thompson* v. *Smith*, 23 Ont. A.R. 29. Affirmed by Supreme Court of Canada, on June 15th, 1897.

—**Election—General Words—"My Estate"—Insurance Policies—Apportionment—Variation—R.S.O. c. 136, sec. 6 (1)—Deficiency of Assets—Legacies—Abatement.**]—Testatrix by her will left all her executors, upon trust, *inter alia*, (5) to set apart $4,500 and pay the income to the plaintiff, one of her sons; (6) to realize on all the residue of the estate, and after providing for maintenance of unsold portions, to pay $1,400 to a second son, and $2,000 to a third, and, when all the residue should be realized, to divide it equally between these two; (7) after the death of the plaintiff, to divide the $4,500 among his children, adding: "It is my will that my son Robert" (the plaintiff), "is to get no benefit from my estate except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life." Two policies of insurance on her life formed part of the estate of the testatrix, and she had besides effected an insurance for $2,000 on her life payable to the three sons, which was in force at the time of her death:—Held, that the plaintiff was not put to an election between the benefits given to him by the will and his share of the $2,000 policy:—Held, also, that the will had not varied the apportionment of the $2,000 policy, under the powers conferred by R.S.O. c. 136, s. 6 (1), and amendments, so as to exclude the plaintiff, or put him to his election:—Held, further, that in the event of the assets not being sufficient to admit of the setting apart of the $4,500, and the payment of the two legacies of $1,400 and $2,000, the $4,500 was first to be provided for without abatement, and the other two legacies were to come out of the residue, and abate in the event of a deficiency. *King* v. *Yorston*, 27 Ont. R. 1.

—**"Who may then be Heirs-at-law"—Deed—Delivery—Operation—Trusts and Trustees—Limitation of Action—Trustee Act, 1891, s. 13, s.s. 1 (a), (b)—Commencement of Statute—Balance in Trustee's Hands—Letter—Acknowledgment—Estoppel.**]—The father of the plaintiff's deceased husband, by his will, left all his property to trustees, of whom the defendant was the survivor, in trust to convey and transfer it, after the death of his wife, unto all his surviving children, share and share alike, and their heirs forever; and, by a codicil, directed that the share of the plaintiff's husband should not be paid over or conveyed to him, but kept invested by the trustees, and the income paid to him during his life for his sole benefit, and after his death that such share should be paid over or conveyed to those "who may then be the heirs-at-law of my said son," share and share alike. The property in the hands of the defendant, as surviving trustee, at the time of the death of this son, was all real estate:—Held, per MacMahon, J., the judge at the trial, that the words above quoted signified those who would take real estate as upon an intestacy: *Coatsworth* v. *Carson*, 24 Ont. R. 185, followed.—By the deed dated 2nd March, 1887, the defendant, as surviving trustee, conveyed the lands retained by him as the share of the plaintiff's husband, to his brothers and sisters as his heirs and heiresses-at-law. This deed was, on the day of its date, signed and sealed by the defendant, and delivered by him to a person acting on behalf of the grantees, and wholly left the possession of the defendant on that day, and there was nothing to show that he did not intend it to operate

immediately:—Held, by the Divisional Court, that it took effect from the day of its date.—In this action begun on the 8th July, 1893, the plaintiff sought an account of the defendant's dealings with the estate of the testator, and a transfer and conveyance to her of her husband's share, which she claimed under a marriage settlement. The defendant pleaded the Trustees Act, 1891, sec. 13, sub-sec. 1 (*a*) and (*b*), in bar of the action:—Held, notwithstanding that a small balance of $6.35, ascertained as early as the 3rd of February, 1887, remained in the defendant's hands until the 21st July, 1887, that the statute began to run in his favour on the 2nd March, 1887, assuming a breach of trust on that day, and the plaintiff's action was barred before it was begun.—On the 27th September, 1892, the defendant wrote a letter to the plaintiff's solicitors in which he stated that all the affairs of the estate between himself, as trustee, and the heirs, were wound up "as long ago as July, 1887":—Held, that this was not an acknowledgment which had the effect of taking the case out of the operation of the statute; and the defendant was not estopped by the letter from saying that the conveyance was as early as the 2nd March, 1887. *Stephens* v. *Beatty*, 27 Ont. R. 75.

—**Device—Incumbrances—Exoneration—Widow—Dower—Election—Remainder—Acceleration.**]—By paragraph 3 of his will, made in 1886, the testator, who died in 1895, devised house No. 35, until 1st January, 1890, to his wife, and from and after that to his brother, "his heirs and assigns for ever, free from all encumbrances." This property, together with house No. 45, which, by paragraph 6, he devised, with other lands, to his wife for life, and after her decease to his brother, his heirs and assigns, subject to certain legacies, was subject at the date of the will to a mortgage for $1,200, made by the testator, which was subsequently discharged and replaced by a mortgage for $1,300 on the same lands, which was that subsisting at the date of the death. By paragraph 4 the testator bequeathed to his wife certain leasehold premises held by him at the date of his will. The term, however, expired in his lifetime and nothing passed to his wife under this paragraph. By paragraph 5 the testator directed his wife to pay off the mortgage for $1,200, and any other encumbrances upon the property devised by paragraph 3, and declared that the bequests made to the wife by paragraphs 3 and 4 were made to her for that purpose:—Held, that the effect of the will was to exonerate house No. 35, to the extent of the interest in it devised to the brother from the payment of the proportionate part of the mortgage, and to cast the burden of the payment of it upon the residuary estate, leaving the other house to bear its proportionate share of the mortgage; that the devisee of house No. 35 was not entitled to have the dower of the widow in it discharged out of the residuary estate, she having elected to take her dower instead of the provision made for her by the will.—Paragraph 7 provided, in the event of the brother dying before the wife, for a sale of what the will described as "all my said property," and directed that the proceeds of the sale should be invested, and the interest of the investment paid to certain persons for their lives, and for the division of the corpus, after the death of the survivor, among certain persons named:—Held, that the provisions of paragraph 7 applied only to the device contained in paragraph 6, and not to that in paragraph 3.—The effect of the disclaimer by the widow of the provision made for her by the will was to accelerate the brother's remainder, and make it an estate in possession. *Toronto General Trusts Co.* v. *Irwin*, 27 Ont. R. 491.

—**Construction—Absence of Material Words—Uncertainty—Devise.**]—A testator by his will provided as follows: "It is my will that as to all my estate, both real and personal, whether in possession, expectancy or otherwise, which I may die possessed of, my wife, Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this, my will":—Held, not void for uncertainty, and a device to the testator's wife in fee. *May* v. *Logie*, 27 Ont. R. 501, affirmed by Court of Appeal, 23 Ont. A.R. 785, and by Supreme Court of Canada, 27 S.C.R. 443.

—**Construction—Devise of Land not owned by Testator—Application to Land owned.**]—A testator purporting to devise "all his real and personal estate," gave to one son the south fifty acres of lot 21, and to another the north fifty acres of the same lot. The will contained no residuary devise and no other gift of land. The testator died seized of the east half of lot 21, (100 acres), but had no interest in the west half:—Held, that the one son took the south twenty-five acres of the east half of the lot and the other the north twenty-five acres, and they took together the central fifty acres as tenants in common. *McFadyen* v. *McFadyen*, 27 Ont. R. 598.

—**Devise—Estate—Defeasible Fee—"Die Without Issue"—Share.**]—A testator, dying in 1833, by his will, made in the previous year, gave to his two sons, after a life estate to his wife, certain lands, habendum to his two sons "as tenants in common, their heirs and assigns forever, subject however, to this proviso, that if either of my aforesaid sons should die without legitimate issue his share as aforesaid shall revert to and become vested in the other son united with him in the aforesaid devise." One son died unmarried in 1843. The other son married and had children, and in 1847 sold the whole property and conveyed it as in fee simple to the purchaser, who failed to observe the provisions of the Act as to entails by registering his conveyance within six months:—Held, that the devise was of a defeasible fee, which in the event became absolute in the surviving son. Although the words "die without issue" pointed to an indefinite failure of descendants, the context was sufficient to restrict the interpretation: *Roe d. Sheers* v. *Jeffery*, 7 T.R. 589 and *Greenwood* v. *Verdon*, 1 K. & J. 74, followed; *Chadock* v. *Cowley*, 3 Cro. Jac. 695, distinguished; *Little* v. *Billings*, 27 Gr., at p. 357, commented on. *VanTassel* v. *Frederick*, 27 Ont. R. 646.

II. Devises and Legacies.

—**Legacy—Bequest of Partnership business—Acceptance by Legatee—Right of Legatee to an account.**]—J. and his brother carried on business in partnership for over thirty years and

the brother having died his will contained the following bequest: "I will and bequeath unto my brother J. all my interest in the business of J. & Co. in the said city of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible":—Held, affirming the decision of the Court of Appeal, that J. on accepting the legacy was under no obligation to indemnify the testator's estate against liability for the debts of the firm in case the assets should be insufficient for the purpose and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency. *Robertson* v. *Junkin*, 26 S.C.R. 192.

—**Construction of—Executory Devise Over—Contingencies—"Dying without Issue"—"Revert"—Dower—Annuity—Election—Devolution of Estates Act, 49 V. (O.) c. 22—Conditions in Restraint of Marriage**—A testator divided his real estate among his three sons, the portion of A. C. the eldest son being charged with the payment of $1,000 to each of his brothers and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the fifty dollars on her marriage." A. C. died after the testator, leaving a widow but no issue:—Held, that the gift over in the last mentioned clause was intended by the testator to take effect on the death of the devisee without issue at any time and not during the lifetime of the testator only; that it was no ground for departing from this *primâ facie* meaning of the terms of the gift that very burdensome conditions were imposed upon the devisee; and that no such conditions would be imposed on the devise to A. C by this construction as the two sums of $1,000 each charged in favour of his brothers were charged upon the whole fee and if paid by him his personal representatives on his death could enforce repayment to his estate:—Held, also, that the widow of A.C. was entitled to the dower out of the lands devised to him, notwithstanding the defeasible character of his estate; that she was also entitled to the annuity of $50 per annum given her by the will, it not being inconsistent with her right to dower and she was, therefore, not put to her election; that the limitation of her annuity to widowhood was not invalid as being in undue restraint of marriage; and that she could not claim a distributive share of the devised lands under the Devolution of Estates Act which applies only to the descent of inheritable lands. *Cowan* v. *Allen*, 26 S.C.R. 292. Reversing 23 Ont. A R 457.

—**Devise to Two Sons—Devise over of one's Share—Condition—Context—Codicil.**]—A testator devised property "equally" to his two sons, J. S. and T. G., with a provision that "in the event of the death of my said son T. G unmarried or without leaving issue" his interest should go to J. S. By a codicil a third son was given an equal interest with his brothers in the property on a condition which was not complied with, and the devise to him became of no effect:—Held, that the codicil did not affect the construction to be put on the devise in the will; that J. S. and T. G. took as tenants in common in equal moieties, the estate of J. S. being absolute and that of T. G. subject to an executory devise over in case of death at any time, and not merely during the lifetime of the testator. *Cowan* v. *Allen*, (26 S.C.R. 292) followed:—Held, also, that the word "equal" indicated the respective shares which the two devisees were to take in the area of the property devised, and not the character of the estates given in those shares. *Fraser* v. *Fraser*, 26 S.C.R. 316, reversing 28 N.S.R. 172.

—**Legacy—"Legal Personal Representatives"—Vested Share.**]—Devise of land to executors and trustees upon trust to allow the testator's wife to use and occupy during her life, and after her death to sell and pay, among other legacies, a moiety of the purchase money to his son, with the provision that if any of the legatees died before their shares should be paid over, the share of the person so dying should be paid to his "legal personal representative" The son assigned his share to the plaintiff. and died before his mother and before payment:—Held, that the legacy vested in the son, by being given in the event of his death "as his share" to his executor and administrator as "legal personal representative," and that the plaintiff was entitled. *Kerr* v. *Smith*, 27 Ont. R. 409.

—**Widow—Legacy—Dower—Election—Estoppel.**]—A will provided for the payment of a large number of pecuniary legacies, including one to the testator's widow, and, except as to the household property, which was bequeathed to her, the residue of the estate, real and personal, after paying the debts and these legacies, was given to a charity, provision being made for the early conversion into money and distribution of the estate:—Held, that the widow was not put to her election, but was entitled both to her legacy and to dower.—The will further provided that the widow for her legacy might have the first selection of such securities or real estate as she might think desirable. Without making any claim to dower, she joined with her co-executors in sales and conveyances of parts of the real estate, and selected the remainder of it in part satisfaction of her legacy, and, although not transferred to her, subsequently dealt with such remainder as her own. It was not until after the sales and selection referred to that her right to dower was in any way considered, when she immediately claimed it:—Held, that under these circumstances, the residuary legatees not having been prejudiced by her dealings with the lands selected by her, she was not estopped from claiming dower; but was entitled to treat the executors as having received for her use so much of the purchase money of the lands sold as was equal to her value of her dower in them, ascertained on the same principle as it would have been had the sale been one made by the Court of the lands free of her dower, and so much of the sum at which the lands selected by her were valued at as was equal to the value of her dower in those lands, ascertained in the same way: *Bingham* v. *Bingham*, 1 Ves. Sr. 126, applied. *Elliott* v. *Morris*, 27 Ont. R. 485.

—**Executor—Preservation of Estate—Charge—Legacy—Issue of Different Marriages—Per Capita, or per Stirpes—Substitution.**]—The will of R., made in 1852, contained the following devise:—"I give and bequeath to my two sisters—German (naming them), the usufruct of all my goods whatever, and the property in them, to their children." The executor was charged "to realize the said property, sell it and place the proceeds so as to furnish revenues for his said sisters (usufructuaries), and preserve the corpus for their children." The testator declared, moreover, that these legacies were made *à titre d'aliments*, and that the property bequeathed should be unsaleable (*incessibles*), and not subject to seizure (*insaisissables*). In 1890, the executor named in the will having died, a codicil was executed naming another executor and providing that "he will be, moreover, administrator of all my effects until the death of my two sisters, usufructuaries, named in my said will, and until the final partition of my property among my heirs, proprietors: Held, that these provisions of the will did not effect a substitution, or two successive gifts taking effect the one after the other, but comprised merely a legacy of usufruct to the sisters of the testator and a legacy of property, subject to this usufruct, to their children, which legacies took effect at the same time; that in charging his executor to preserve the estate for the children the testator only imposed upon him an obligation to which he was already subject by law, and it could not be presumed that he wished to impose the same obligation on his sisters, who were excluded from the administration of his property, and to give them the property in the estate with the charge of transferring to their children.—A legacy under a collective name to children, the issue of different marriages, without limitation as to parts, should be divided among those children *per capita* and not *per stirpes*. *Duguay* v. *Robin*, Q.R. 5 Q.B. 277; affirmed by Supreme Court of Canada, 27 S.C.R. 347.

—**Devise—Vested Interest.**]—A will contained the following clause: "I give, devise and bequeath to such of my wife's children as are alive at the time of my death, all money or moneys deposited in my name in any bank or banks in the Province of British Columbia, said money to be divided between each of said children, share and share alike, when they shall attain the age of 21 years. Until such time the said money and interest as aforesaid is to remain untouched except as hereinafter provided":—Held, that the legacies vested on the death of the testator, but payment was postponed. Each child, on attaining 21, was entitled to his or her share of the fund then existing. *In re Baillie*, 3 B.C.R. 350.

III. Execution.

—**Attesting Witnesses—Inability to Procure Proof by—Other sufficient Evidence—Letters after Execution—Admissibility.**]—Where the Surrogate Judge is satisfied of the inability to furnish proof of the execution of a will by the attesting witnesses, it may be proved by other sufficient evidence.—A will in testator's handwriting and signed by him was found in a place where testator was accustomed to keep his papers, it being so signed in the presence of two persons, who signed as witnesses, the handwriting being apparently that of two persons and distinct from that of the testator, and who, though due search was made for them, could not be found, this being attributable to their being strangers, testator being under the belief, from the misreading of a text book on wills, that strangers were the best witnesses. The Surrogate Judge being satisfied as to the inability to procure proof by the witnesses, and that the due execution of the will had been proved by other evidence, admitted it to probate. On appeal to the Divisional Court the judgment was affirmed.—Per Boyd, C.: Where the will is itself in evidence with the testator's and witnesses' signature thereon, post-testamentary letters of the testator are receivable in evidence to enable the court to come to a right conclusion. *Re Young*, 27 Ont. R. 698.

IV.—Validity.

—**Holograph Will executed abroad—Quebec Civil Code, art. 7—Locus Regit Actum—Lex Domicilii—Lex rei Sitae—Legacy in Trust—Discretion of Trustee—Vagueness or Uncertainty as to Beneficiaries—Poor Relatives—Public Protestant charities—Charitable Uses—Right of Intervention—Persona Designata.**]—In 1865 J.G.R., a merchant, then and at the time of his death domiciled in the city of Quebec, while temporarily in the city of New York made the following will in accordance with the law relating to holograph wills in Lower Canada: "I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one half of them for public Protestant charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best, the other half to himself and for his own use, excepting £2,000 which he will send to Miss Mary Frame, Overton Farm." A.R. and others, heirs at law of the testator, brought action to have the will declared invalid:—Held, Taschereau J. dissenting, that the will was valid. Held, further, Fournier and Taschereau JJ. dissenting, that the rule *locus regit actum* was not in the Province of Quebec, before the Code, itself (art. 7), imperative, but permissive only:—Held, also, Taschereau J. dissenting, that the will was valid even if the rule *locus regit actum* did apply, because it sufficiently appeared from the evidence that by the law of the State of New York the will would be considered good as to movables wherever situated, having been executed according to the law of the testator's domicile, and good as to immovables in the Province of Quebec, having been executed according to the law of the situation of those immovables.—In this action interventions were filed by Morrin College, an institution where youth are instructed in the higher branches of learning, and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free general and theological education, and are assisted by scholarships and bursaries to complete

their education; by the Finlay Asylum, a corporate institute for the relief of the aged and infirm, belonging to the communion of the Church of England; and by W. R. R., a first cousin of the testator, claiming as a poor relative:—Held, that Morrin College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no *locus standi* to intervene; Sedgewick, J., dissenting; but that Finlay Asylum came within the terms of the will as one of the charities which F. R. might select as a beneficiary, and this gave it a right to intervene to support the will:—Held, further, that in the gift to "poor relatives" the word "poor" was too vague and uncertain to have any meaning attached to it, and must, therefore be rejected, and the word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. R. not coming within that class his intervention should be dismissed:—Held, per Fournier and Taschereau, JJ., that the bequest to "poor relatives" was absolutely null for uncertainty. *Ross* v. *Ross*, 25 S.C.R. 307.

—**Execution of—Testamentary Capacity.**]—A testator was suffering from a disease which had the effect of inducing drowsiness or stupor during the time he gave the instructions for drafting and when he executed his will, but as the evidence showed that he thoroughly understood and appreciated the instructions he was giving to the draftsman as to the form his will should take and the instrument itself when subsequently read over to him, it was held to be a valid will. *McLaughlin* v. *McLellan*, 26 S.C.R. 646, affirming 28 N.S.R. 226 sub nomine *re Estate John A. P. McLellan*.

—**Devise to Religious Body—Minister's Residence—Necessity for User as—R.S.O. c. 237, ss. 1 and 23—38 Vict., c. 76, s. 10—Gift for School Teacher's Residence—Invalidity—9 Geo. II, c. 36.**]—A testator, by his will, made more than six months prior to his death, directed that after his wife's death a house and lot should go to the trustees, for the time being, of a named Presbyterian church for a manse, if required, or that it might be kept in good repair and rented for the benefit of the congregation. The widow died shortly before the commencement of this action, which was for the construction of the will, and the land had not yet been used for a manse:—Held, that the devise was valid, for sec. 23 of the Religious Institutions' Act, R.S.O. c. 237, and sec. 10 of 38 Vict., c. 76 (O.), enabled the trustees to take land for a minister's residence, if actually used as such, although it could not be held merely for the purpose of rental; that an intention not to so use it would not be presumed from the non-user for the short period that had elapsed since the widow's death, but that, in any event, the effect of such non-user would be that the interest of the trustees in the property could be sold within seven years, as provided for by that section, or that the property would revert to the testator's heirs; and semble, that the trustees could legally sell.—By another clause certain other land was devised to the trustees of a named common school section, on which a teacher's residence might be erected, or that it might be rented for the benefit of the school funds, subject however, to a condition of preserving and keeping in order an adjoining plot:—Held, a devise for charitable purposes within the 9th Geo. II, c. 36, and so void. *Sills* v. *Warner*, 27 Ont. R. 266.

—**Substitution created by—Registration—Prescription.**]—In 1834 there was in Lower Canada a special registry for insinuations distinct from the ordinary registry for judgments:—Held, that publication in that year of a will in open Court, and registration in the ordinary registry, but not on the special register, was insufficient.—Prescription against a substitution created under a will in 1834 was held to be governed by the law then in force, and not by the code, and it ran against the substitutes in favour of third parties only from the opening (*ouverture*) of the substitution.—Children who have accepted the succession of their father, who accepted the succession of his mother by whom an immovable subject to substitution had been sold, are *garants* of the latter's acts and cannot revendicate the immovable as subject to a substitution in their favour.—In an action for revendication evidence of renunciation of the father's succession pending the action is inadmissible. *Page* v. *McLennan*, Q.R. 9 S.C. 193, affirming 7 S.C. 368.

—**Instrument on Instructions of Legatee—Validity—Onus of Proof—Undue Influence—Testamentary Capacity—Costs.**]—Testator was a bachelor of 84. He had always been of careful habits and very determined mind, aad had accumulated a small fortune by saving. He lived unattended in a small cottage which he owned. His only relatives were abroad. He had, commencing thirteen years before his death, carried on a correspondence with the plaintiff, his nephew, who lived in England, and was in indigent circumstances, intimating an intention to provide for him by making a will in his favour. No testamentary disposition in favour of any other relative was indicated. Plaintiff obtained admission to a Sailor's Home, in England, in 1887, when testator wrote "I am glad you have got into that noble institution, it is all you will want for life." Testator in his subsequent correspondence made no allusion to any intention to leave plaintiff anything. Testator in 1891 was found in his cottage, in a state of physical collapse, from cold, weakness and neglect, and was taken to the house of the defendant who was his friend of long standing. He died there eight days afterwards. Seven days before his death he made the will in question, leaving all his property to the defendant, who, at testator's request employed and instructed a solicitor who drew up the will at his office. The solicitor attended the testator, read the will over to him twice, and asked him if he understood the will, and wished to leave his property to the defendant, to which testator answered "Yes," and also asked if he had power to alter the will afterwards. The evidence of the solicitor, and of the attending physician, was that the testator was then of testamentary capacity:—Held, per Crease, J., at the trial, that where a will is drawn on

instructions of, or procured by, the person propounding and taking a benefit under it, the *onus* of proof of its validity is shifted upon that person, who must remove any suspicion raised in the mind of the Court by the surrounding circumstances. That the facts in evidence had raised such a suspicion in his mind, which had not been removed. On appeal to the full Court (McCreight, Walkem and Drake, J.J.):—Held, that the evidence established the will as that of a free and capable testator, and removed the case from the region of suspicion. That the conduct of the defendant was not so suspicious as to warrant the litigation, and that costs should not be ordered to be paid out of the estate. *Adams* v. *McBeath*, 3 B.C.R. 513: affirmed by Supreme Court of Canada, 27 S.C.R. 13.

V. Miscellaneous Cases.

—**Election—Period of Accounting—Interest.**]—Testator by his will left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil, not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality belonged to her. His widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will:—Held, that her election related back to, and she was liable to account from, the date of the testator's death; but, as she was not called upon to elect until this action was brought, she should not be charged with interest in the meantime. *Davis* v. *Davis*, 27 Ont. R. 532.

And see Dower.
" " Executors and Administrators.
" " Probate Act.

WINDING-UP ACT.

—**Act—R.S.C. c. 124—Sale by Mortgage—Power of Court to Confirm—Valuation.**]—Where a company is being wound up under the Dominion Act (R.S.C. c. 124) the court has no control over a mortgage on the assets until the holder has filed his claim and valued the security. An order to confirm a sale by the mortgagee was refused on this ground. *Re Thunder Hill Mining Co.*, 3 B.C.R. 351.

See also Companies, VII.

WITNESS.

Proper Question—Defamation—Libel—Evidence—Witness.]—It is proper to ask witnesses in a libel action, who, in their opinion, is aimed at by the libel in question. It is not proper in such an action to ask a witness whether, in his opinion, the alleged libel is likely to cause injury to the plaintiff's business, but the court refused to interfere because of the admission of the opinion of one witness, when in the charge to the jury special stress was laid on the fact that they were to form their own opinion as to the damages, and the damages allowed were small. *Journal Printing Company* v. *Maclean*, 23 Ont. A.R. 324.

—**Action of Criminal Con.—Discovery—R.S.O. c. 61, s. 7.**]—Under the provisions of the Witnesses and Evidence Act R.S.O. c. 61, s. 7, the defendant in an action for criminal conversation with plaintiff's wife cannot be compelled to submit to an examination for discovery. *Mulholland* v. *Misener*, 17 Ont. P.R. 132.

—**Crim. Con.—Alienation of Wife's Affections—Discovery—R.S.O., c. 61, s. 7.**]—The plaintiff cannot enforce the attendance or examination of the defendant as a witness, or for discovery, when the proceeding is one instituted in consequence of adultery: *Mulholland* v. *Misener*, 17 Ont.P.R. 132, followed. Where, however, the plaintiff also claimed damages for the alienation of the affections and loss of the society of his wife, the defendant has no protection or privilege that shields him from compulsory examination on that part of the case. *Taylor* v. *Neil*, 17 Ont. P.R. 134.

—**Religious Adviser—Privilege—Art. 275 C.C.P.**]—Art. 275 of the Code of Civil Procedure, which provides that a witness cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious adviser, applies also to what the witness said in reply to the penitent.—B. brought an action against G. for damages, alleging that G. had wrongfully induced his (B.'s) apprentice to leave his service. G. was examined as a witness for plaintiff and asked: "Did you counsel the said * * * or did you advise him to leave the service of the plaintiff either at the confessional or elsewhere?" G. objected to reveal what had been said at confession:—Held, that he could not be compelled to reveal it. *Gill* v. *Bouchard*, Q.R. 5 Q.B. 138.

—**Witness—Evidence by Defendant on his own behalf—Commercial Matter.**]—An action for damages in consequence of plaintiff's name having appeared as a debtor of defendant in a list published by a commercial agency is based on a commercial transaction, namely, the sale and delivery of goods and collection of their price, and defendant may give evidence on his own behalf. *Gauvreau* v. *Bernard*, Q.R. 9 S.C. 323.

And see Evidence.

—**Religious Adviser—Privilege—Art. 275, C.C.P.**]—Religious advisers who receive statements made in confidence by persons who consult them in their professional character as religious advisers, cannot be compelled to disclose in the witness box the purport of such communications. *Ouellet* v. *Sicotte*, Q.R. 9 S.C. 463.

—**Witness—Conduct Money.**]—A defendant moved for a change of venue on his own affidavit and plaintiff served him with an order for his cross examination thereon:—Held, that he could not refuse to be examined because his conduct money was not paid: *Mansel* v. *Clanricarde* (54 L. J. Ch. 982) followed. *Emerson* v. *Irving*, 4 B.C.R. 56.

—**Agreement to Charge Lands—Statute of Frauds—Registry.**]—See Registry Laws.

WORDS AND TERMS.

"**A titre d'aliments**"]—See *Duguay* v. *Robin*, Q.R. 5 Q.B. 277, ante, col. 363.

"**Action.**"—See *Re McCabe* v. *Middleton, The Ancient Order of United Workmen, Garnishees*, 27 Ont. 170, ante, col. 117.

"**Amount in Controversy**".]—See *Lachance* v. *La Société de Prêts et de Placements de Quebec*, 26 S.C.R. 200, ante, col. 16.

"**Appeal from Single Judge.**"—See *Wilson* v. *Manes*, 17 Ont. P.R. 239, ante, col. 23.

"**At and From a Port.**"]—See *St. Paul Fire and Marine Insurance Co.* v. *Troop*, 26 S.C.R. 5, ante, col. 164.

"**Backing of Warrant.**"]—See *Re Hendry*, 27 Ont. R. 297, ante, col. 117.

"**Bequeathment Certificate.**"]—See *Leadlay* v. *McGregor*, 11 Man. R. 9, ante, col. 163.

"**Bon père de famille.**"]—See *Montreal Steam Laundry Co.* v. *Demers*, Q.R. 5 Q.B. 191, ante, col. 199.

"**Brokers bought Notes.**"]—See *Jackson* v. *Allan*, 11 Man. R. 36, ante, col. 130.

"**Chief Constable.**"]—See *O'Neil* v. *Attorney General of Canada*, 26 S.C.R. 122, ante, col. 101.

"**Clerks.**"]—See *Re Ontario Forge and Bolt Co.; Re Winding Up Act; Townsend's Case*, 27 Ont. R. 230, ante, col. 62.

"**Creditor.**"]—See *Gurofski* v. *Harris*, 27 Ont. R. 201, ante, col. 145; and *Grant* v. *West*, 23 Ont. A.R. 533, ante, col. 37.

"**Dependents.**"]—See *In re William Roddick*, 27 Ont. R. 537, ante, col. 162.

"**Direct Tax.**"]—See *In re Yorkshire Guaranty Co.*, 4 B.C.R. 258, ante, col. 71.

"**Dispose of Property.**"]—See *Meharg* v. *Lumbers*, 23 Ont. A.R. 51, ante, col. 36.

"**Dying Without Issue.**"]—See *Cowan* v. *Allen*, 26 S.C.R. 292, ante, col. 361; *Vantassel* v. *Frederick*, 27 Ont. R. 646., ante, col. 360.

"**Engineer's Certificate.**"]—See *Goodwin* v. *The Queen*, 5 Ex. C.R. 293, ante, col. 78.

"**Exempt from Taxation.**"]—See *The Queen ex rel. Harding* v. *Bennett*, 27 Ont. R. 314., ante, col. 211.

"**Fixtures.**"]—See *Warner* v. *Don*, 26 S.C.R. 388., ante, col. 207.

"**Grade.**"]—See *McDonald* v. *City of Halifax*, 28 N.S.R. 84, ante, col. 79.

"**Interest.**"]—See *Carroll* v. *Beard*, 27 Ont. R. 349, ante, col. 178.

"**In Three Annual Instalments.**"]—See *In re Babcock* v. *Ayers*, 27 Ont.R. 47, ante, col. 116.

"**Joint Petition.**"]—See *Union School of East and West Wawanosh, and Hullett* v. *Lockhart*, 27 Ont. R. 345, ante, col. 318,

"**Judicial Proceeding.**"]—See *Turcotte* v. *Dansereau*, 26 S.C.R. 578, ante, col. 16.

"**Labourer or Mechanic.**"]—*Garing* v. *Hunt and Claris*, 27 Ont. R. 149, ante, col. 200.

"**Lands Injuriously Affected.**"]—See *Hendrie* v. *The Toronto, Hamilton and Buffalo Ry. Co.* 27 Ont. R. 46, ante, col. 297.

"**Legal Personal Representatives.**"]—See *Kerr* v. *Smith*, 27 Ont. R. 409, ante, col. 362.

"**Letter of Credit.**"]—See *Jacques Cartier Bank* v. *The Queen*, 25 S.C.R. 84, ante, col. 38.

"**Lost Grant.**"]—See *Re Cockburn*, 27 Ont. R. 450, ante, col. 351.

"**My Estate.**"]—See *King* v. *Yorston*, 27 Ont. R. 1, ante, col. 357.

"**My Lawful Heirs.**"]—See *Thompson* v. *Smith*, 23 Ont. A.R. 29, ante, col. 357.

"**Negotiation.**"]—See *Halstead* v. *The Bank of Hamilton*, 27 Ont. R. 435, ante, col. 39.

"**Opposite Party.**"]—See *Re Toronto, Hamilton and Buffalo Railway Co. and Burke*, 27 Ont. R. 690, ante, col. 298.

"**Or other Person Whomsoever.**"]—See *Attorney General for Ontario* v. *The Hamilton Street Ry. Co.*, 27 Ont. R. 49, ante, col. 335.

"**Owner.**"]—See *Garing* v. *Hunt and Claris*, 27 Ont. R. 149, ante, col. 200.

"**Passing Ships.**"]—See *The Ship "Cuba"* v. *McMillan*, 26 S.C.R. 651, ante, col. 323.

"**Persona Designata.**"]—See *Toronto, Hamilton and Buffalo Ry. Co. and Hendrie*, 17 Ont. P.R. 199, ante, col. 14.

"**Personal Property.**"]—See *In re Yorkshire Guarantee Co.*, 4 B.C.R. 258, ante, col. 71.

"**Person interested.**"]—See *re Estate Alexander McRae*, 28 N.S.R. 20, ante, col. 290.

"**Poor Relatives.**"]—See *Ross* v. *Ross*, 25 S.C.R., 307, ante, col. 167.

"**Printing.**"]—See *Frowde* v. *Parrish*, 27 Ont. R. 526, ante, col. 87.

"**Proprietary Interest.**"]—See *Cooney* v. *Sheppard*, 23 Ont. A. R. 4, ante, col. 153.

"**Revert.**"]—See *Cowan* v. *Allen*, 26 S.C.R. 292, ante, col. 361.

"**Risk.**"]—See *McKay* v. *Norwich Union Ins. Co.*, 27 Ont. R. 251, ante, col. 160.

"**Road.**"]—See *Fisher* v. *Webster*, 27 Ont. R. 35, ante, col. 121.

—"**Seine-Fishing.**"]—See *The Queen* v. *The Ship "Frederick Gerring, Jr.,"* 5 Ex. C.R. 164, ante, col. 143.

"**Soon as possible.**"]—See *The Queen* v. *The Ship Beatrice*, 5 Ex. C.R. 9, ante, col. 40.

"**Stranger.**"]—See *Re Estate of Mary F. W. Smith*, 28 N.S.R. 221, ante, col. 290.

"**Tidal Rivers.**"]—See *In re Jurisdiction over Provincial Fisheries*, 26 S.C.R. 444, ante, col. 66.

"**Superintendence.**"]—See *Garland* v. *City of Toronto*, 23 Ont.A.R. 238, ante, col. 199.

"**Tenant.**"]—See *Farwell* v. *Jameson*, 26 S.C.R. 588, ante, col. 177.

"**Who may then be Heirs-at-Law.**"]—See *Stephens* v. *Beatty*, 27 Ont. R. 75, ante, col. 358.

"**Working Expenditure.**"]—See *Charlebois* v. *The Great North-Western Ry. Co.*, 11 Man.R. 135, ante, col. 298.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT, IV (b.)

WRIT.

See PRACTICE AND PROCEDURE, XXVII.

WRIT OF EXTENT.

—**Damages against Ship Injuring Government Canal—Extent issued against Owners—Rights of Crown thereunder.**]—Semble, where the Crown pursues its remedy by writ of extent against the owners of a ship, it can only take under the writ of extent, the property of the debtor at the time of the issue of the writ. If the debtor has assigned his property before that, the Crown can realize nothing under the writ in respect of the *res*. *The Queen* v. *The City of Windsor*; *Symes* v. *The City of Windsor*, 5 Ex. C.R. 223.